

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

-of-

The Application of Besicorp-Empire Development Company, LLC for a Part 201 Air State Facility Permit; a State Pollutant Discharge Elimination System (SPDES) Permit; a Title IV Acid Rain Permit; a Water Quality Certification; a Construction Stormwater SPDES Permit; and an Excavation and Fill in Navigable Waters Permit

CASE No. #4-3814-00052/00001 – 00006

SUPPLEMENTAL
HEARING REPORT/RECOMMENDED DECISION

-by-

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge
March 9, 2004

This Supplemental Recommended Decision/Hearing Report addresses developments in this case that have occurred since the issuance of the Recommended Decision in this case on January 9, 2004.

Additional Traffic Information

In the January 9, 2004, Hearing Report/Recommended Decision in this matter, I determined that certain information regarding the impacts of construction worker vehicles leaving the site of the proposed project was missing from the record and provided the Applicant an opportunity to supplement the record. Specifically, the Applicant had failed to analyze the impacts of the release of construction worker vehicles before and after the afternoon peak hour (between 4:30 p.m. and 5:30 p.m.). The Applicant was provided until January 20, 2004, to notify the parties whether it would provide the additional analysis. (Recommended Decision, at. 39).

By letter dated January 16, 2004, the Applicant responded that it would conduct an additional traffic analysis and provide the information identified as missing from the record. By letter dated January 23, 2004, the Applicant supplied a supplemental traffic analysis. The supplemental traffic analysis conducted by the Applicant revealed additional traffic impacts during construction that required additional mitigation. Specifically, the number of construction worker vehicles should be limited to: (1) 285 for the hour between 2:30 p.m. to 3:29 p.m.; (2) 306 for the hour between 3:30 p.m. to 4:29 p.m.; and (3) 368 for the hour between 5:31 p.m. to 6:30 p.m. Based on its traffic counts, the Applicant calculated that these limits would result in an acceptable Level of Service ("LOS"), specifically LOS D.

After allowing the other parties an opportunity to review this new information, a conference call was held on February 2, 2004, at 1:30 p.m. During the call, Staff of the Department of Public Service ("DPS Staff") indicated that the submission was not complete because certain supporting information was not provided. By letter dated February 4, 2004, the Applicant provided the information requested by DPS Staff.

By e-mail dated February 4, 2004, the City moved that the litigation and briefing schedule be suspended pending the outcome of a new round of negotiations, sponsored by State Senator Joseph Bruno and State Assemblyman Ronald Canestrari. The City renewed its motion on February 20, 2004, and suggested that the parties report by March 5, 2004, on the status of negotiations. This

motion was supported by DPS Staff, opposed by the Applicant and DEC Staff took no position.

By Ruling dated February 25, 2004, I denied City's motion because the continuation of the litigation schedule in this case was not inconsistent with the continuation of negotiations and there was no need to further delay the completion of this case. In the Ruling, the parties were also directed to identify any genuine dispute regarding a material factual issue relating to the Applicant's supplemental traffic analysis. Parties were also directed to identify any expert witness they planned to call as well as provide a summary of expected testimony. In the event a party provided this, additional evidentiary hearings would be scheduled. If not, the case would proceed to closing briefs. The Ruling gave the parties until the close of business on February 27, 2004, to respond.

By letter dated February 26, 2004, DEC Staff argued that there was no need for additional hearings and requested a briefing schedule be established. DEC Staff stated that the supplemental traffic analysis was complete, no additional information was necessary and that no factual dispute existed.

By letter dated February 26, 2004, the City stated that the Applicant's supplemental traffic analysis should not be entered into the evidentiary record unless introduced at a reconvened hearing which would allow cross-examination. The City did not identify any specific issues with the supplemental traffic analysis. Following cross-examination, the City suggested, it would decide whether to offer rebuttal testimony.

By letter dated February 27, 2004, DPS Staff echoed the City's request and proposed a six week schedule to litigate issues relating to the supplemental traffic analysis. DPS Staff asserted that factual disputes exist between the parties related to the supplemental traffic analysis "regarding the validity of the information and calculations, the intended mechanics or implementation details of the proposed revised mitigation measures and the factual relationship between the adverse traffic impacts identified and the proposed revised mitigation measures and ordering clauses offered to mitigate the adverse impacts." DPS Staff also requested the Applicant provide a sponsoring witness for cross-examination, and depending upon the scope and quality of the cross-examination, DPS Staff would decide whether to offer additional evidence or offer additional testimony.

By letter dated February 27, 2004, the Applicant responded to the City and DPS Staff. The Applicant asserted that the

supplemental traffic analysis resolves the deficiency identified in the Recommended Decisions (this case and the companion proceeding before the New York State Board on Electric Generation Siting and the Environment, Case # 00-F-2057). The Applicant pointed out that, in the nearly four weeks since this information was provided, no party has submitted additional or competing traffic information or discovery requests. Further, the Applicant stated that there is no need to test the modeling technique utilized to develop the supplemental traffic analysis because the methods used to develop the traffic analyses were the same as those already in the record. The Applicant continued that the heart of DPS Staff's proposal is its apparent disagreement with the conclusions in the Recommended Decisions and its efforts to retry the traffic issues that have already been addressed. Since there are no factual disputes, the Applicant asserted, the additional traffic information should be entered into the record and a briefing schedule set.

Neither the City nor DPS Staff have identified a genuine dispute of material fact regarding the supplemental traffic analysis that would require an evidentiary hearing. DPS Staff makes a vague assertion of factual dispute regarding the validity of the information and calculations without specifically identifying which information may be invalid or why. The specter of such an unidentified factual issue is especially dubious in these circumstances where there have been no discovery demands concerning the Applicant's traffic survey methods,¹ where the methods are claimed to be identical to those used in the original study which was entered into the record at the hearing without any challenge to either the data or its compilation.

DPS Staff asserts a factual dispute regarding the intended mechanics or implementation details of the proposed mitigation measures; however, this is a discussion relating to the efficacy of mitigation measures and more properly handled through briefs. Finally, DPS Staff believes there are factual disputes regarding the relationship between the adverse traffic impacts identified and the proposed revised mitigation measures and ordering clauses offered to mitigate the adverse impacts; this is also an appropriate topic for briefs. Potential factual issues, clearly, relate only to traffic data and other facts, which have not been disputed in any specific respect.

Based upon the submissions of the parties, an analysis of the supplemental traffic information and the analysis above,

¹ On March 1, 2004, DPS Staff issued interrogatories to the Applicant and the City regarding on-street parking.

there is no need for additional evidentiary hearings. The information contained in the supplemental traffic analysis is adequate to evaluate both the traffic impacts and mitigation measures necessary to address these impacts. The additional traffic information should be allowed into the record in this case.

Based upon my independent review of the supplemental traffic analysis provided by the Applicant (specifically, Exh. 168, Appendix I, Table 1), the Recommended Certificate Condition X.P (and corresponding DEC permit condition) should be amended to read:

- P. Construction shall be scheduled to start not later than 7:30 a.m. The Certificate Holder shall limit the number of construction worker vehicles and shuttle buses or other similar transportation released from the site as follows:
 - i. between the hours of 2:30 p.m. and 3:29 p.m. no more than 285 vehicles may be released;
 - ii. between the hours of 3:30 p.m. and 4:29 p.m. no more than 306 vehicles may be released;
 - iii. between the hours of 4:30 p.m. and 5:30 p.m. no more than 157 vehicles may be released; and
 - iv. between the hours of 5:31 p.m. and 6:30 p.m. no more than 368 vehicles may be released.

The Certificate Holder shall construct and operate its on-site parking lot in such a manner as to facilitate and ensure compliance with these release limitations.

In addition, the Applicant proposed further mitigation in the form of extending the hours of police officer control at the intersection of South Street/9J with the Route 9/20 northbound on/off ramps (beginning at 2:30 p.m. instead of 3:30 p.m. and ending at 6:30 p.m. instead of 6:00 p.m.). The Commissioner should adopt this proposal and incorporate the following language.

- J. The Certificate Holder shall contract, at the Certificate Holder's expense, for traffic control officer(s) from either the City of Rensselaer Police, the Rensselaer County Sheriff, or other local or state law enforcement agencies, at the intersection of South Street/9J with the Route 9/20 northbound on/off

ramps during the evening (2:30 to 6:30PM) peak hours or otherwise as needed for purposes of public safety for the construction period at any time when the total construction labor force working on the same shift exceeds 550 workers. The contract shall also address the requirements of condition X.K. A copy of the contract for police officer control shall be provided as a Compliance Filing prior to start of construction. No construction authorized by this Certificate shall commence until the traffic control officer contract is executed.

The Applicant also suggested that the police officer control be discontinued at such times that it is not necessary to maintain safe operation in the intersection, as manifested by lack of conditions that might lead to queuing on Route 9/20 northbound, at the discretion of the DEC environmental monitor. While the expenditure of resources on unnecessary mitigation should be avoided, this change would amend the Recommended Certificate Conditions proposed by the Applicant. Parties should address this suggestion in their briefs. However, at this time, without the benefit of arguments from all parties, I reject this suggestion.

Marking of Additional Exhibits

The following exhibits are introduced into evidence in the hearing record:

Exhibit #	Description
#168	1/23/04 letter from Mr. Tyson and Supplemental Traffic Analysis
#169	2/4/04 letter from K. Bernstein and manual turning movement counts
#170	1/29/04 letter from T.C. Werner (NYSDOT) to D.K. May (DPS Staff)

Exhibit #168 is the supplemental traffic analysis discussed above. Exhibit #169 is the information requested by DPS Staff on February 2, 2004 conference call. Exhibit #170 is a letter

from NYSDOT to DPS Staff which DPS Staff requested and which is relevant to this matter.

Emission Reduction Credits

By Notice dated January 21, 2004, the public was informed that the Applicant had obtained the Emission Reduction Credits ("ERCs") necessary to secure DEC permits. The notice was published in the *Environmental Notice Bulletin* on January 21, 2004, the *Albany Times Union* on January 22, 2004, and the *Troy Record* on January 22, 2004. A supplemental issues conference regarding the ERCs was scheduled for February 25, 2004, but was cancelled because no issues existed between the Applicant and DEC Staff, and no petitions for party status were received.

DEC's Program Policy

In the Recommended Decision (at 58-59), I discussed DEC Staff's compliance with the DEC Policy "Assessing and Mitigating Visual Impacts" ("visual policy"). In that discussion, I indicated that DEC's visual policy has "the force of law." Because this statement might be subject to misinterpretation, further explanation is warranted.

The issue of DEC Staff's compliance with the visual policy was not specifically dealt with at the adjudicatory hearing, however, the issue of visual impacts was advanced to adjudication in the issues ruling in this case (September 22, 2002, at 11). In the issues ruling, I noted that the record needed to be sufficiently developed to allow the Commissioner to take a "hard look" as required by the State Environmental Quality Review Act ("SEQRA"). After the adjudicatory hearing concluded, DEC Staff in its initial brief (at 12, footnote 14), indicated for the first time on the record that it did not have a visual expert on staff. In its reply brief, DEC Staff further explained that its sole visual expert had retired after he had reviewed the Applicant's original proposal in order to ensure that all visual and aesthetic areas of concern had been addressed in conformity with the visual policy (at 8). However, as I noted in the Recommended Decision, this expert retired before the final arrangement of the proposed facility was negotiated and could not have reviewed the Applicant's visual simulations depicting the final proposed project. In fact, DEC Staff's briefs are silent as to whether any member of DEC Staff has reviewed the final visual simulations.

I raised this issue in the Recommended Decision in an effort to protect the record and any subsequent Commissioner's action based upon it. My reasoning was it was my duty to recognize a possible deficiency in the record that arose during the briefing process and allow the parties to comment on it before the Commissioner's final decision. I chose to include this discussion in the Recommended Decision due to the time constraints imposed by PSL Article X and because parties would have an opportunity through their closing briefs to discuss this matter. Had I not done so, I thought it possible that upon receipt of closing briefs and replies, the issue might not be properly framed and the record insufficiently developed for a timely decision by the Commissioner.

In the recommended decision, I indicated that compliance with the visual policy was a legal requirement. This was an overstatement and I meant that such compliance was required in this case by the stipulations (Exh. 1, Appendix B1, at 30). One of the stated purposes of the visual policy is to "provide a mechanism for complying with the balancing provisions of SEQRA with respect to environmental aesthetics" (at 1). The Commissioner must make SEQRA findings prior to taking a final agency action on the pending application. Thus, before the permits may be issued or denied, DEC Staff must comply with the terms of the visual policy.²

My concern relates to the sufficiency of the record and the arguments presented in the briefs. For example, if DEC Staff's expert did not review the final simulations for adequacy, accuracy and thoroughness, can the Commissioner make her required SEQRA findings? Similarly, if DEC's visual expert did not review the final proposed mitigation, what is the basis for DEC Staff to be assured that the proposed mitigation strategies will be effective?

In summary, it is my opinion that DEC Staff has in its briefs raised an issue regarding its compliance with the visual policy. I believe that in order to build a complete record on this issue, parties should address it in their final round of briefs. In my opinion, this will assist the Commissioner in making SEQRA findings and taking final action on the instant application.

² DEC Staff does not appear to argue that compliance with the visual policy is not required in this case.

Briefing Schedule for Comments on the RD and Supplemental RD

DEC regulations provide that parties are entitled to a minimum of fourteen days after receipt of a recommended decision to submit comments to the Commissioner (6 NYCRR 624.13(a)(3)). At the direction of the Commissioner, comments on the recommended decision and this supplemental recommended decision will be due March 23, 2004. Parties will be allowed an opportunity to respond to the comments of other parties and such responses shall be due April 7, 2004.

Any appeals must be received at the office of the Commissioner no later than 4:00 P.M. on the dates above, at the following address: Commissioner Erin M. Crotty, NYS Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1010. Service by fax and e-mail is not authorized. The parties are to transmit copies of any appeals and replies to all persons on the service list at the same time and in the same manner as they are sent to the Commissioner.