STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of articles 17 and 25 of the Environmental Conservation Law and part 661 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York by

CALL-A-HEAD PORTABLE TOILETS, INC., CALL-A-HEAD CORP., CHARLES W. HOWARD, individually and as corporate officer of Call-A-Head Portable Toilets, Inc. and Call-A-Head Corp., KENNETH HOWARD, individually and as corporate officer of Call-A-Head Portable Toilets, Inc. and Call-A-Head Corp., and CHARLES P. HOWARD, individually and as corporate officer of Call-A-Head Portable Toilets, Inc. and Call-A-Head Corp.,

Respondents.

RULING

DEC File Nos. R2-20030505-128 and R2-20030505-129

April 29, 2005

Summary

Staff of the Department of Environmental Conservation (DEC Staff) served a notice to permit entry, seeking to inspect the three sites involved in the above administrative enforcement action. Respondents moved for a protective order to deny or limit the notice to permit entry, and also moved that a hearing be scheduled forthwith. DEC Staff opposed the motion and also moved for an order to compel the discovery sought in the notice to permit entry.

The ruling concludes that the Respondents' motion was made after the deadline for such motions, and in addition to not being timely, the motion did not show that the inspection would be prejudicial to Respondents. Accordingly, the motion for a protective order is denied. Respondents' motion that a hearing be scheduled forthwith is also denied and the ordinary pre-hearing procedures under the DEC enforcement hearing regulations may go forward. DEC Staff's motion to compel discovery is granted.

Background

The motions that are the subject of this ruling concern a DEC enforcement hearing that commenced with a complaint dated July 2, 2004. The complaint alleges nineteen causes of action

concerning alleged violations of Environmental Conservation Law (ECL) article 17 (Water Pollution Control) and article 25 (Tidal Wetlands), and of part 661 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR part 661, Tidal Wetlands - Land Use Regulations) and 6 NYCRR part 751 (State Pollutant Discharge Elimination System - Required Permits)[1] at three sites in Broad Channel, Queens County, New York. The allegations include conducting regulated activities in a tidal wetland or its adjacent area without a DEC permit and discharging untreated residual contents of portable toilets and wash-down fluids into wetlands and navigable waters.

The three sites are: Site 1, Queens County Tax Block 15376, Lots 45 and 48, also identified as 302-304 Cross Bay Boulevard; Site 2, Queens County Tax Block 15375, Lot 20, which is not identified by a street address in the complaint but is identified in the Respondents' motion as 210 Cross Bay Boulevard; and Site 3, Queens County Tax Block 15322, Lots 19 and 20, also identified as 40 West 17th Road.

DEC Staff mailed to Respondents a notice to permit entry upon all three sites, between the hours of 10 AM and 5 PM on March 31, 2005, for the purpose of inspecting, measuring, surveying, sampling, testing, photographing and/or recording by motion pictures or otherwise. The notice to permit entry was dated March 1, 2005. It was transmitted to Thomas C. Monaghan, Esq., counsel for Respondents, with a letter dated March 1, 2005 from Udo M. Drescher, Esq., Assistant Regional Attorney, DEC Region 2. The letter was sent by certified mail, return receipt requested, and the return receipt was received by the DEC Region 2 Office on March 4, 2005.

Respondents' motion

In response to the notice to permit entry, Respondents moved for a protective order denying the requested discovery or, in the alternative, limiting, conditioning and regulating the notice so as to prevent "unreasonable annoyance, expense, embarrassment or other prejudice by virtue of its' [sic] enforcement at this time in the middle of the pending proceedings." Respondents also moved for an order "moving this case to trial forthwith upon the compliance by petitioner [DEC Staff] to the reasonable,

[1] In 2003, parts 751 through 758 were repealed and replaced by new part 750, State Pollutant Discharge Elimination System (SPDES) Permits.

reciprocal discover [sic] demands made on behalf of these respondents in connection with the Complaint."

Attached with the motion for a protective order were an affirmation by Mr. Monaghan and an affidavit by Charles W. Howard, one of the Respondents. Also attached were several exhibits including copies of the notice to permit entry and the March 1, 2005 transmittal letter that accompanied it, and a February 25, 2005 letter from Mr. Monaghan to Mr. Drescher objecting to any entry on the sites by an inspector.

Respondents' motion discussed the history of their interactions with DEC about the sites, including an order on consent signed by Call-A-Head Corp. on December 30, 1993 and by the DEC on January 27, 1994, and an enforcement action in 2003 and 2004 that involved the Queens County District Attorney's office. Respondents asserted that DEC Staff had not responded to discovery requests made by Respondents, including a request for reports related to toxic discharges to wetlands or sewers, and that DEC Staff is not willing to meet with Respondents to arrive at settlement of this matter.

With regard to DEC Staff's proposed inspection of the site, Respondents stated that the "disruption to the efficient, effective flow of operations of the business at CAH [Call-A-Head Portable Toilets, Inc.] is too obvious to require further comment." Respondents stated that the inspection may be for the purpose of amending the complaint and that this is "tantamount to harassment and obstruction of the legitimate activities by this petitioner of the ongoing operations of CAH." Respondents stated that DEC Staff intends to send a team of investigators and scientist to conduct tests, "All of this activity from 10:00 a.m. to 5:00 p.m. on the busiest day of the company's work week, all in interference of and obstruction to, the hustle bustle of activities that routinely take place upon the property Monday through Friday. In the very least, any such testing could just as easily be done on a Saturday or a Sunday when DEC is well aware that the business shuts down over the weekend."

DEC Staff's reply and cross-motion

On March 28, 2005, DEC Staff opposed the motion for a protective order and moved to compel discovery. This correspondence from DEC Staff also opposed Respondents' motion that the hearing be scheduled forthwith.

DEC Staff argued first that the motion for a protective order was procedurally flawed in that it was not timely, based upon the time limits in 6 NYCRR 621.7(c)[sic], and that Respondents made no attempt to resolve the discovery dispute without resort to a motion.

With regard to the merits of the motion for a protective order, DEC Staff argued that the requested inspection is an acceptable discovery device and that when the premises are the principle matter at issue, access should be allowed. DEC Staff stated that, with regard to questions of privacy and annoyance, the access in this matter encompasses the exterior area near the residence of one of the Respondents (at Site 3) but does not entail inspection of this Respondent's house. DEC Staff argued that Respondents have not shown how the requested discovery would cause them expense or other prejudice. In addition to these reasons, DEC Staff stated that Call-A-Head Corp. consented to DEC Staff having access to Site 1 as a provision of the January 27, 1994 order on consent between that Respondent and DEC.

DEC Staff briefly addressed other assertions in Respondents' papers, including Respondents' claim that DEC Staff did not respond to Respondents' discovery requests. DEC Staff outlined the requests and its response, and enclosed a copy of an October 20, 2004 letter from Mr. Drescher to Mr. Monaghan that transmitted certain requested documents and identified privileges under which DEC Staff was withholding other requested documents. DEC Staff also noted that there may be documents that were generated during the City of New York's independent proceeding and that DEC Staff has not yet obtained.

With regard to Respondents' motion that the hearing be scheduled, DEC Staff stated the hearing will be scheduled upon DEC Staff filing a statement of readiness for the adjudicatory hearing, pursuant to 6 NYCRR 622.9(a), that discovery is still occurring, and that this motion by Respondents is not ripe.

DEC Staff moved to compel discovery, pursuant to 6 NYCRR 622.7(c)(2), seeking access to the sites as requested in the notice to permit entry. DEC Staff stated an 8-hour window of time is reasonable but that it is possible much less time would be required for the inspections.

Reply by Respondents

On April 11, 2005, Mr. Monaghan submitted a reply affirmation, stating that the motion for a protective order was

timely pursuant to section 3122 of the Civil Practice Law and Rules (CPLR). He also stated he had numerous telephone conferences with DEC Staff regarding discovery. On April 12, 2005, Mr. Drescher sent an electronic mail message to me and to Mr. Monaghan, in care of the e-mail address of Mr. Monaghan's partner or associate, stating that DEC Staff would not submit further briefs on the pending motions.

Discussion and rulings

Motion for a protective order

Section 622.7(a) of 6 NYCRR provides that, "The scope of discovery must be as broad as that provided under article 31 of the CPLR." Section 622.7(c)(1) of 6 NYCRR states that:

> "A person against whom discovery is demanded may make a motion to the ALJ [Administrative Law Judge] for a protective order, in general conformance with CPLR section 3103, to deny, limit, condition or regulate the use of any disclosure device in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice. Such motion must be filed within 10 days of the discovery demand and must be accompanied by an affidavit of counsel, or by the moving party if not represented by counsel, reciting good faith efforts to resolve the dispute without resort to a motion."

Under 6 NYCRR section 622.6(b)(2), "[i]f a period of time prescribed under this Part is measured from the date of the ruling, pleading, motion, appeal, decision or other communication instead of the date of service:...five days will be added to the prescribed period if notification is by ordinary mail."

In the present case, DEC Staff argued that the motion for a protective order was untimely. Respondents argued that it was timely under CPLR section 3122, which allows a party 20 days to respond to a notice to inspect or examine. Although part 622 includes procedures from or similar to the CPLR, part 622 rather than the CPLR governs the DEC's enforcement hearing procedures. Thus, the ten day deadline in part 622 applies.

The notice to permit entry is dated March 1, 2005, and was sent by mail. The date on which the fifteen days ended was March 16, 2005, a Wednesday. The motion for a protective order is dated March 21, 2005, and thus was not timely.

Even if the motion for a protective order were timely, however, Respondents did not show that a protective order should be made, and the motion is denied.

Regarding the merits of the motion for a protective order, Respondents' arguments do not provide any reason why the proposed inspection of the site should be prohibited or limited. Respondents asserted that the inspection would disrupt their business but dismissed explaining why, on the basis that it was "too obvious to require further comment." Respondents have not explained how the presence of DEC employees taking measurements, samples, photographs, and so forth would prevent the Respondents' employees from carrying out their tasks on the sites. Contrary to the Respondents' conclusion, the claimed disruption is not obvious. DEC Staff's description of the types of observations it seeks to make, and the likelihood that DEC employees would be at any one of the three sites for substantially less than the seven hour period between 10 AM and 5 PM, indicate that the inspection would not be unduly disruptive. Respondents claimed the date proposed for the inspection (March 31, 2005, a Thursday) is "the busiest day of the company's work week," but only made general reference to "activities that routinely take place upon the property Monday through Friday" in support of this claim.

Respondents' proposal for limiting the discovery, to avoid the claimed disruption, was that the inspection occur on a weekend when the business is not operating. The correspondence regarding the motion does not provide a basis to limit the inspection in this manner. It is also common that inspections by DEC Staff of a variety of businesses occur during normal business hours.

Respondents' papers mentioned the possibility of DEC Staff coordinating its inspection with those of monitors who apparently check one or more of the sites under a stipulation with the Queens County District Attorney's Office (Howard affidavit, paragraph 22, and Exhibit C of Respondents' motion). Because the stipulation allows the monitors to make unannounced site checks up to five times per month, this would appear to allow even more access than DEC Staff seeks through its discovery demand.

It is reasonable that DEC Staff visit a site to ascertain current conditions before considering a settlement agreement or testifying in a hearing. Nothing in the correspondence regarding this motion supports a conclusion that the proposed inspection is harassment of Respondents or otherwise would be prejudicial to Respondents.

Ruling: Respondents' motion for a protective order is denied.

DEC Staff motion to compel discovery

Section 622.7(c)(2) states, "If a party fails to comply with a discovery demand without having made a timely objection, the proponent of the discovery demand may apply to the ALJ to compel disclosure." As noted above, the motion for a protective order was not timely, and would have been denied even if it were timely.

Failure to comply with discovery after being directed to do so by the ALJ may lead to preclusion of the material demanded or inferences unfavorable to the noncomplying party's position (see, 6 NYCRR 622.7(c)(3)).

Ruling: DEC Staff's motion to compel discovery is granted. The parties are directed to schedule a date, that would be within one month following the date of this ruling, on which the inspection would occur.

Motion to schedule hearing

Respondents moved that the hearing be scheduled to occur forthwith, after DEC Staff complies with the Respondents' discovery demands. DEC Staff's reply indicates that it provided a detailed response to the only clearly identified discovery demands of Respondents. Discovery is still taking place, however, at least to the extent of DEC Staff's notice to permit entry.

Sections 622.9(a) and 622.9(b)(2) provide that a case will be placed on the hearing calendar upon DEC Staff filing a statement of readiness for adjudicatory hearing, that includes (among other items) a "statement that discovery is complete or has been waived or an explanation as to why it hasn't been completed." There is no legal or regulatory requirement that the present hearing take place within a stated period of time such that the hearing would be scheduled before DEC Staff files a statement of readiness with the Office of Hearings and Mediation Services (*cf.*, 6 NYCRR 622.9(a)).

Ruling: The motion to schedule the hearing forthwith, upon DEC Staff's response to a discovery demand by Respondents, is denied.

_____/s/_____
Susan J. DuBois
Administrative Law Judge

Albany, New York
April 29, 2005

TO: Thomas C. Monaghan, Esq.
Udo M. Drescher, Esq.