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

January 24, 2007

Summary

On or about December 26, 2006, staff of the Department of Environmental Conservation (DEC Staff) served a second notice to permit entry, seeking to re-inspect the three sites involved in the above administrative enforcement action. The inspections were requested as discovery, under the DEC enforcement hearing procedures. Respondents moved for a protective order to deny or limit the inspection, and also moved to dismiss the enforcement matter for want of prosecution. DEC Staff opposed both motions and also moved for an order to compel the discovery sought in the notice to permit entry.

The present ruling denies the motion to dismiss. It grants DEC Staff's motion to compel, in part (regarding Site 3). It reserves judgment on the remainder of both the motion for a protective order and the motion to compel until further information and argument are provided by the parties. While these motions are pending, the requested discovery at Sites 1 and 2 is suspended.

Background

This case commenced with a complaint dated July 2, 2004. The complaint alleged 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.

The complaint describes Site 1 as Call-A-Head's main business location, and Site 2 as a lot located approximately 400 feet from Site 1 and allegedly used for storage of portable toilets. Respondents' motion describes Site 3 as a residential property personally owned by Respondent Charles W. Howard.

In March 2005, DEC Staff served a notice to permit entry, that was opposed by Respondents and was the subject of a ruling dated April 29, 2005. The ruling denied Respondents' motion for a protective order, granted DEC Staff's motion to compel discovery, and denied Respondents' motion that a hearing be scheduled forthwith. Based upon correspondence from the parties, DEC Staff inspected the sites on or about May 27, 2005, although Respondents denied DEC Staff access to the interior of shipping containers that are located on Site 1. Although both DEC Staff and Respondents submitted correspondence about the denial of entry (letters dated May 31 and June 1, 2005, respectively), neither party submitted a subsequent motion concerning further inspection until Respondents' recent motion about the second notice to permit entry.

DEC Staff's second notice to permit entry, dated December 26, 2006, is stated as a discovery demand pursuant to 6 NYCRR 622.7 to permit entry during regular business hours on Sites 1, 2

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

and 3 for the purpose of inspecting, measuring, surveying, sampling, testing, photographing and/or recording by motion pictures or otherwise.

Respondents' motion, and DEC Staff's cross-motion

Respondents moved to dismiss the enforcement action for want of prosecution, pursuant to section 3216 of the Civil Practice Law and Rules (CPLR), or in the alternative, to limit the inspection. Respondents argued that DEC Staff had not pursued the enforcement action since the time of the May 2005 inspection.

Respondents sought to limit the days or hours during which DEC Staff could inspect the "public area" of Site 1, so that the inspection would occur during non-business hours, and to prohibit DEC Staff entirely from inspecting within any structures, containers and enclosed spaces on Site 1 without a search warrant. Respondents' arguments in support of limiting the time of the exterior inspection were similar to those in its 2005 motion, and relate to claims that Respondents' business would be disrupted if the inspection were to occur within business hours. Respondent's arguments about structures and enclosed spaces on Site 1 cited, without explanation, "the Fourth, Fifth and Fourteenth Amendments of both the Federal and State Constitution" (Affirmation in reply, at 7) and stated, "Hopefully, there is no question but that DEC has no right whatsoever to enter in and upon the offices and various other enclosed spaces upon the premises without a search warrant" (January 3, 2007 affirmation of Thomas C. Monaghan, Esq., at 9). Respondents also argued that the Department deals with "the environs," and that these have nothing to do with the interior of structures (Affirmation in reply, at 2).

With regard to Site 2, Respondents argued that a footnote in DEC Staff's reply, regarding a missing paragraph in the complaint, reveals that the complaint did not state a basis for DEC having jurisdiction over Site 2. Respondents further argued that it would be improper for DEC Staff to amend the complaint, and objected to any inspection of Site 2 on this basis.

With regard to Site 3, DEC Staff stated it was willing to limit its discovery request such that it would not enter any buildings but would seek access to exterior areas (DEC Staff January 10, 2007 reply, at 3). Mr. Monaghan's January 15, 2007 reply affirmation stated that Respondent Charles W. Howard has no objection to DEC Staff "conducting whatever experiments and/or evidence collecting/photographing that it might do upon the

external areas of" Site 3 (Affirmation in reply, at 6 - 7). Therefore, with DEC Staff's January 10, 2007 limitation of its request regarding Site 3, there is no dispute between the parties regarding inspection of Site 3.

With regard to Sites 1 and 2, DEC Staff stated the motion for a protective order should be denied because Respondents failed to submit an affidavit reciting good faith efforts to resolve the discovery dispute, as required by 6 NYCRR 622.7(c)(1). DEC Staff stated it does not seek to enter any buildings on Site 2. DEC Staff stated it is requesting access to buildings and other enclosed spaces on Site 1 because conditions inside are "relevant to evaluate what regulated activities are taking place and if those regulated activities are permissible or not," citing several categories of land uses in 6 NYCRR part 661 (the tidal wetlands regulations) and four paragraphs of the complaint (paragraphs 46, 81, 82 and 83). DEC Staff moved for an order granting access to exterior locations on Sites 2 and 3, and both exterior and interior locations on Site 1.

With regard to the motion to dismiss for want of prosecution, DEC Staff stated the DEC enforcement hearing procedures (6 NYCRR part 622) do not provide for this remedy. DEC Staff also argued that even if CPLR 3216 were applicable, Respondents failed to comply with the demand letter requirement of CPLR 3216(b)(3). DEC Staff also stated that Respondents have not been prejudiced by the delay in pursuing the case. DEC Staff submitted an affidavit of Stephen Zahn, Marine Resources Program Manager, stating that the DEC employee who was assigned to handle enforcement matters in Broad Channel is on leave and the matter has been re-assigned to another DEC employee.

Discussion

Motion to dismiss

Although 6 NYCRR part 622 uses some procedures taken from the CPLR or modified from those in the CPLR, not all of that law is used in the DEC enforcement hearing procedures. Part 622 does not provide for dismissing an enforcement action for want of prosecution. Instead, delay in providing a hearing in a DEC administrative enforcement matter is evaluated based upon State Administrative Procedure Act (SAPA) section 301(1) (Matter of Manor Maintenance Corp., Order of the Commissioner, February 12, 1996). SAPA section 301(1) states, "In an adjudicatory proceeding, all parties shall be afforded an opportunity for hearing within reasonable time." The decision in Matter of

Cortlandt Nursing Home v Axelrod (66 NY2d 169, 495 NYS2d 927 [1985]) outlined the factors to be weighed in deciding if a delay is reasonable within the meaning of SAPA section 301(1). These are: "(1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by governmental regulation" (66 NY2d, at 178, 495 NYS2d, at 932). Respondents have not presented assertions concerning those factors or arguments why the timing of this case involves unreasonable delay.

Ruling: The motion to dismiss is denied, without prejudice.

Access to sites

As noted above, there is no remaining dispute about DEC Staff's requested inspection of the exterior of Site 3. That inspection may proceed.

With regard to Site 2, I am reserving ruling on both Respondents' motion for a protective order and DEC Staff's motion to compel, until the parties submit additional information. Both the factual allegations and the legal arguments presented by the parties are inadequate to serve as a basis for deciding the motions at the present time.

The complaint refers to a restriction on development of Site 2. DEC Staff's reply to the motion states that a paragraph about a restrictive covenant is missing from the complaint and suggests that this restriction makes Site 2 subject to inspection. The complaint and this assertion will need to be clarified before they can be evaluated with regard to the requested inspection.

In addition, the complaint alleges that Respondents installed a fence at Site 2 (paragraph 67), but one cannot tell if the entire site is fenced, whether the fence blocks the view of Site 2 from the street, whether the fence has a gate, or other facts that may be relevant to deciding the motions. It appears that there are no buildings or storage containers on Site 2, and that the dispute involves inspection of an open area on which there may be portable toilets, not inspection of the interior of buildings or storage containers. If this understanding is not correct, the parties should clarify what is in dispute.

Contrary to Respondents' assertion about the impropriety of amending the complaint (affirmation in reply, at 7), 6 NYCRR

622.5(b) allows parties to amend pleadings at any time prior to the final decision of the Commissioner, by permission of the ALJ or the Commissioner, and absent prejudice to the ability of the other party to respond. If DEC Staff were allowed to amend its complaint to add the missing paragraph, Respondents could be provided an opportunity to amend their complaint in response and would not be prejudiced by DEC Staff's amendment.

If DEC Staff wishes to pursue its request to inspect Site 2 again, it will need to provide the missing paragraph referred to in its January 10, 2007 reply and request that the complaint be amended to add this paragraph. If DEC Staff continues to argue that "the permit and restrictive covenant are binding [upon] respondent Howard Jr. as successor to the original permittee" and that this makes Site 2 subject to inspection, DEC Staff will need to provide a copy of the permit and the restrictive covenant. The complaint and DEC Staff's reply refer to a permit and a restriction, but the terms of these are not in the record.

With regard to Site 1, DEC Staff is asking to inspect both exterior areas and interiors of buildings and other enclosed structures. Site 1 was the subject of an order on consent (DEC File No. R2-0610-92-12) that became effective on January 27, 1994. The order on consent was attached as Exhibit B of Respondents' March 2005 motion. It includes a paragraph VI stating, "For the purpose of monitoring compliance with this Order, duly authorized representatives of DEC shall be permitted access to the subject site without prior notice at such times as may be desirable or necessary in order to inspect and determine the status of the property." The schedule of compliance that is part of the order on consent includes requirements concerning activities inside buildings or partly inside buildings on Site 1 (paragraphs 5 and 6). These requirements include that "use of the two-story structure on Respondent's lot shall be limited to office space and repair of Respondent's vehicles...Other than as specifically provided in this paragraph, during the period of temporary authority, Respondent shall not store, load, unload or transfer septic tanks, cesspools, marina holding tanks, portable toilets, chemicals or other wastes at the Call-A-Head site [Site 1]...Within thirty (30) days from the effective date of this Order Respondent shall remove all concentrated disinfectant from the site and convert the existing dilution tank for fresh water use only."

DEC Staff cited this order on consent in support of its first notice to permit entry (see April 29, 2005 ruling, at 4). With regard to the second notice to permit entry, and the currently pending motions, Respondents submitted a January 3,

2007 affidavit of Respondent Charles W. Howard. In his affidavit, Mr. Howard states, among other things, that Assistant Regional Attorney Udo Drescher "informed me that the Consent Order was 'no longer operative'" and that additional enforcement action was being taken. DEC Staff's January 10, 2007 reply to the motion did not address this assertion.

DEC Staff will need to clarify whether the 1994 order on consent remains part of its basis for access to Site 1 (exterior areas, interiors or both). If Respondents are of the opinion that the order on consent does not provide DEC Staff access to exterior areas of Site 1, interior areas, or both, Respondents will need to describe the factual and legal basis for these assertions.

Respondents, in their reply, objected to inspection of Site 1 on the basis of the Federal and State Constitutions, but only presented a brief, conclusory statement of position.[2] DEC Staff, in its reply and motion to compel, did not address the constitutional objection. The constitutionality of the requested inspection, or parts of it, is not a simple legal question and it also quite likely depends on facts that are not in the record at present. The parties will need to present their arguments why the requested inspection of Site 1 is or is not constitutional. To the extent Respondents may object to inspection of Site 2 for constitutional reasons as well, Respondents would need to present their position and arguments.

DEC Staff will also need to clarify whether, and how, the requested inspections relate to the allegations in the complaint.

ECL section 17-0829 authorizes the Department to conduct certain inspections to carry out the purposes of the Clean Water Act. It is unclear whether DEC Staff is relying on this authority. If so, DEC Staff should provide clarification of how it believes this authority applies to the requested inspections. If Respondents oppose an exercise of such authority for constitutional reasons, they should clarify whether their opposition is based on constitutionality of the statute or its application in the present case.

The parties may submit their arguments, and the other information outlined above, to be received by the other party and

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[2] Although Respondents sought to rely on the State Constitution, Respondents' motion does not identify specific provisions of the State Constitution.

by me on or before February 23, 2007. The parties may then submit replies, to be received by the other party and by me on or before March 9, 2007.

I will reserve ruling on both the motion for a protective order and the motion to compel, with respect to Sites 1 and 2, until after March 9, 2007. As noted above, there no longer appears to be a dispute about DEC Staff's request to inspect the exterior areas at Site 3, and that inspection may proceed.

Under part 622, motions for protective orders may be made "in general conformance with CPLR section 3103" (6 NYCRR 622.7(c)(1)). CPLR section 3103(b) provides that: "Service of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute." Until the motion for a protective order is decided with respect to Sites 1 and 2, DEC Staff's notice to permit entry is suspended with regard to those sites. Such a suspension is consistent with the CPLR and also appears reasonable as part of the conduct of this hearing. DEC Staff has not stated a reason why the inspections of Site 1 or Site 2 need to occur immediately.

In view of the January 25, 2007 date DEC Staff identified for the inspections, this ruling is being sent to the parties both by fax and by first class mail.

/s/

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Albany, New York
January 24, 2007

Susan J. DuBois
Administrative Law Judge

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