

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

RULING

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.,

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

April 3, 2007

Respondents.

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On December 26, 2006, staff of the Department of Environmental Conservation (DEC Staff) issued to Respondents a second notice to permit entry, seeking to inspect the three sites that are the subject of the alleged violations in this case. DEC Staff proposed to conduct the inspection on January 25, 2007, as part of discovery under the DEC enforcement hearing procedures (part 622 of title 6 of the Official Compilation of Codes, Rules and Regulations [6 NYCRR part 622]). On January 3, 2007, Respondents moved that the case be dismissed or, in the alternative, that a protective order be issued to limit the scope of the inspection.

DEC Staff replied on January 10, 2007, opposing Respondents' motion and seeking an order to compel the inspection. In its January 10, 2007 correspondence, DEC Staff stated that it seeks access at Site 1 to both exterior areas and the interiors of structures, containers,<sup>1</sup> and enclosed spaces, but only seeks access to the exterior areas at Sites 2 and 3. DEC Staff noted that a paragraph concerning Site 2 was inadvertently omitted from

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<sup>1</sup> The "containers" were described in a May 31, 2005 letter from Udo Drescher, DEC Assistant Regional Attorney, as "four large shipping containers that are located on [Site 1] and apparently being used for Call-A-Head's commercial activities, including office space and for the storage of chemicals" (see also, photograph attached with May 31, 2005 letter).

the complaint, and described it as referencing a tidal wetlands permit and a restrictive covenant that make Site 2 subject to inspection.

Respondents replied on January 15, 2007, arguing among other things that DEC Staff should not be allowed to amend the complaint to include the missing paragraph.

The three sites, located in Broad Channel, Queens County, 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 Respondents' motion as 210 Cross Bay Boulevard; and Site 3, Queens County Tax Block 15322, Lots 19 and 20, also identified as 40 West 17<sup>th</sup> 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.

On January 24, 2007, I issued a ruling that denied the motion to dismiss, granted DEC Staff's motion to compel with respect to Site 3, and reserved judgment on the remainder of both the motion for a protective order and the motion to compel (Sites 1 and 2). The ruling suspended the discovery with respect to Sites 1 and 2 while the parties submitted additional information identified in the January 24, 2007 ruling.

DEC Staff submitted additional correspondence on February 21, 2007, and supplemented that correspondence on March 2, 2007 as allowed in connection with granting Respondents' request for an extension of the response deadline (see letters of February 22 and 23, 2007). Respondents submitted additional correspondence on March 1, 2007. Both parties then replied, in submissions dated March 15, 2007.

#### Site 1

In their March 1, 2007 correspondence, Respondents stated "with regard to Site 1 respondents do not object to external inspection." Respondents asked that I limit the time of the inspection and the number of inspectors, as well as denying DEC Staff's request to enter areas such as sealed containers and buildings (March 1, 2007 memorandum, at paragraph (¶) 7; see also ¶¶ 10 and 12). In their January 3, 2007 motion, Respondents had

asked that the inspection be limited to non-business hours (Saturday, Sunday or after 6 P.M.).

DEC Staff's February 21, 2007 and March 2, 2007 correspondence presented arguments in support of obtaining access to the inside of structures at Site 1, and responded to the questions posed by my January 24, 2007 ruling that relate to this issue. In its March 15, 2007 correspondence, however, DEC Staff noted Respondents' statement quoted in the preceding paragraph, and stated DEC Staff "is willing to table" its request to inspect interior areas at Site 1. DEC Staff limited its inspection request to those portions of Site 1 that are outside of the buildings and the stacked containers. DEC Staff noted it was limiting the request "in the interest of moving this matter ahead" and asked that Respondents' refusal to grant access be reflected in the record "so that the appropriate inferences can be drawn by your Honor and the Commissioner." DEC Staff stated it does not expect to bring more than ten people to the inspection, and suggested that it take place between 10 A.M. and 3 P.M. although it might be completed in a shorter time.

I am interpreting DEC Staff's decision to "table" its request to inspect interior areas at Site 1 as a withdrawal of this portion of its discovery request, without prejudice to renewing it at a later date. As a result, it is not necessary for me to rule on the issue whether DEC Staff should be allowed to inspect the interior of buildings, storage containers or other structures at Site 1, either in deciding the motion for a protective order or the motion to compel. Consequently, the issue whether DEC Staff is entitled to such access remains unresolved. Further argument, possibly in closing briefs, may be necessary concerning any inferences to be drawn based upon Respondents' refusal to grant such access voluntarily, but considering such inferences is premature at present.

In its February 21 and March 2, 2007 correspondence, DEC Staff stated the inspection would provide information on current conditions at the sites. Staff stated this information relates to Staff's assertion that violations are ongoing, locations where wetland restoration may be required, and penalty amounts. DEC Staff's explanation demonstrates that the information sought is relevant.

In their prior motion for a protective order, Respondents included arguments about inspections during work hours that are similar to the arguments in their present submissions. I denied the prior motion, as discussed in my April 29, 2005 ruling. Respondents' recent correspondence does not provide any reasons

for limiting the time during which the inspection would take place, nor for limiting the number of DEC employees who would participate in the inspection. DEC Staff's description of the timing and number of people involved is reasonable, and this inspection of the exterior areas of Site 1 may proceed.

DEC Staff's second notice to permit entry asked to enter the sites on January 25, 2007. That date has passed, so DEC Staff will need to notify Respondents concerning a new date for the inspection.

Ruling: DEC Staff's motion to compel discovery, as modified on March 15, 2007 to omit inspection of interior areas at Site 1, is granted. Respondents' motion for a protective order is denied with respect to Site 1. The inspection may occur during work hours and with the approximately ten or fewer persons DEC Staff anticipates bringing to the site.

#### Site 2

Both Respondents' March 1, 2007 correspondence (at ¶ 13) and the aerial photographs attached with DEC Staff's February 21, 2007 correspondence indicate that a building exists on Site 2. DEC Staff's December 26, 2006 second notice to permit entry sought access to Site 2 including "all business facilities located thereon." DEC Staff's January 10, 2007 letter limited that request to seek only access to exterior areas, not buildings, at Site 2.

Respondents' March 1, 2007 correspondence (at ¶¶ 10, 12, 13) consented to external inspections and evidence gathering at Site 2. Following DEC Staff's limitation of its request, such external inspections are all DEC Staff is requesting. Respondents have not shown or argued that this limited inspection should be prohibited.

Ruling: DEC Staff's motion to compel discovery, as modified on January 10, 2007 to limit it to exterior areas at Site 2, is granted. Respondents' motion for a protective order is denied with respect to Site 2.

#### Amendment of Complaint

DEC Staff seeks leave to amend the complaint to add language pertaining to restrictions imposed by the deed for Site 2, and to add the City of New York as a respondent with respect to certain

alleged violations related to Site 2. Respondents oppose this request, arguing that amending the complaint two and a half years after it was served is "highly irregular and should not be permitted," and that amending the complaint would prolong the litigation. Respondents argued that although leave to amend a complaint should be freely given, prejudice and surprise to a party should also be weighed.

In DEC enforcement hearings, parties may amend their pleadings at any time prior to the final decision of the Commissioner, by permission of the Commissioner or the administrative law judge (ALJ) and absent prejudice to the ability of any other party to respond (6 NYCRR 622.5(b)). Respondents did not show how they would be prejudiced if DEC Staff were allowed to amend the complaint as requested, and the record does not indicate any such prejudice. Respondents would be provided an opportunity to amend their answer in response to an amended complaint. The time period for amending the answer would be 20 days (6 NYCRR 622.4(a)), which would not prolong the case to any significant extent.

DEC Staff may amend its complaint as requested in its February 21, 2007 correspondence. The amended complaint must be served, pursuant to 6 NYCRR 622.3, upon the City of New York and mailed to Respondents.

Ruling: DEC Staff's motion to amend the complaint is granted.

Albany, New York  
April 3, 2007

\_\_\_\_\_/s/\_\_\_\_\_  
Susan J. DuBois  
Administrative Law Judge

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