STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Articles 17 and 25 of the New York State Environmental Conservation Law and Part 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York

RULING

DEC FILE NOS. R2-20030505-128
R2-20030505-129

- 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.

PROCEEDINGS

Staff of the Department of Environmental Conservation (Department) filed an amended complaint (complaint), dated May 5, 2012, which alleges that respondents violated numerous provisions of the laws and regulations pertaining to tidal wetlands and the State Pollution Discharge Elimination System (SPDES). The vast majority of the allegations in the complaint relate to the operation of a portable toilet business by respondents. The complaint sets forth nineteen causes of action.

This ruling addresses respondents' motion (motion) to dismiss or, alternatively, to compel disclosure that was filed with the Office of Hearings and Mediation Services by respondents on May 16, 2016.

By its motion, respondents assert two bases for dismissal: (1) that the Department lacks jurisdiction, and (2) that the complaint is so defective that it deprives respondents of due process.

Additionally, if the complaint is not dismissed, respondents request additional disclosure relating to the tidal wetlands permits issued by the Department in Queens and Kings Counties.

DISCUSSION

Motion to Dismiss

In July 2015, respondents advised this office that they had engaged new counsel and, after consultation with the parties, I set October 27, 2015 as the hearing date (see administrative law judge [ALJ] letter to the parties dated July 28, 2015 [noting that "the October hearing dates were selected to afford [respondents'] new counsel time to review the case and file any pre-hearing motions"]). On July 28, 2015, respondents provided the name of their new attorney. On July 29, and again on August 4, 2015, I requested a notice of appearance from respondents' counsel, and received same on August 4, 2015. After granting respondents' counsel's request for an extension to the initial date set for filing pre-hearing motions (August 25, 2015), I set a September 24, 2015 deadline for filing such motions (see ALJ letter to the parties dated Sept. 17, 2015). No motions were filed.

On October 26, 2015 the parties advised that they had reached an agreement in principle and that, although some issues remained unresolved, settlement appeared likely. I opened the hearing record on October 27, 2015 and, at the request of the parties, granted an adjournment (see ALJ letter to the parties dated October 28, 2015).

Subsequently, the parties advised that they were not able to reach settlement and, after consultation with the parties, I scheduled the hearing to commence on June 13, 2016 (see ALJ letter to the parties dated April 21, 2016). Although I did not foreclose further motion practice prior to the new hearing date, I noted that the deadline for pre-hearing motions had passed on September 24, 2015. Accordingly, I directed that, in the event that either party elected to file a pre-hearing motion at this stage of the proceeding, the movant must provide "reasonable justification" for not filing the motion prior to the previously scheduled deadline (id. at 1; see 6 NYCRR 622.10[b][1][x] [setting forth the ALJ's authority to "do all acts" to maintain the efficient conduct of the hearing]).

By their motion, respondents set forth various reasons that they assert "constitute[] reasonable justification for not filing a pre-hearing motion prior to the previously scheduled deadline" (motion at 13). First, respondents argue that their current counsel was retained in August 2015 and had sought an extension to the original hearing date. As noted above, respondents sought, and were granted, an extension to the date for filing pre-hearing motions. However, I have no record that respondents requested an extension to the October 2015 hearing date (see staff email to ALJ, with copy to respondents' counsel, dated August 18, 2015 [stating that staff was amenable to "a reasonable extension" of the deadline for pre-hearing motions and advising that respondents' counsel had "indicated that he was not going to ask for a postponement of the hearing"]).

Respondents next argue that "[t]he majority of the information that forms the bases of the instant motion was simply not available to the Respondents or [their counsel] prior to the

previously scheduled deadline for pre-hearing motions" (motion at 14). This assertion, however, has is of no moment relative to respondents' claims concerning the Department's jurisdiction or the purported errors on the face of the complaint. The jurisdictional claim is premised upon facts that have always been in respondents' possession as they pertain to the date that respondents allege their business was established. Therefore, this information was plainly available to respondents.

As to the purported errors and defects on the face of the complaint, respondents have been in receipt of the complaint since May 2012. Respondents make no argument that the alleged defects in the complaint could not have been identified, and subject to motion practice, prior to the September 24, 2015 deadline.

In an apparent acknowledgment of the lack of justification for filing its motion at this stage of the proceedings, respondents state that they:

> "could have submitted a pre-hearing motion prior to [the September 24, 2015] deadline, seeking some forms of the relief sought in the instant motion. The primary reason that the Respondents elected not to do so, however, was that the parties, soon after [counsel's] substitution into this proceeding, began substantive settlement negotiations, which led, at the request of the parties, to the adjournment of the hearing . . . [and respondents' counsel] had hoped that those substantive settlement discussions, to which a great deal of time and effort were devoted, would have culminated in a negotiated resolution of this proceeding" (motion at 14-15).

Respondents' "hope" for settlement is not a sufficient basis to justify the timing of the instant motion. After engaging their current counsel, respondents had nearly two months before the September 24, 2015 deadline to file pre-hearing motions. An additional month lapsed between that deadline and the October 27, 2015 hearing date. During that time, respondents never sought an additional extension of time to file pre-hearing motions nor an adjournment of the filing date pending settlement discussions.

I conclude that respondents have failed to provide reasonable justification for filing the motion to dismiss at this time rather than prior to the September 24, 2015 deadline. Accordingly, the motion to dismiss is denied without prejudice to present argument and evidence on these issues at hearing.

Motion to Compel Disclosure

With regard to respondents' motion to compel disclosure, respondents again fail to specify what information they were lacking in September 2015 that prevented them from moving to compel disclosure at that time. Respondents state that, as a result of "Superstorm Sandy" documents in the possession of respondents' prior counsel were lost or destroyed (motion at 14). Respondents' discovery demands, however, relate to "documents evidencing the issuance of Department [tidal wetlands] permits to non-water dependent commercial facilities operating in the counties of Queens and Kings from 1992 to date" (id. at 12). Respondents make no argument

and assert no facts that provide justification for failing to file the motion to compel disclosure of these documents prior to the September 2015 deadline.

Moreover, discovery in this matter had been ongoing for many years (see e.g. ALJ ruling, dated April 29, 2005 [denying respondents' motion for a protective order and granting staff's motion to compel disclosure]; ALJ letter to the parties, dated October 15, 2014 [memorializing staff's agreement to "recreate a disclosure file" for respondents in the aftermath of Superstorm Sandy]). Additionally, my ruling in this matter dated June 9, 2015 expressly advised that I would "contact the . . . parties shortly after they have been served with this ruling to discuss the status of discovery and to schedule the hearing on this matter" (ruling at 4). During the subsequent conference call, on July 28, 2015, I stated that I understood that disclosure was now complete and we were ready to proceed to hearing (see ALJ letter to the parties dated July 28, 2015). Neither party objected and the hearing date was set.

Lastly, I note that respondents' discovery request seeks to compel disclosure relating to other "commercial facilities" that are not parties to this proceeding (motion at 12). Respondents argue that "[u]pon information and belief, the Department's enforcement action against the Respondents is discriminatory" and assert that "[t]he Department is well aware of other commercial facilities, which conduct operations substantially similar to those conducted by the Respondents" (id.). Respondents' argument of selective enforcement, is not adjudicable in this forum, but rather must be pursued in civil court (see Matter of 303 West 42nd Street Corp. v Klein, 46 NY2d 686, 693 [1979][noting that a claim of selective enforcement "is treated not as an affirmative defense to . . . the imposition of a regulatory sanction but rather as a motion to dismiss or quash the official action [and a reviewing] court must conduct a hearing if, on the papers before it, a strong showing of selective enforcement, invidiously motivated, appears"] [citations omitted]).

For the reasons discussed above, respondents' motion to compel disclosure is denied.

CONCLUSION

I deny respondents' motion to dismiss and to compel disclosure.

/s/

Richard A. Sherman
Administrative Law Judge

Dated: June 3, 2016
Albany, New York

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