STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 17 of the Environmental Conservation Law of the State of New York ("ECL") and Title 6, Part 750 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR")

RULING ON RESPONDENTS' MOTION

-by-

DEC Case No. R5-20160308-2200 (Deerfield Estates Mobile Home Park)

C AND J ENTERPRISES, LLC and JAMES P. BURR, Individually,

Respondents.

I. Background

This matter involves allegations by staff of the New York State Department of Environmental Conservation ("Department") that respondents C and J Enterprises, LLC and James P. Burr (collectively "respondents") have violated ECL article 17 and its implementing regulations, 6 NYCRR part 750, and Order on Consent No. R5-20080515-814 with respect to the operation of a wastewater treatment system located at property known as Deerfield Estates Mobile Home Park, located in the Town of Perth, Fulton County, New York ("site").

Currently pending before me is respondents' motion seeking: (i) a declaration precluding the Department from introducing evidence arising from inspections of the site conducted by Robert Streeter; (ii) a declaration that respondent James Burr can only be held jointly and severally liable if the Department can demonstrate that he knew of the violations and could have prevented them; and (iii) permission to take the depositions of Department employee Robert Streeter and Assistant Attorney General Morgan A. Costello.

As discussed below, respondents' motion is denied.

II. Discussion

A. Request to Preclude Evidence of Inspections

Respondents seek to preclude evidence arising from inspections conducted by Robert Streeter, arguing that the inspections were conducted in violation of respondents' Fourth Amendment rights against warrantless seizures. See generally Respondents' Memorandum of Law in Support of Motion for Leave To Take Depositions, dated October 4, 2017 ("Resp.

Mem."), at 4-7;[1] see also Attorney Affirmation in Support of Motion to Preclude Inspection, dated October 4, 2017 ("Young Aff."), at 4-9. Respondents do not, however, identify any particular inspection that they claim is constitutionally infirm, and do not provide an affidavit of a person with knowledge of facts with respect to any specific inspection.

Indeed, respondents argue in one place that "evidence arising from any inspection" should be excluded, see Resp. Mem. at 6 (emphasis added); see also Young Aff. at 8, ¶ 9 (same), while in other places respondents argue that "at least some of the inspection[s]" violated respondents' Fourth Amendment rights, id. at 4, Point Heading II (emphasis added); see also Young Aff. at 4, Heading II (same). Moreover, respondents' factual assertions relating to inspections are made upon information and belief, rather than through a sworn affidavit of someone with personal knowledge. See e.g. Young Aff. at 5, ¶¶ 8, 8(a).

Finally, respondents concede that they do not know which, if any, of the inspections allegedly violated respondents' Fourth Amendment rights. See Young Aff. at 9 ("The deposition of Robert Streeter is necessary in order to determine, which if any, of the inspections, that are the basis for the Department's entire case, are admissible herein").

Respondents' motion, insofar as it seeks to preclude with respect to evidence arising from inspections, is denied without prejudice.

B. Request for a Declaration Regarding Individual Liability

Respondents also seek a "declaration" regarding the circumstances and applicable law under which individual respondent Burr can be held liable under the "corporate officer doctrine." See Resp. Mem. at 2-4. In response, Department staff argues that "[t]he Commissioner and ALJ cannot predetermine the law and policy that they should apply in this proceeding without first considering the evidence admitted into the record on this issue." Affirmation of Assistant Regional Attorney Scott Abrahamson – Opposing Respondents' Motion to Preclude Inspections, dated October 6, 2017 ("Abrahamson Aff."), at 7, ¶¶ 19-22.

Irrespective whether respondents' characterization of applicable law is complete or accurate – and I make no ruling on such characterization or law herein – they have offered no facts in an admissible form on the issue of Mr. Burr's liability. The parties are free to determine what they believe the law requires, to present evidence regarding the issue of individual liability, and then to argue in post-hearing briefs whether the parties have satisfied their respective burdens. Respondents' motion, insofar as it seeks a declaration, is denied.

C. Request for Leave to Take Depositions

Respondents seek permission pursuant to 6 NYCRR § 622.7(b)(2) to depose DEC employee Robert Streeter and Assistant Attorney General ("AAG") Morgan A. Costello. See Young Aff. at 2, ¶ 2(c); see also id. 9-13, ¶¶ 11-18.

[1] Respondents have also appended to their memorandum of law what appears to be a legal research memorandum, written for review by respondents' counsel Mr. Young, summarizing five cases relating to "warrantless inspections."

A party seeking to take depositions must demonstrate that the depositions will expedite the proceedings, and that unique or unusual circumstances exist warranting a departure from the typical administrative practice of examination of witnesses only at hearing. The regulatory language makes clear that depositions in Part 622 enforcement proceedings are the rare exception, and that depositions "will only be allowed … upon a finding that they are likely to expedite the proceeding." 6 NYCRR § 622.7(b)(2). This regulatory limitation on the circumstances in which depositions may be allowed is consistent with other disclosure limitations in Part 622, see e.g. 6 NYCRR § 622.7(b)(3) (bills of particulars are not permitted) and § 622.7(b)(2) (written interrogatories only allowed with ALJ permission and upon finding that they are likely to expedite the proceeding), and is fully authorized by State Administrative Procedure Act § 305.[2]

In addition to the clear regulatory limits regarding depositions, prior administrative rulings further demonstrate the rarity of pre-hearing depositions in Part 622 practice. See e.g. Matter of U.S. Energy Development Corporation, Ruling of Chief ALJ on Motion for Leave to Conduct Depositions, May 9, 2014, at 5 (depositions "are seldom allowed absent a showing of particularized need arising from unique or unusual circumstances").

As set forth above, respondents seek to depose Mr. Streeter "in order to determine, which if any, of the inspections, that are the basis for the Department's entire case, are admissible herein." Young Aff. at 9. Respondents' argument that pre-hearing depositions are necessary is unavailing. Facts regarding inspections may be explored at hearing; respondents have made no showing of particularized need warranting a deposition of Mr. Streeter prior to the hearing.

Although respondents' submission quotes documents at length, including documents submitted in a related judicial proceeding and an order on consent that is relevant to this administrative proceeding, respondents offer no argument that unique or unusual circumstances are present here warranting a deposition of AAG Costello. Rather, respondents state generally that they seek to depose AAG Costello "regarding the Department's actions/decision/agreements during the period April, 2010 through January, 2015 under the 2008 Order on Consent." Respondents' motion, insofar as it seeks permission to conduct depositions, is denied.

III. Conclusion

Respondents' motion seeking (i) to preclude evidence of inspections; (ii) a declaration regarding the individual liability of respondent Burr; and (iii) permission to conduct depositions, is DENIED.

_____/s/_____
D. Scott Bassinson
Administrative Law Judge

Dated: Albany, New York
January 18, 2018

[2] SAPA § 305 states: "Each agency having power to conduct adjudicatory proceedings may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings."