

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Application for a Permit to Construct
and Operate a Transfer Station for
Regulated Medical Waste and Exempt Hazardous Waste
Pursuant to Article 27 of the Environmental Conservation Law
and Parts 360 and 370 of Title 6 of the Official Compilation
of Codes, Rules and Regulations of the State of New York,

- by -

CMW INDUSTRIES, LLC,

Applicant.

DEC Project No. 2-6104-01410/00001

DECISION OF THE ASSISTANT COMMISSIONER

February 2, 2010

DECISION OF THE ASSISTANT COMMISSIONER¹

CMW Industries, Inc. ("applicant" or "CMW") filed an application to construct and operate a fifteen ton per day regulated medical waste ("RMW") transfer station (the "project") with the New York State Department of Environmental Conservation ("Department" or "DEC"). The transfer station would be located on 100-02 Farragut Road, in the Brooklyn neighborhood of Canarsie, Kings County, New York (the "site").

BACKGROUND

The matter was referred to the Office of Hearings and Mediation Services in November 2008 and assigned to Administrative Law Judge ("ALJ") Helene G. Goldberger. Three intervenors, New York State Assembly Member N. Nick Perry, New York City Council Member Charles Barron, and the South Canarsie Civic Association ("SCCA"), petitioned for party status. MSSRs. Perry and Barron each separately sought full party status, while SCCA applied for amicus status. The ALJ, in her Rulings on Issues, Party Status and Environmental Significance and Order of Disposition dated March 24, 2009 (the "Rulings"), held that no substantive and significant issues had been presented for adjudication and denied all three petitions.

The ALJ directed that certain revisions be made to the proposed permit conditions. Specifically, she directed that limits be imposed on truck trips to the facility, truck idling be prohibited, and facility operating hours be curtailed (Rulings, at 33).

During the time period for appeals of the Rulings, Department staff issued a letter to CMW dated April 8, 2009 ("April letter"), stating that the negative declaration that Department staff had issued for the project, pursuant to the State Environmental Quality Review Act ("SEQRA"), had been withdrawn. Subsequently, in a letter dated May 26, 2009 to ALJ Goldberger ("May letter"), Department staff advised that the April letter was incorrect, the negative declaration had not

¹ By memorandum dated March 12, 2009, Commissioner Alexander B. Grannis delegated decision making authority in this proceeding to Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services. A copy of the memorandum was distributed to the participants in this proceeding, as an attachment to the ALJ's Rulings on Issues, Party Status and Environmental Significance and Order of Disposition dated March 24, 2009.

been withdrawn or rescinded, and the negative declaration was "still in effect" (May letter, at 1).²

In the May letter, Department staff noted its concern that, in reliance on the April letter, some participants to the issues conference "may have opted to not exercise their right to appeal the [Rulings]" and requested that the Office of Hearings and Mediation Services consider appropriate relief with regard to the time to appeal the Rulings (*id.*). In order to avoid any prejudice to the issues conference participants who might have appealed but for the April 8, 2009 communication, the ALJ accepted Department staff's suggestion that a new appeals schedule be established (see Memorandum of ALJ Helene Goldberger, May 29, 2009). Accordingly, appeals of the Rulings were due no later than June 26, 2009 and any replies due no later than July 10, 2009 (see id.).

An appeal from the Rulings, submitted on behalf of, collectively, New York State Assembly Member N. Nick Perry, SCCA and New York City Council Member Charles Barron ("appellants"), was received by me on June 26, 2009 ("Appeal"). However, because appellants mistransmitted the submission to Department staff, Department staff did not receive a copy until July 1, 2009. Consequently, the ALJ, by e-mail communication dated July 2, 2009, extended the time for replies until July 17, 2009. Replies were submitted, respectively, by Department staff ("Staff reply") and applicant ("CMW reply") on July 17, 2009.

Based on the record in this proceeding, I hereby affirm the ALJ's Rulings, subject to the following comments.

DISCUSSION

Appellants, in their appeal, argue that the ALJ erred in denying appellants' request for party status. In addition, appellants contend that, because Department staff failed to confirm that the site was properly zoned for the proposed RMW transfer station, Department staff's issuance of a negative declaration pursuant to the State Environmental Quality Review Act was "irrational and out of line with the case law" (Appeal, at 6). Accordingly, appellants urge that CMW's application for an RMW transfer station be remanded to Department staff for further evaluation and review.

² Department staff also sent a letter to applicant on May 26, 2009, advising that the negative declaration was still in effect.

Department staff and applicant in their replies contend that the ALJ correctly applied the standards for party status, and that the project's negative declaration was properly issued and should not be rescinded.

My task on this appeal is to determine whether the ALJ properly applied the standards governing party status and the determination of adjudicable issues.

The Part 624 regulations expressly set forth the criteria that a person, organization or other entity must satisfy for full party or amicus status (see 6 NYCRR 624.5[b]), and these criteria govern my review.

With respect to the adjudicability of any issue, where the contested issues are not the result of a dispute between applicant and Department staff, but, as in this proceeding, are proposed by potential parties, an issue must be "both substantive and significant" to be adjudicable (see 6 NYCRR 624.4[c][1][iii]; see also section 70-0119[1] of the Environmental Conservation Law; Part 622/Part 624 Comments/Response Document dated December 1993, at 18 [first response]). An issue is substantive "if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry" (6 NYCRR 624.4[c][2]). An issue is significant "if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit" (6 NYCRR 624.4[c][3]).

Where Department staff has reviewed an application and finds that a component of an applicant's project, as proposed or as conditioned by the draft permit, conforms to all applicable statutory and regulatory requirements, the burden of persuasion at the issues conference is on the potential party proposing any issue related to that component to demonstrate that it is both significant and substantive (6 NYCRR 624.4[c][4]). In this proceeding, no issues exist between applicant and Department staff, and the potential parties bear the burden of persuasion.

In determining whether a potential party has raised an adjudicable issue, the ALJ "must consider the proposed issue in light of the application and related documents, the draft permit, the content of any petitions for party status, the record of the issues conference and any subsequent written arguments [that the ALJ authorizes]" (6 NYCRR 624.4[c][2]).

Conducting an adjudicatory hearing "where 'offers of proof, at best raise [potential] uncertainties' or where such a hearing 'would dissolve into an academic debate' is not the intent of the Department's hearing process" (Matter of Adirondack Fish Culture Station, Interim Decision of the Commissioner, August 19, 1999, at 8 [citing Matter of AZKO Nobel Salt Inc., Interim Decision of the Commissioner, January 31, 1992, at 12]). If a potential party fails to adequately present or explain the nature of the evidence that it expects to offer and the specific grounds upon which its assertions are made, an issue is not raised (see Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, December 29, 2006, at 8). The generalized expression of differing views or objections, without more, is insufficient to raise an adjudicable issue. Absent the identification of an issue for adjudication, no basis exists for granting full party or amicus status.

Party Status Determinations

1. SCCA (Amicus Status)

Appellants argue that "although [SCCA] did not strictly follow the format provided by [6 NYCRR] Part 624, [it] did meet the substantive requirements" for amicus status (Appeal, at 3). Appellants further argue that latitude should be given to SCCA because of its "pro se" status, and that the determination to deny party status to SCCA should be reversed "as it is against the interest of justice, is not good policy and in direct contrast with the mission of the DEC" (Appeal, at 4). According to appellants, the standards set forth in 6 NYCRR Part 624 are a "guideline," not a "rigid dictation" (id.).

An ALJ's ruling of entitlement to amicus status must be based upon:

"(i) a finding that the petitioner has filed an acceptable petition [which meets the criteria of 6 NYCRR 624.5(b)(1) and (3)];

"(ii) a finding that the petitioner has identified a legal or policy issue which needs to be resolved by the hearing; and

"(iii) a finding that the petitioner has a sufficient interest in the resolution of such issue and through expertise, special knowledge or unique perspective may contribute materially to the record on such issue" (6 NYCRR 624.5[d][2][i-iii])(emphasis added).

The ALJ, based upon her review of SCCA's petition and presentation at the issues conference, indicated that SCCA has an interest in the CMW application for a RMW transfer station and that its environmental interest in the application had not been contested (see Rulings, at 9). The ALJ noted, however, that SCCA failed to meet other required standards in 6 NYCRR part 624, including the failure to identify a legal or policy issue requiring resolution and the failure to submit an acceptable petition for amicus status (see id.). Furthermore, the ALJ stated that SCCA provided only a list of concerns about various developments in the community "without any indication how SCCA could provide information to support a nexus between these concerns and the proposal or to demonstrate that the application was faulty in addressing any of them" (id.).

I have reviewed the record of this proceeding, including but not limited to SCCA's petition for party status and its presentation at the issues conference, and concur with the ALJ's determination that SCCA failed to satisfy the regulatory requirements for amicus status in this proceeding. Even considering SCCA's other submissions and its presentation at the issues conference, the generalized description of its concerns fails to satisfy the applicable regulatory criteria in 6 NYCRR part 624.

In the appeal, SCCA concedes that its petition was not in compliance with the Part 624 requirements (see Appeal, at 3), but maintains that Part 624 does not require strict compliance, and should not be seen as a "rigid dictation" (Appeal, at 4). It supplies no support for that position, however. Contrary to SCCA's argument, the Part 624 regulations expressly sets forth the "required contents" for petitions for full party and amicus status (see 6 NYCRR 624.5[b]). SCCA's arguments were insufficiently detailed to satisfy the regulatory standards. Furthermore, SCCA in its appeal, does not, other than repeating general criticisms of the project, specify how its prior submissions satisfied the threshold regulatory criteria or identify where the ALJ failed to properly apply the regulatory standards in considering SCCA's petition.

SCCA further contends that the voice of the community it represents is somehow being "[shut] out" of this process (see Appeal, at 4). I disagree. SCCA and other members of the community had a full opportunity to present their views at the legislative hearing on this application that was held on January 13, 2009, and did so (see generally Legislative Hearing Transcript, January 13, 2009). SCCA participated in the issues conference where it had the opportunity to present its position

on the CMW application (see generally Issues Conference Transcript, January 27, 2009). Based upon my review of the Rulings, it is clear that the ALJ fully considered and addressed the matters that SCCA raised.

2. New York State Assembly Member N. Nick Perry and New York City Council Member Charles Barron (Full Party Status)

With respect to New York State Assembly Member N. Nick Perry and New York City Council Member Charles Barron, appellants argue that the ALJ erred in ruling that neither raised an adjudicable issue. According to appellants, the ALJ established a standard for adjudication that is higher than that established by 6 NYCRR part 624 or the courts. Appellants argue that both MSSRs. Barron and Perry met their burden of persuasion with respect to such matters as traffic, noise, community character, possible food contamination, and "bad actor" issues (see Appeal, at 5-6).

My review of the record confirms that the ALJ properly applied the substantive and significant standard (see, e.g., Rulings, at 10-11). The regulatory requirement of a substantive and significant issue ensures that the proceeding will not become a setting for academic or other generalized debate, but will address those issues relating to an applicant's ability to meet the applicable statutory or regulatory criteria, or that have the potential to lead to the denial of a permit, a major modification or the imposition of significant permit conditions.

The ALJ's evaluation of the issues raised both by MSSRs. Perry and Barron was comprehensive and based on judicial and Department precedent (see Rulings, at 9-33 [addressing noxious land issues, zoning, community character, property values, truck traffic, food contamination, unacceptable risk, environmental racism, scope of environmental review, noise and nuisance level, training, refrigeration, emergency action plan and biohazards]).

In their appeal, appellants note a concern about "increase[d] traffic to an already high traffic area, increase[d] noise in a predominately residential area," and a change to the character of the neighborhood as a result of the project (Appeal, at 6). This articulation of issues in such a generalized or conclusory manner is, however, insufficient to raise an adjudicable issue.

In their appeal, appellants noted that they had identified two parties for an adjudicatory hearing "to assist them with their knowledge of how this proposed project may impact [the] community" (see Appeal, at 5). This alone is insufficient to

meet the regulatory requirements for an offer of proof. As set forth in the regulations, as part of a petition, an offer of proof must, in addition to specifying any witness, indicate the nature of the evidence the witness expects to present and the grounds upon which the assertion is made with respect to the issue proposed for adjudication (see 6 NYCRR 624.5[b][2][ii]). This was not done here.

Appellants also argue that applicant "lied on its EIS in responding to the zoning issues" and are "bad actors" that cannot be expected to comply with the terms of their permit (Appeal, at 6). The record before me does not raise a triable issue concerning these allegations.

Accordingly, I affirm the ALJ's determination that no adjudicable issues were raised in this proceeding.

Issuance of a Negative Declaration for the Project

Appellants maintain that applicant CMW inaccurately stated that the project complied with the applicable local zoning requirements and that Department staff failed to independently confirm appellant's representations regarding zoning. Appellants contend that Department staff issued the negative declaration for the project based on the inaccurate information that applicant provided.

Appellants further contend that Department staff was irrational in issuing a negative declaration and that the application should be remanded to Department staff for further review.

Part 624 sets forth the criteria by which determinations made pursuant to SEQRA can be considered in an adjudicatory proceeding. Where the Department is the lead agency, as is the case here, the ALJ may review a staff's negative declaration under SEQRA to consider whether an environmental impact statement should be prepared. Where the ALJ finds that staff's determination was irrational or otherwise affected by an error of law, the determination is to be remanded to staff with instructions for a redetermination (see 6 NYCRR 624.4[c][6][i][a]). Otherwise, the ALJ is not to disturb staff's determination (see id.).

The ALJ considered the arguments that were raised on behalf of requiring the preparation of an environmental impact statement in the context of the applicable legal requirements and the information presented (see, e.g., Rulings, at 11-12, 18-20, & 27-28). The ALJ concluded that she had "no basis to

determine that [Department] staff acted irrationally or contrary to law in its determination of non-significance" (see Rulings, at 28), and I concur with the ALJ's evaluation.

Appellants also take issue with applicant's alleged failure to consider local zoning issues in the proceeding. Contrary to appellants' contention, local zoning requirements were discussed at length during the course of the issues conference and fully reviewed by the ALJ (see Rulings, at 12-14).³

On March 18, 2009, following the close of the issues conference record, Department staff e-mailed to the ALJ a March 4, 2009 letter from Derek Lee, R.A., Brooklyn Borough Commissioner of Buildings (see Rulings, at 13 n7). Mr. Lee's letter, which was addressed to Assembly Member Perry, stated that, under the applicable zoning law, waste transfer stations are not permitted in a C8-1 district. CMW disputes this position, and contends that no error or mischaracterization exists in the SEQRA environmental assessment form that it provided to Department staff with respect to the project's compliance with local zoning (see, e.g., CMW Reply, at 3-5).

As the ALJ correctly notes, the Department lacks the authority under the Environmental Conservation Law to adjudicate legal issues concerning compliance with local zoning (see Rulings, at 13-14). Issues concerning the consistency of a project with local zoning must be decided by the local agency with appropriate jurisdiction, subject to judicial review if necessary. Mr. Lee's interpretation of the local zoning law, which conflicts with applicant's determination, is not a matter that the Department would decide (see Matter of 4-C's Development Corp., Interim Decision of the Commissioner, May 1, 1996, at 3 [applicant's ability to obtain zoning permits or approvals is not a matter for the Department to adjudicate or resolve]).

ECL 27-1513(5)

Subsequent to the issuance of the Rulings on March 24, 2009, legislation was enacted that amends section 27-1513(5) of the Environmental Conservation Law. The amendment, which became effective on April 7, 2009, requires that, as a condition of approval for a permit for a regulated medical waste treatment, storage and disposal facility, the operator of the facility must

³ Local zoning was referenced in the SEQRA documents (see, e.g., negative declaration dated August 11, [2008], at 2 [noting project location in a Commercial (C8-1) zone] and the environmental assessment form [Section C "Zoning and Planning Information"]).

provide a certification that such activities conform with existing local zoning laws or ordinances" (see Laws of 2009, ch 14, § 1).

On appeal, appellants argue that the certification must be submitted "in order to complete [an] application," and that this legislative enactment renders the application incomplete and, accordingly, it should be remanded to the Department for further review (Appeal, at 13). In this specific instance, the amendment did not become effective until after the Department determined the application complete. I do not read the amendment to retroactively negate Department staff's completeness determination, but, in these specific circumstances I read it to require applicant to submit a certification as a condition precedent to the final issuance of any permit for the project. I do not need to reach the question, with respect to applications that are filed subsequent to April 7, 2009, whether an applicant must submit a certification to Department staff prior to a determination of completeness.

Although I recognize the concerns that appellants have raised in this proceeding, the Rulings have fully addressed these matters in conformance with the standards set forth in 6 NYCRR part 624. Based upon my review of the record, including but not limited to the appeal and replies, no adjudicatory hearing is warranted. Furthermore, appellants have not established any legal basis that would lead me to rescind the negative declaration that Department staff issued for this project.

As noted, the ALJ issued several directives in the Rulings to modify or impose new permit conditions for the proposed facility. These included: a limit on truck trips; a prohibition on truck idling; and the curtailment of facility operation hours to 7:00 a.m. to 7:00 p.m. (see Rulings, at 20-21, 33). In addition, the ALJ recommended that applicant develop a public complaint hot-line and/or designate an ombudsman to provide an avenue for the community to address any perceived problems with operation (see Rulings, at 33). In its reply, applicant stated that it does not object to the proposed conditions that the ALJ set forth (CMW Reply, at 1). Accordingly, Department staff is directed to incorporate the ALJ's proposed conditions into the permit. Applicant is also directed to advise Department staff, Assembly Member Perry, City Council Member Barron and SCCA whether it will be establishing a hot-line or designating an ombudsman to receive any complaints from the community.

CONCLUSION

This matter is hereby remanded to Department staff to issue a RMW transfer station permit to CMW, as modified by the ALJ's Rulings. In addition, as a condition precedent to the issuance of the permit, applicant must submit to Department staff the certification required by ECL 27-1513(5). Applicant shall also provide, at the same time, copies of the certification to Assembly Member N. Nick Perry, City Council Member Charles Barron, and SCCA.

New York State Department of
Environmental Conservation

/s/

By: _____

Louis A. Alexander
Assistant Commissioner

Dated: February 2, 2010
Albany, New York