OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 19 of the Environmental Conservation Law ("ECL") and Part 211 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

- by -

COBLESKILL STONE PRODUCTS, INC.,

Respondent.

RULINGS OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTIONS

DEC Case No. R4-2010-0909-93

January 31, 2013

Appearances of Counsel:

-- Steven C. Russo, Deputy Commissioner and General Counsel (Richard Ostrov and Jill T. Phillips of counsel), for staff of the Department of Environmental Conservation

-- Stack Law Office (Rosemary Stack of counsel) and John Holmes, in-house counsel, for respondent Cobleskill Stone Products, Inc.

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation (Department) alleges that a blast conducted on August 31, 2010, at a quarry owned and operated by respondent Cobleskill Stone Products, Inc., violated the prohibition against air pollution contained in former section 211.2 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR). This ruling addresses respondent's motions for bifurcation of the pending enforcement proceeding, and for leave to take depositions. For the reasons that follow, respondent's motions are denied.

PROCEEDINGS

Department staff commenced this administrative enforcement proceeding by service of a notice of hearing and complaint dated November 9, 2010. In the complaint, staff alleged that respondent Cobleskill Stone Products, Inc., owns and operates a limestone mine known as Schoharie Quarry in the

Town of Schoharie, Schoharie County. Staff further alleged that on August 31, 2010, respondent's contractor performed a blast at the mine; that the blast created a dust cloud; that a dust cloud qualifies as an "air contaminant" as defined at 6 NYCRR 200.1(d); and that the dust cloud travelled beyond the mine property boundaries. Staff also alleged that the Department received several complaints from local individuals, and that photographs taken by the individuals showed the dust cloud beyond the mine property boundaries. Staff asserted that the individuals complained that the dust unreasonably interfered with their comfortable enjoyment of life. Accordingly, staff charged respondent with violating 6 NYCRR former 211.2[1] by creating a dust cloud from the blast at the mine that travelled beyond the mine property boundaries, thereby causing emissions of air contaminants to the outdoor atmosphere of such quantity, characteristic or duration so as to unreasonably interfere with the comfortable enjoyment of life of the individuals.

Respondent filed an answer and affirmative defenses dated December 23, 2010.

In a ruling dated January 18, 2012, I (1) granted Department staff's motion to strike six of respondent's affirmative defenses; (2) denied respondent's cross motion to dismiss the complaint; (3) denied without prejudice to renew respondent's motion, insofar as it sought an order excluding any and all evidence, references to evidence, testimony, or argument to any event relating the operations of its Schoharie quarry other than the blast conducted on August 31, 2010; and (4) denied respondent's motion, insofar as it sought a protective order (see Matter of Cobleskill Stone Prods., Inc., Rulings of the Chief Administrative Law Judge on Motions, Jan. 18, 2012, at 16).

Respondent has now filed two motions. In the first, respondent moves pursuant to 6 NYCRR 622.10(e)(2) and CPLR 603 to bifurcate the proceeding and proceed solely on the issue whether the August 31, 2010, blast caused off-site impacts of such quantity, characteristic or duration so as to have caused a substantial interference with the comfortable enjoyment of life or property. In the second motion, respondent moves pursuant to 6 NYCRR 622.7(b)(2) for leave to depose the three lay witnesses the Department proposes to produce at the hearing.

[1] Effective January 1, 2011, 6 NYCRR former 211.2 was renumbered 211.1. This ruling refers to the former numbering throughout.

Department staff opposes both motions in separate letters. In the letter opposing the motion to bifurcate, staff requests that respondent be directed to produce the documents directed to be produced by the January 2012 ruling. Respondent filed an unauthorized reply on its motion to bifurcate, which I have nonetheless considered.

DISCUSSION

A. Motion To Bifurcate

On its motion to bifurcate the proceeding and proceed solely on the issue whether the August 31, 2010, blast caused a substantial interference with the comfortable enjoyment of life or property, respondent seeks to exclude evidence of blasts other than the one that occurred on August 31, 2010. Although respondent recognizes that the applicable standard is an "unreasonable interference," respondent argues that whether the August 31, 2010, blast was of sufficient magnitude and duration so as to constitute a "substantial" interference with the comfortable enjoyment of life is a "threshold" question. Respondent asserts that if Department staff is unable to carry its burden on this issue, the balancing of the various parties' interests and the reasonableness of respondent's actions would be rendered academic, thereby obviating the need for any proof of prior blasts at the site or respondent's past practices and procedures. Accordingly, respondent argues that because the "threshold" issue could be dispositive of the entire matter, granting its motion to bifurcate will lead to judicial economy and efficiency. Moreover, respondent contends bifurcating the hearing will avoid the introduction of irrelevant and potentially prejudicial material, and thereby avoid confusing the record.

Staff opposes, arguing that no deviations from the normal hearing process should be made in this case. Staff notes that no jury would be involved in this proceeding and, thus, the claim of prejudice is overstated. Staff asserts that the Administrative Law Judge (ALJ) and, by implication the Commissioner, are capable of sorting through the evidence and making appropriate findings of fact and reaching the proper conclusions of law.

Pursuant to 6 NYCRR 622.10(e)(2), the ALJ has the discretion to order a severance of the hearing and hear separately any issue in order to avoid prejudice or to achieve administrative efficiency (see Matter of Hakes 1, Chief ALJ Ruling on Motions for Bifurcation, Stay, and Protective Order, Nov. 5, 2008, at 5-6 [addressing similar provision under 6 NYCRR part 624]; see also CPLR 603). Based upon the papers submitted, I conclude that respondent has failed to establish either the requisite prejudice or efficiency to warrant bifurcation (see 6 NYCRR 622.11[b][3] [party making a motion bears the burden of proof on that motion]).

With respect to efficiency, respondent cites no authority for the proposition that the "significance" of the interference is a "threshold" determination under nuisance law that may be considered in isolation from other relevant factors. The law relating to nuisances, which is incorporated into 6 NYCRR 211.2 (see, e.g., Matter of Original Italian Pizza, LLC, Order of the Commissioner, Nov. 25, 2012, at 3), is a law of degree and usually turns on questions of fact whether the use is reasonable or not under all the circumstances (see McCarty v Natural Carbonic Gas Co., 189 NY 40, 46 [1907]). The nature, extent and frequency of the injury complained of are several among all the factors that are considered and balanced when making a nuisance finding (see, e.g., id. at 46-47; see also Restatement of Law [Second] of Torts § 827). Respondent cites no authority suggesting that these factors may be considered in isolation.

Even assuming without deciding that the significance of the interference may be considered as a threshold factor, respondent is in essence seeking to litigate this matter one element of staff's claim at a time. From a purely procedural perspective, litigating staff's claim piece meal, with potentially multiple appeals to the Commissioner, would not lead to the efficient administration of the hearing. Following the normal course in this case will be the most efficient -- presenting a complete record to the Commissioner at one time for determination. Respondent's papers do not identify any procedural efficiencies that support deviating from the normal course.

With respect to prejudice, respondent's claim is based upon its assertion that evidence of blasts other than the August 2010 one, and respondent's practices and procedures related to

blasting, will somehow confuse the record. As staff notes, however, Departmental enforcement hearings are bench trials and, thus, any concerns about confusing a jury are unwarranted.

Moreover, consideration of prior blasting events, and respondent's practices and procedures related to blasting, is not inherently or unduly prejudicial to respondent. As previously noted in this case, evidence of prior, similar acts is generally inadmissible to prove that a party committed a similar act on a later, unrelated occasion (see Matter of Cobleskill Stone Prods., Ruling, Jan. 18, 2012, at 14 [citing, for example, Coopersmith v Gold, 89 NY2d 957, 958-959 (1997)]). The general rule has exceptions, however, and does not exclude evidence of the collateral act if the act has some relevancy to the issues beyond mere similarity (see Matter of Brandon, 55 NY2d 206, 210-211 [1982]; see also Prince, Richardson on Evidence § 4-517, at 194-196 [Farrell 11th ed]). For example, courts have allowed evidence of the absence of prior accidents and lack of complaints in response to claims that a product was defectively manufactured (see Wilkanowski v White Metal Rolling & Stamping Corp., 10 AD2d 880 [2d Dept 1960]).

As noted in the prior ruling, respondent itself has invited the comparison between the August 2010 blast and prior blasts at the quarry (see Ruling, at 14-15). In defense of staff's nuisance claim, respondent has alleged that the August 2010 blast was no different from prior blasts, about which no complaints were received. Allowing respondent to pursue its defense (and allowing Department staff discovery on the issue) is not prejudicial to respondent or inconsistent with the evidentiary rules governing prior acts. Moreover, as previously ruled, comparison of the circumstances of the August 2010 blast to prior blasts may provide relevant evidence concerning the reasonableness of the August 2010 blast under all the relevant circumstances (see id. at 15).

In sum, respondent has failed to establish either prejudice or efficiency sufficient to warrant a bifurcation of the hearing. Accordingly, respondent's motion to bifurcate should be denied.

B. Motion To Depose the Department's Witnesses

Respondent argues that the deposition of Department staff's three lay witnesses is necessary to allow it to prepare a defense and effectively cross-examine those witnesses. Respondent asserts that discovery has failed to reveal the substance of the witnesses' proposed testimony beyond the allegation that a dust cloud from the August 2010 blast caused an interference with their comfortable enjoyment of life. Respondent also asserts that discovery has failed to reveal the circumstances under which certain photographs of the August 2010 blast were taken. Respondent contends that allowing depositions will expedite the hearing by avoiding the necessity of adjournments after the presentation of the Department's case to allow respondent to analyze the evidence, hire experts, and prepare a response. Moreover, respondent asserts that proceeding without granting it the opportunity to ascertain the substance of the witnesses' testimony violates due process.

Under the Department's enforcement hearing procedures, depositions will only be allowed with the permission of the ALJ upon a finding that they are likely to expedite the proceeding (see 6 NYCRR 622.7[b][2]). As noted by Department staff, respondent fails to identify anything unique about the alleged violation or the nature of the witnesses' testimony that distinguish this case from any other administrative enforcement proceeding. Thus, respondent fails to establish how granting the motion will expedite this proceeding.

With respect to respondent's due process claim, State Administrative Procedure Act § 305 grants to the Department the question of how much, if any, discovery to allow in agency proceeding. The courts have consistently held that due process does not require the full panoply of discovery tools available to civil litigates, including oral depositions (see Matter of Miller v Schwartz, 72 NY2d 869 [1988]; Matter of Singa v Ambach, 91 AD2d 703 [3d Dept 1982]). Thus, denying respondent's motion without a showing of unique circumstances does not deny it due process. Moreover, as noted by respondent, an adjournment during the hearing to allow respondent to respond to unforeseen testimony or evidence may be entertained if needed.

C. Department Staff's Request for Documents

In response to respondent's motion to bifurcate proceedings, Department staff requests that respondent be directed to produce the documents ordered to be produced by the January 2012 ruling in this matter. Inasmuch as respondents do not oppose staff's request, it should be granted.

Finally, Department staff indicates that it is ready to proceed to hearing as soon as possible.

RULING

Respondent's motion to bifurcate the hearing is denied. Respondent's motion for leave to take depositions is denied.

Department staff's request that respondent produce the documents directed to be produced by the January 18, 2012, ruling is granted. Respondent is hereby directed to produce the documents within 30 days after the date of this ruling.

Department staff is hereby directed to file a statement of readiness for adjudicatory hearing within 30 days after receipt of the above referenced documents.

/s/

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James T. McClymonds
Chief Administrative Law Judge

Dated: January 31, 2013
Albany, New York