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

In the Matter

- of -

an Application To Construct and Operate a Solid Waste Management Facility pursuant to Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 360 in the Town of Clay, Onondaga County,

- by -

EVERGREEN RECYCLING, LLC,

Applicant.

DEC Case No. 7-3124-00356/1

INTERIM DECISION OF THE DEPUTY COMMISSIONER

July 28, 2005

INTERIM DECISION OF THE DEPUTY COMMISSIONER[1]

In this permit hearing proceeding conducted pursuant to part 624 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), intervenors Town of Clay, Madison County, and Onondaga appeal, by leave of the Commissioner, from two rulings of Administrative Law Judge ("ALJ") Daniel P. O'Connell: (1) a November 18, 2003 ruling adjourning the proceeding until the merits of applicant Evergreen Recycling, LLC's notice of claim against various municipal and county intervenors were resolved, and (2) a December 4, 2003 ruling (denominated a clarification) resuming proceedings as a result of applicant's withdrawal without prejudice of its notice of claim. For the reasons that follow, I reverse the ALJ's December 4, 2003 ruling, affirm the November 18, 2003 ruling, and adjourn the proceeding until applicant's notice of claim is resolved on the merits.

Facts and Procedural Background

Applicant submitted an application to the New York State Department of Environmental Conservation ("Department" or "DEC") for a 6 NYCRR part 360 ("Part 360") permit to construct and operate a solid waste transfer station. As originally

[1] Acting Commissioner Denise M. Sheehan delegated decision making authority in this proceeding to Deputy Commissioner Lynette M. Stark by memorandum dated March 29, 2005.

proposed, the transfer station would accept construction and demolition debris from building and demolition contractors, municipalities, and local haulers, and commercial municipal solid waste from private haulers and businesses. The proposed facility would use an existing building located in the Town of Clay, Onondaga County, New York.

Department staff determined that the application was complete as of August 15, 2002. By submission dated May 28, 2003, applicant also applied for an air facility registration. Staff determined, however, that based upon applicant's analysis of hazardous air pollutant emissions from alternative fuel processing, applicant did not qualify for registration. Rather, applicant was required to apply for a State facility permit to address its air emissions.

On January 9, 2003, a legislative public hearing was held pursuant to 6 NYCRR part 621 ("Part 621"), and written comments were received until January 17, 2003. After reviewing the public comments, in a letter dated May 5, 2003, Department staff requested, pursuant to 6 NYCRR 621.15(b), additional technical information from applicant. In a letter dated May 28, 2003, applicant provided some information, but otherwise indicated that no further information would be provided, and demanded that the Department make a final determination on the permit application within ten working days.

In a letter dated July 16, 2003, the Department's Region 7 staff notified applicant that the permit application was denied based upon applicant's failure to respond to staff's request for information and its failure to meet the specific requirements of 6 NYCRR parts 201, 212, and 360. Staff indicated that, although some information requested was provided, most of the information requested was not (see Letter from DEC Regional Director Kenneth Lynch [7-16-04]). By letter dated July 16, 2003, applicant requested an adjudicatory hearing with respect to the permit application denial, and the matter was subsequently referred to the Department's Office of Hearings and Mediation Services on July 21, 2003.

ALJ O'Connell scheduled an issues conference for September 8, 2003. Timely petitions for full party status were filed by Madison County, Informed Clay Residents Against the Transfer Station ("I C RATS"), Town of Camillus, Onondaga County, Town of Clay, and the Oneida-Herkimer Solid Waste Management Authority ("Oneida-Herkimer SWMA"). In addition, a timely petition for amicus status was filed by the Onondaga County Resource Recovery Agency ("OCRRA") (collectively "intervenors").

Applicant's July 16, 2003 Notice of Claim

Through its petition for amicus status, OCRRA informed the ALJ that on July 16, 2003, applicant and Industrial Media Corporation served a notice of claim pursuant to General

Municipal Law § 50-e as against all the municipalities and public corporations that participated in the January 9, 2003 legislative hearing in these proceedings. Those parties included OCCRA, Onondaga County, Oneida-Herkimer SWMA, Oswego County, Town of Clay, Town of Camillus, Town of Cicero, City of Auburn, Madison County, and the Department (collectively "named parties").

In its notice of claim, applicant stated that:

> "The nature of the claim includes, but is not necessarily limited to: tortious interference with business relations, abuse of process, prima facie tort, common law indemnity, breach of contract, restitution and strict liability. Claimants also assert anti[t]rust and constitutional violations. The claims arise out of the individual and combined improper efforts of [the named parties] to prevent claimants from obtaining a permit from the [Department] to construct and operate a solid waste management facility at 7707 Henry Clay Blvd., Town of Clay.
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> . . . "The time when the claim first arose and the first injuries sustained was on July 16, 2003, when the New York State Department of Environmental Conservation denied Evergreen Recycling, LLC's application for a permit to operate a solid waste management facility at 7707 Henry Clay Blvd., Town of Clay"

(Notice of Claim [7-16-03]).

In a supplemental claim dated July 31, 2003, submitted in response to Oswego County's demand for a supplemental notice of claim, applicant indicated that the named parties were "jointly and severally liable" for over $6 million in damages for lease payments, lost revenues, engineering fees, and additional

legal fees.

Issues Conference and November 18, 2003 Ruling

After some preliminary matters were addressed, the majority of the September 8, 2003 issues conference was devoted to a discussion of applicant's notice of claim and the effect the claim had upon participation at the hearing. Participants at the issues conference included Department staff, applicant and all the parties that filed petitions for either full or amicus party status. The intervenors argued that the filing of the notice of claim had had an improper chilling effect on public participation at the hearing and undermined the integrity of the hearing process. Among other things, intervenors contended that the notice of claim exposed the parties to thousands of dollars in attorney's fees and the involvement of insurance companies to defend against the claims. Intervenors were concerned that further participation in the proceedings would expose them to additional costs and claims. It was also noted that several municipalities that participated in the Part 621 legislative hearing -- Oswego County, the Town of Cicero, and the City of Auburn -- did not file petitions for party status. Counsel for Madison County indicated that she was told by Oswego County's counsel that Oswego would not participate in the DEC proceedings because of the notice of claim (see Issues Conference Transcript, at 82-83). Oswego County allegedly stated that it was served in

a similar situation by applicant's counsel, and did not need another law suit. OCCRA indicated that it chose to file for amicus, as opposed to full, party status because of the notice of claim.

The ALJ adjourned the issues conference at the conclusion of the discussion and provided the participants with an opportunity to file briefs and replies. On November 18, 2003, the ALJ issued a ruling and notice of adjournment ("November 2003 Ruling"). In that ruling, the ALJ held that, despite applicant's arguments to the contrary, the notice of claim had adversely impacted public participation in the hearing process (see November 2003 Ruling, at 13). After examining all the options presented by the parties, the ALJ concluded that the best course of action was to adjourn the administrative proceeding until applicant's claims were resolved on the merits "by a court of competent jurisdiction" (see id.). The ALJ also noted that if applicant chose to withdraw the July 16, 2003 notice of claim, or any subsequently filed complaint, before the court examined the matter, the ALJ would resume the issues conference (see id. at 14).

December 4, 2003 Clarification Ruling

By letter dated November 26, 2003, applicant served an executed notice of withdrawal of notice of claim upon the named parties. At a December 2, 2003 conference call with the parties,

intervenors expressed concern whether the withdrawal was effective and sought clarification of that portion of the ALJ's November 2003 ruling that allowed for withdrawal. Intervenors argued that to be effective, the withdrawal of the notice of claim had to be "with prejudice" in order for the issues conference to continue.

On December 4, 2003, the ALJ issued a second ruling, denominated a "clarification" ("December 2003 Ruling"). In the December 2003 ruling, the ALJ indicated that he had not intended to condition the withdrawal of notice of claim in the manner urged by intervenors.

On January 22, 2004, the parties were informed that the Commissioner granted motions for leave to appeal filed by Town of Clay, Madison County, and Onondaga County. A joint appeal brief was filed by the Town of Clay and Madison County. Onondaga County filed a separate appeal brief. Reply briefs were filed by applicant and Department staff. An amicus brief was filed by OCCRA supporting appellants.

Positions of the Parties

Town of Clay/Madison County Appeal

The Town of Clay and Madison County ("joint appellants") support the ALJ's conclusion that the notice of claim adversely impacted public participation in these proceedings and that the claim should be resolved on the merits

by a court of competent jurisdiction before administrative proceedings resume. Joint appellants, however, challenge the ALJ's determination to resume proceedings based upon a withdrawal of the notice of claim that was not "with prejudice."

Joint appellants argue that a withdrawal without prejudice can be re-filed at any time, and note that applicant has taken the position that such a withdrawal is not a determination "on the merits." Joint appellants assert that allowing resumption of proceedings without a withdrawal "with prejudice" is inconsistent with the requirement that applicant's claim be resolved on the merits before proceedings resume.

Joint appellants assert that ECL article 70 and 6 NYCRR part 624 evince a Departmental policy to ensure fair public hearings. Joint appellants contend that the ALJ's December 2003 ruling undermines that policy because it imposes no penalty for "unscrupulous applicants who would seek to chill the public process by the filing of illegitimate" notices of claim.

Joint appellants contend that it is applicant who has created the dilemma before the Commissioner. Joint appellants argue that applicant, in its notice of claim, has alleged that the Department, together with the participating municipalities, counties, and other governmental entities, improperly conspired to deny applicant a permit. Yet, it is applicant, joint appellants contend, that seeks to have Departmental

administrative review proceed.

Joint appellants contend that the only effective remedy for the harm to the process caused by applicant is to require a resolution of applicant's claims "on the merits," either by a full release of liability or litigation of the claim to its completion in a judicial forum. In the alternative, joint appellants seek summary dismissal of applicant's Part 624 proceedings.

Onondaga County Appeal

Onondaga County also does not contest the ALJ's conclusion that the notice of claim adversely impacted public participation in these proceedings, or the ALJ's conclusion that a remedy is required to cure the adverse impact. Onondaga County, however, challenges as ineffective the remedy imposed in the ALJ's December 2003 ruling.

Citing section 70-0103(4) of the Environmental Conservation Law ("ECL") and 6 NYCRR 621.7(c), Onondaga County asserts that public participation is the "sine qua non" of the Department's permit process. Onondaga County contends, however, that applicant's notice of claim has driven potential parties from the process due to insurance coverage concerns. Onondaga County contends that parties driven from the process include Oswego County, which filed no petition for party status, and OCCRA, which only sought amicus status. Onondaga County contends

that the full extent of the chilling effect cannot be determined.

Onondaga County argues that the ALJ's December 2003 ruling essentially rewards intimidation tactics and deters public participation. Onondaga County contends that the only fair and effective remedy is to dismiss applicant's Part 624 proceeding (citing Matter of Bath Petroleum Storage Facility, Interim Decision of the Deputy Commissioner, Nov. 6, 2000, affirmed on judicial review by Matter of Bath Petroleum Storage, Inc., 298 AD2d 883 [2002], lv denied 99 NY2d 507 [2003]). Onondaga County urges that the primary function of the hearing -- public participation in a fair process -- cannot be met in these proceedings, thereby warranting dismissal.

In the alternative, Onondaga County urges that proceedings should be adjourned until applicant's claims have been finally resolved on the merits.

Applicant's Reply

In reply, applicant challenges the ALJ's determination that its notice of claim had an improper "chilling effect" on the proceedings. Applicant argues that the remedies sought by appellants are "grossly disproportionate" to the alleged harm. First, applicant denies that the timing of the notice of claim with the filing of the request for a Part 624 hearing is proof of an impermissible effort to chill public participation. Rather, applicant contends that such timing was required by the short

time frames associated with both notices of claim and permit hearing requests.

Second, applicant argues that the evidence does not support the conclusion that intervenors were chilled in their participation by the notice of claim. Applicant offers various explanations for why those who filed petitions for party status and those who did not took the actions they did.[2]

Third, applicant contends that citizen participation, not governmental participation, is what is protected by the ECL and other statutory provisions sanctioning SLAPP ("strategic lawsuits against public participation") suits.

Applicant continues that, even assuming its filing of a notice of claim improperly chilled public participation in the administrative process, its actions were reasonable and necessary to protect its constitutional right of meaningful access to the courts and administrative agencies, and it should not be sanctioned for attempting to exercise its constitutional rights. Applicant claims that no legal basis exists for adjourning the

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[2] While addressing Oswego County's failure to participate, applicant refers to an ex parte communication from Oswego County to the ALJ. To the extent that this reference suggests that the communication was improper, such a charge is not supported by the record. Upon receipt of the subject communication from Oswego County, the ALJ forwarded a copy of the letter to the entire service list for these proceedings, including applicant, with instruction that further communications must be copied to all parties. Thus, to the extent an ex parte communication occurred, it was remedied by the ALJ.

hearing process until its claims are resolved on the merits, or otherwise requiring applicant to provide general releases to the named parties.

Distinguishing Matter of Bath Petroleum, applicant also contends that permit denial cannot be summarily determined without a hearing. Citing Matter of Blasdell Develop. Group, Inc. (ALJ Rulings on Issues and Party Status, Aug. 17, 1995), applicant contends that it is entitled to a hearing to identify precisely the information it must provide to complete the application review process before any permit can issue.

Department Staff's Response

Department staff's submission on the appeal, supports the position of appellants Town of Clay, Madison County, and Onondaga County. Staff argues that because no provision in law exists for withdrawal of a notice of claim once it has been filed, applicant's withdrawal, whether with or without prejudice, is meaningless. Staff contends that the only remedy available is for the Commissioner to uphold denial of the permit, either on the basis of the notice of claim's impact on public participation, or on the merits, based upon the pre-filed testimony already submitted in these proceedings.

OCCRA Amicus Brief

In its amicus brief, OCRRA also supports the position of appellants. In particular, OCRRA focuses on the "abuse of

process" claim alleged in the notice of claim, and points out that the Department is included in that claim. OCRRA contends that the abuse of process claim must be judicially resolved before the administrative process may continue. OCRRA argues that it makes no sense to continue a process that applicant alleges is tainted until the judiciary has investigated and resolved the claim.

Discussion

Public participation in the administrative review of permit applications is a central feature of New York's environmental policy. In adopting ECL article 70 -- the uniform review procedures for major regulatory programs of the Department -- the Legislature expressly indicated its intent "to encourage public participation in government review and decision-making processes and to promote public understanding of all government activities" (ECL 70-0103[4]; see also ECL 1-0101[2] [Legislature's declaration of policy]). In addition, the Legislature expressed its intent that the administrative review of regulatory permits be "fair, expeditious and thorough" (ECL 70-0103[1]).

Consistent with the policy of public involvement in the review process, ECL 70-0119 expressly recognizes the role of members of the public and "other state agencies or units of government" in permit hearing proceedings (see ECL 70-0119[1]).

Indeed, the failure to afford the public and all interested parties their appropriate role in the permit review process in general, and the adjudicatory hearing proceedings in particular, has served as a basis for annulment of a Departmental action on judicial review (see, e.g., Matter of City of Long Beach v Flacke, 77 AD2d 638 [2d Dept], app dismissed 51 NY2d 878 [1980]).

Having expressly authorized adjudicatory proceedings as an element of permit application review (see Matter of Mount St. Mary's Hospital v Catherwood, 26 NY2d 493, 505 [1970]), and having expressly provided for participation by affected governmental entities and the public in that process, the Legislature vested the Department with both the responsibility and authority to protect the integrity of the public hearing process and to take measures necessary to correct threats to that integrity (see Matter of Nicholas v Kahn, 47 NY2d 24, 31 [1979] [State agency has those powers expressly and impliedly delegated by the Legislature]). Consequently, actions by parties that threaten the fundamental fairness of the hearing process, or have an undue adverse impact upon, or constitute an abuse of, public participation in that process must be examined closely, and the appropriate remedy imposed in the event that abuses or improper impacts are identified.

Intervenors allege that applicant's notice of claim is frivolous and filed for the sole purpose of chilling public

participation in these proceedings. Review of the record strongly supports intervenors' contentions. First, applicant's claim does not appear to be ripe for judicial review. Given the availability of these Part 624 permit hearing proceedings to administratively challenge Department staff's determination to deny the permit application, applicant's contention that it was required to file its notice of claim at a time prior to a final agency determination appears overstated.

Second, the factual allegations of the claim lack specificity, raising justifiable doubt about their validity. Instead, the notice of claim contains a "kitchen sink" litany of vague tort and constitutional claims that lacks any discernable factual allegations that would support such claims. Moreover, given the basis for staff's denial of the permit (i.e. applicant's failure to provide requested technical information), the allegation of an illegal conspiracy effecting permit denial appears specious. Not only is staff's denial on the asserted ground not inherently illegal, it is authorized by statute and regulation (see ECL 70-0117[2]; 6 NYCRR 621.15[b]). Nothing in the record supports the assertion that staff based its denial on grounds other than those it expressly asserted.

Additionally, the timing of applicant's notice of claim is suspicious, as is the circumstance that only those entities participating in the legislative hearing on applicant's proposed

solid waste transfer facility were named. Furthermore, even assuming the doctrine of exhaustion of administrative remedies did not apply, and applicant was required to commence its challenge to Department staff's July 16, 2003 permit denial within ninety days of that denial, as applicant contends, applicant has apparently done nothing to pursue its claims. Applicant's failure to pursue its notice of claim raises doubts about its seriousness.

The record also contains ample evidence that participation in the hearing process has been chilled as a result of the attorney's fees and insurance costs incurred by intervenors in defense of applicant's notice of claim. To be sure, intervenors in Part 624 permit hearing proceedings often face litigation costs that are an unavoidable part of the process. Indeed, if applicant's claims were valid and the timing of their notice of claim appropriate, the costs associated with defending against the claims would not place an "improper" burden upon intervenors. However, litigation costs associated with the defense of frivolous claims impose upon the participants in Departmental proceedings an extraordinary undue burden not ordinarily associated with the process.

On the other hand, assuming applicant's claims are valid, those claims also challenge the integrity of the permit application review process. Applicant's notice of claim alleges

a fundamental illegality involving intervenors and Department staff in the denial of applicant's permit application. Thus, the Department is faced with a dilemma. Whether intervenors are correct, or applicant is correct, either way, the fundamental integrity of this Part 624 permit hearing proceeding has been brought into serious question.

Accordingly, I agree with the ALJ that these proceedings must be adjourned pending resolution on the merits of the claims alleged in applicant's July 16, 2003 notice of claim (see November 2003 Ruling, at 14). Applicant has opted to invoke a judicial forum, rather than this Part 624 proceeding, to address its claim of illegal conspiracy. Accordingly, these Part 624 proceedings should not proceed until applicant's claims are resolved, so that whatever illegality occurred, if any, can be identified and remedied. In addition, court proceedings will also provide an appropriate forum for resolving whether applicant's claims are indeed frivolous, and the court may provide the appropriate remedy in such eventuality. Once applicant's claims are judicially resolved on the merits, and any and all appeals addressed, this Part 624 proceeding may resume.

I disagree with the ALJ's conclusion, however, that applicant's withdrawal of its notice of claim "without prejudice" provides a sufficient alternative to judicial resolution of applicant's claims on the merits (see December 2003 Ruling, at

1). Applicant's unwillingness to withdraw its notice of claim "with prejudice" suggests that it has not released its claim with the finality a judicial determination on the merits would carry. Thus, until applicant's claim is resolved on the merits by a court of competent jurisdiction, is withdrawn "with prejudice" by applicant, or otherwise settled among the parties, this Part 624 proceeding should be adjourned.

Applicant's contention that its right to meaningful access to the courts is infringed by an adjournment of this administrative proceeding is not persuasive. To the contrary, applicant should exhaust the judicial proceedings it deems are available to it to resolve the claims it has alleged and to address any improper taint or illegality in the Department's permit review process that it alleges has occurred.

Accordingly, the ALJ's December 2003 Ruling is hereby reversed, the November 2003 Ruling affirmed, and the matter is adjourned until applicant's July 16, 2003 notice of claim is resolved consistent with this Interim Decision.

For the New York State Department
of Environmental Conservation

_____/s/_____
By: Lynette M. Stark, Deputy
Commissioner for Natural Resources
and Water Quality

Dated: Albany, New York
July 28, 2005