STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Environmental Conservation Law Article 27 and Part 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York by JAMAICA RECYCLING, INC., MICHAEL BELLINO, and STEPHEN BELLINO, individually and as officers of Jamaica Recycling, Inc., Respondents	RULING DEC File Nos. R2-0136-97-08 R2-0204-97-10 R2-0287-97-12 R2-1999-1105-162 and R2-20030709-171 March 8, 2004

On September 24, 2003, James P. Rigano, Esq., moved on behalf of the Respondents that an Administrative Law Judge ("ALJ") be assigned to the above pending enforcement actions and that a hearing be scheduled in the matter. For reasons stated in a ruling dated October 9, 2003, I denied the motion that a hearing be scheduled, without prejudice to future motions about the schedule based upon subsequent events relevant to the hearing.

The Respondents then moved, on January 23, 2004, to have a hearing scheduled expeditiously in this matter. The Respondents asserted that as of November 6, 2003, they had provided all documentation that was requested by the Department of Environmental Conservation Staff ("DEC Staff") and available to the company. The Respondents also asserted that they were refraining from certain activities that they consider to be in compliance with Jamaica Recycling's permit and 6 NYCRR part 360 but that the DEC Staff alleges are violations of these provisions, and that the cessation of these activities severely impacts the viability of Jamaica Recycling's operation. The Respondents argued that the hearing on these issues will resolve the alleged violations and allow Jamaica to properly operate its transfer station.

DEC Staff replied to the motion on February 2, 2004, arguing that although discovery may have concluded as of November 2003, DEC Staff was not ready to proceed to hearing and therefore had not filed a statement of readiness under 6 NYCRR 622.9(a). DEC Staff stated that there is no requirement to file a statement of readiness when the Respondents are ready for a hearing but the DEC Staff is not. DEC Staff cited the decision in Cortlandt Nursing Home v Axelrod, 66 NY2d 169, 177 [1985] and stated that the Respondents had not shown that there was an unreasonable delay in view of the factors the Court said should be taken into account in determining whether a delay is reasonable within the meaning of State Administrative Procedures Act ("SAPA") section 301(1). DEC Staff's reply did not indicate any reason why Staff was not ready to proceed with the hearing, nor any projected length of time until the statement of readiness is filed.

On February 9, 2004, I spoke by conference phone call with John Nehila, Esq., of DEC Region 2, and James Rigano, Esq., representing the Respondents. I inquired when DEC Staff might be filing a statement of readiness. Mr. Nehila stated he was hesitant to say when this might be done, and did not give a general time frame within which DEC Staff might be ready to proceed with the hearing. He stated that DEC Staff had received more than six boxes of documents from the Respondents. Mr. Nehila stated DEC Staff's argument, that had been discussed in the February 2, 2004 letter, that there was no set deadline for the hearing and that the Respondents had only made vague statements about being prejudiced by the delay that were not sufficient to support their motion. Mr. Rigano argued that prejudice had been shown under the factors in the Cortlandt case and that there was actual prejudice to the Respondents by their not being able to open waste drums.

DISCUSSION AND RULING

Two sections of 6 NYCRR part 622 (Uniform Enforcement Hearing Procedures) are particularly relevant to the present motion. These are 6 NYCRR 622.9, concerning the statement of readiness for adjudicatory hearing, and 6 NYCRR 622.10, concerning the conduct of DEC administrative enforcement hearings.

The latter section authorizes the ALJ to rule upon motions and requests (622.10(b)(1)(i)); set the time and the place of hearing (622.10(b)(1)(ii)); do all acts and take all measures necessary for the maintenance of order and efficient conduct of the hearing (622.10(b)(1)(x)); and exercise any other authority available to ALJs under part 622 or presiding officers under article 3 of SAPA (622.10(b)(1)(xiv)).

Subdivision 622.9(b) of 6 NYCRR specifies the contents of a statement of readiness, which must include: (1) the name, address and telephone number of each of the parties and their attorneys; (2) a statement that discovery is complete or has been waived or an explanation as to why it hasn't been completed; (3) an affirmative assertion that a reasonable attempt has been made to settle, and that the case is ready for adjudication; and (4) a request for the setting of a hearing date. Statements of readiness are filed with the Office of Hearings[1] by the DEC Staff (622.9(a)). When a respondent is entitled by law or regulation to a hearing within a stated period of time, the case will be placed on the hearing calendar upon the filing of a copy of the answer with the Office of Hearings. Section 622.9(c) states that the accuracy and sufficiency of the statement of readiness will not be subject to motion practice or any form of adjudication.

In the present case, DEC Staff states that no statute or regulation specifies any fixed period of time within which the Respondents must have an opportunity for a hearing. The

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[1] The current version of part 622 was adopted prior to the Office of Hearings being re-named as the Office of Hearings and Mediation Services, and the regulation uses the earlier name for this office.

Respondents do not dispute this and do not identify any applicable statutory or regulatory time period. DEC Staff asserts that the Cortlandt decision provides the factors to consider when deciding whether a hearing has been scheduled within a reasonable time as required by SAPA section 301(1). The Cortlandt decision states that "[i]n determining whether a period of delay is reasonable within the meaning of State Administrative Procedure Act §301(1), an administrative body in the first instance, and the judiciary sitting in review, must weigh certain factors, including: (1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by governmental regulation."

The Cortlandt case had to do with whether the New York State Department of Health should be precluded from taking certain action (recouping Medicaid overpayments) due to its delay in taking such action. An analogous situation in the present case would be if the Respondents were moving that I dismiss the complaint due to the timing of events in this hearing. The Respondents are asking for something less significant than that, however, and are instead asking that a hearing be scheduled. This motion could be granted based on less severe circumstances than those that would lead to the case being dismissed.

The documents submitted by the parties contain most of the information that would otherwise be in a statement of readiness (except for the telephone numbers of the Respondents themselves, information that would not likely be used if the Respondents are represented by an attorney). The statement in 622.9(b)(3) that "the case is ready for adjudication," when read in context with the rest of that paragraph, can be interpreted as meaning that settlement discussions are over without a settlement having been reached. Because the Respondents have moved twice that a hearing occur, it is reasonable to conclude that further attempts to settle will not occur or will not be productive. If the contents of a statement of readiness are in the record, there does not appear to be a reason to hold off scheduling the hearing solely because the DEC Staff declines to submit a formal statement of readiness within any foreseeable time.

An ALJ has authority, under 6 NYCRR 622.10(b)(1)(ii) and (x), to schedule the hearing and to take measures necessary for the efficient conduct of the hearing. Hearings are usually scheduled around the existing schedules of the parties with an effort to avoid prejudice to either party. This does not mean, however, that a hearing will be put off indefinitely, particularly where the party that does not want the hearing scheduled has not given an indication of when it might be ready to proceed. DEC Staff also has not given an indication why they might not be ready to proceed other than Mr. Nehila's suggestion that the documents provided last fall by the Respondent were voluminous. In addition, in this case the party looking for an indefinite wait on scheduling the hearing is the party that initiated the proceeding by serving the notice of hearing and complaint. The Respondents' arguments about how they are prejudiced by not knowing the outcome of the case (and not knowing the Commissioner's decision on whether certain activities are allowed by their permit), while not documented in a detailed way, are at least spelled out with some specificity. These arguments must be weighed against the DEC Staff's reasons for not going forward, which have not been specified. The discovery documents mentioned by Mr. Nehila appear to have been provided by the Respondents by the end of September 2003. If DEC

Staff has not been able to review these due to workload, this was not stated in the response to the motion.

Any "delay" in scheduling the hearing should be measured from the end of the discovery process, not from the date of the notice of hearing and complaint, due to the Respondents' delay in providing documents as discussed in the October 9, 2003 ruling. This time period would be either four months (from November 6, 2003 to the present)[2] or five months (from September 30, 2003).[3] DEC Staff has not shown why this time period should be extended indefinitely, but the time period is not so unusually long that the hearing needs to be scheduled in a rush or in a way different from the normal process that takes into account the existing commitments of the parties.

I am requesting that the parties notify me of their existing schedule conflicts in April and May, 2004, taking into account the schedules of both counsel and witnesses. I am requesting this information starting with April since I have an existing schedule conflict with a hearing on March 30 and 31, and possibly April 1, 2004. My schedule is open at present in the rest of April and May, although I am waiting to hearing back from the parties about dates for a case that may occur in April. Please also provide an estimate of how many days the Jamaica Recycling hearing may take, or at least how many days your own direct case may take.

Ruling: A hearing will be scheduled in this case, taking into account the schedules of the parties.

Either party may request leave to file an expedited appeal of this ruling, pursuant to 6 NYCRR 622.6(e) and 622.10(d)(2)(ii) and 622.10(d)(3) - (7).

The hearing file does not currently contain a copy of the Respondents' answers to the two complaints. Mr. Nehila's letter of September 30, 2003 mentions an answer and an amended answer that were filed in 2001, and there may also be an answer to the July 15, 2003 complaint. I am requesting that Mr. Rigano provide me a copy of the answers, and notify me of whether any of them have been withdrawn or superceded.

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[2] November 6, 2003 is the date on which the Respondents notified the DEC Staff that all requested documents available to the company had been provided.

[3] September 30, 2003 is the date on which the last group of documents that are mentioned in the record were provided by the Respondents to the DEC Staff.

Albany, New York
March 8, 2004

Susan J. DuBois
Administrative Law Judge

To: James P. Rigano, Esq.
John Nehila, Esq.