STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Proposed Revocation of DEC Permit No. 3-5512-00054-00004 Based Upon Alleged Violations

- by -

KARTA CORPORATION,

Respondent.

RULING ON MOTION TO INTERVENE

DEC Case No. 3-5512-00054-00009

Appearances of Counsel:

-- Alison H. Crocker, Deputy Commissioner and General Counsel (Steven Goverman, Assistant Regional Attorney, Region 3, of counsel), for staff of the Department of Environmental Conservation.

-- Michele Marianna Bonsignore, for respondent Karta Corporation.

-- Stephan Wislocki, for proposed intervenor Tarrytown R&T Corporation.

By verified petition dated September 25, 2007, movant Tarrytown R&T Corporation ("TRAT") seeks leave to intervene in the above referenced permit revocation proceeding initiated by staff of the Department of Environmental Conservation ("Department") to revoke a solid waste management facility permit held by respondent Karta Corporation ("Karta"). On October 3, 2007, TRAT's application was granted in a bench ruling by the undersigned presiding Administrative Law Judge ("ALJ"). This written ruling documents and amplifies the rationale of the oral ruling.

PROCEEDINGS

Pursuant to section 621.13 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), Department staff initiated this administrative enforcement proceeding by service of a May 29, 2007 notice of intent to revoke Karta's May 3, 2006 permit for a solid waste

management facility located at 1011-1017 Lower South Street, Peekskill, New York (DEC Permit No. 3-5512-00054-00004). Department staff seeks to revoke the permit based upon alleged violations of the conditions of the permit, as well as violations of 6 NYCRR part 360 ("Part 360"), which implements Environmental Conservation Law ("ECL") article 27 (Notice of Intent to Revoke a Permit [5-29-07], Exh 5A).

Pursuant to 6 NYCRR 621.13(d), Karta filed a June 11, 2007 letter giving reasons why the permit should not be revoked, and requesting a hearing (Letter from Paul Casowitz, Esq., to Michael Merriman, Deputy Regional Permit Administrator [6-11-07], Exh D).[1] The matter was referred to the Department's Office of Hearings and Mediation Services for administrative adjudicatory proceedings before the undersigned ALJ.

Because the Department-initiated permit revocation proceeding is based upon alleged violations of a permit, and the ECL's implementing regulations, this proceeding is governed by the Department's Uniform Enforcement Hearing Procedures at 6 NYCRR part 622 ("Part 622") (see 6 NYCRR 622.1[a][6]). Accordingly, Department staff's notice of intent to revoke constitutes the complaint in this matter, and Karta's request for a hearing constitutes the answer (see 6 NYCRR 622.3[b][2]).

The hearing was scheduled to begin on October 2, 2007 (see Notice of Rescheduled Hearing [9-11-07]). On September 25, 2007, TRAT filed a written notice of petition and verified petition to intervene in this proceeding. Written responses by Department staff and Karta, respectively, were filed on October 1, 2007. In its written response, Department staff opposes the petition. Karta supports TRAT's applicaition.

Oral argument was conducted on TRAT's petition on the mornings of October 2 and October 3, 2007. On October 3, 2007, TRAT's petition was granted for the following reasons.

ARGUMENTS OF COUNSEL

TRAT states that in January 2002, Karta filed voluntary petitions for reorganization pursuant to chapter 11 of the United States Bankruptcy Code. A plan of reorganization was approved by the federal bankruptcy court (Hon. Adlai S. Hardin, U.S.

[1] Mr. Casowitz subsequently withdrew as counsel for Karta, and was replaced by Ms. Bonsignore.

Bankruptcy Judge, Southern District of New York) on April 27, 2006. Pursuant to that plan, Karta and TRAT would seek transfer of Karta's operating permit for the facility to TRAT. Assuming the Department approved the transfer, TRAT would become the operator of the facility. Karta would remain the fee owner, collecting rents and making distributions as required under the reorganization plan.

In accordance with the approved bankruptcy reorganization plan, TRAT entered into a management services agreement ("MSAT") and land leases with Karta and its affiliates. The MSAT and leases were incorporated into Karta's approved reorganization plan. Pursuant to these agreements and leases, TRAT pays rent to Karta.

Karta and TRAT subsequently jointly filed a permit modification application, together with a record of compliance ("ROC") for TRAT, with the Department's Region 3, requesting that the permit to operate the facility be transferred from Karta to TRAT. Department staff has suspended processing of the permit modification application pending final resolution of the violations alleged in this proceeding (see Letter from Michael Merriman, Deputy Regional Permit Administrator, to Kenneth J. Cartalemi, Karta Corporation [7-27-07], Exh 6).

TRAT also states that the City of Peekskill holds an option to purchase the subject property, notice of such option to be given by July 1, 2009 (see Amended Sunset Provision, Settlement Agreement between Karta Corp. and the City of Peekskill [1/7/05], Exh A). In the event the City of Peekskill exercises its option to purchase, TRAT is contractually entitled to receive a share of the sale (see MSAT ¶ 10 [3-16-06], Exh C).

As indicated in TRAT's petition and as amplified during oral argument, TRAT seeks to intervene to protect its interests in the facility. Among the interests TRAT seeks to defend is the operating permit for the facility, which TRAT indicates is relevant to the purchase price in the event the City of Peekskill exercises its option, among other things. Also, because Karta has indicated that it seeks to establish in the hearing that TRAT is responsible, at least in part, for some of the violations alleged by staff, TRAT seeks to intervene to protect its record of compliance for any future permit review proceedings with the Department.

Department staff opposes the petition arguing that TRAT's interest in the proceeding is merely pecuniary and not environmental. Staff contends that TRAT's pecuniary interest is

insufficient to establish standing to intervene under Part 622. In addition, staff contends that TRAT's interest is insufficiently adverse to, and will be adequately represented by, Karta.

Karta supports TRAT's application. Karta indicated that if TRAT had not sought intervention, Karta would have sought to join TRAT in any event in defense of the case against Karta. Karta contends that the relative culpability between Karta and TRAT is relevant to the significance of the violations alleged and whether such violations warrant permit revocation by the Commissioner.

DISCUSSION

Part 622 expressly authorizes intervention in enforcement proceedings (see 6 NYCRR 622.10[f]). Section 622.10(f) provides that "[a]t any time after the institution of a proceeding, the commissioner or ALJ, upon receipt of a verified petition in writing and for good cause shown, may permit a person to intervene as a party" (6 NYCRR 622.10[f][1]). Section 622.10(f) further provides that "[i]ntervention will only be granted where it is demonstrated there is a reasonable likelihood that [1] the petitioner's private rights [2] would be substantially adversely affected by the relief requested and [3] that those rights cannot be adequately represented by the parties to the hearing" (6 NYCRR 622.10[f][3]).

Part 622's intervention provision is not intended to undermine the Department's role as the State's environmental prosecutor, a primary enforcement role that is charged to the Department and the Commissioner by statute (see Matter of Town of Riverhead, Commissioner's Ruling, Nov. 20, 2000). Thus, where a petitioner seeks to intervene to prosecute general environmental concerns and, thus, to act as a private Attorney General, or otherwise participate in the hearing to offer evidence in support of liability or the proposed remedy, the petition must be denied so as to avoid impinging upon Department staff's lead role on matters of environmental enforcement (see id.; Matter of Environmental Waste Incineration, Inc., ALJ Ruling, Nov. 1, 1996 [City sought to provide evidence on liability and supported closure of facility]). The public interest sought to be achieved by such petitioners is adequately represented by Department staff, in these circumstances, and those petitioners may pursue their general environmental concerns by assisting Department staff in the prosecution of environmental violations (see Riverhead, supra; see also Matter of Danny Fortune & Co., Inc.,

ALJ Ruling on Motion for Intervention, Nov. 12, 1999; Part 622 Public Comment Responsive Documents [1993]).[2]

On the other hand, where a petitioning party can show that it has a private interest which is not adequately represented by Department staff or the respondent, intervention may be allowed. As former Assistant Commissioner Robert Feller, a drafter of the current intervention provision, pointed out, "Such situations could arise if, for instance, the proposed remediation of a site where violations had allegedly occurred could affect the private property rights of an adjacent landowner" (Feller, DEC's New Hearing Rules, 5 Environmental Law in New York [Matthew Bender & Co., Inc.], April 1994, at 62 [emphasis added]). Thus, although it has been rare, third parties have been granted intervention in Departmental enforcement proceedings, including the owners of the subject residence who sought to protect their private property interests in the remediation of the residence (see Matter of Terminix Intl. Co., L.P., ALJ Ruling on Petition to Intervene, Feb. 9, 1999), and neighbors, who sought to demonstrate nuisance and health

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[2] In response to a comment when the current version of section 622.10(f) was proposed for adoption, the Department stated:

> "The agency is sensitive to the public's concerns and will evaluate each intervention request carefully. Where a person's interest is likely to be affected by the adjudication and will not [be] adequately represented by the parties then intervention is appropriate and will be granted. Staff, however, has the primary legal obligation to prosecute violators of the ECL. Public participation in enforcement matters is available through interaction with DEC Staff. Citizens, municipalities and citizen organizations are generally able to accomplish their objectives by registering complaints with Staff, volunteering to be witnesses and otherwise assisting in Staff's prosecution. This is similar to the way citizen concerns with criminal violations must be presented. The reasons are also similar. DEC's resources are limited, both in fiscal funding for initiating actions and personnel available to prosecute those actions. To efficiently fulfill DEC statutory obligations prosecutors must be free to properly allocate department resources on a case-by-case basis."

impacts on their properties (see Matter of Mosher Marble Mfg., Ltd., ALJ Ruling on Motion for Intervention, Dec. 12, 1998]). Intervention has also been granted to a municipality that raised objections to the remedial relief sought by Department staff on the ground that such relief might violate that municipality's zoning laws and a judicial order enjoining the proposed activity (see Matter of Hanaburgh, ALJ Ruling on Liability and Party Status, Sept. 29, 2006), and to a municipality to defend against liabilities that might be imposed upon it if the subject facility was closed (see Matter of Mohawk Valley Organics, LLC, ALJ Ruling on Petition to Intervene, April 11, 2003).

In this case, TRAT has made a sufficient demonstration of good cause to warrant exercising discretion in favor of granting TRAT's motion to intervene. TRAT does not seek to intervene as a prosecutor of environmental violations. Rather, TRAT seeks to defend its private property interests and investments in the facility and its continuing operation. In this regard, TRAT has raised a sufficiently protectable private interest. TRAT has undertaken significant contractual interests and liabilities associated with the operation of the facility. These interests include, among other things, its right and interest in the event the property is ultimately sold to the City of Peekskill, upon which sale TRAT is contractually entitled to receive a portion of the proceeds. TRAT also has a putative interest as the potential operator of the facility subject, of course, to the Department's approval. This interest has received as least tacit approval by the bankruptcy court as part of the reorganization plan for this facility. In addition, given its stated objective of seeking operator status from the Department, TRAT has a private interest in its record of compliance at the facility, and in defending that record with respect to its alleged involvement and its relative culpability for any violations that may be established.

Second, TRAT has demonstrated a "reasonable likelihood" that its private interests might be "substantially adversely affected" by the relief requested by Department staff (see 6 NYCRR 622.10[f][3]). While Departmental enforcement proceedings are not an appropriate forum to litigate indemnification and contribution claims among parties (see Matter of Universal Waste, Inc., Commissioner's Second Interim Decision, Aug. 16, 1989, at 1; Matter of Huntington and Kildare, Inc., ALJ Ruling, Nov. 15, 2006, at 4), revocation of the permit as requested by Department staff may expose TRAT to liabilities it might have to defend in any subsequent civil court actions.

Moreover, revocation of the permit may have an adverse

impact on the value of the subject property in the event the City of Peekskill exercises its option to purchase the facility. According to the agreement between Karta and the City of Peekskill, the value of the property includes the present value of the income/cash flow analysis of the business of the facility projected over ten years (see Settlement Agreement ¶ 10[c][i], Exh C). Termination of operations at the facility would negatively impact such income and cash flow.

In addition, to the extent Karta establishes that TRAT was responsible for some or all of the violations alleged by Department staff, TRAT's record of compliance might be substantially adversely affected in any future relationship TRAT may have with the Department.

Third, TRAT has demonstrated that its interests cannot be adequately represented by the parties to the proceeding. Clearly, Department staff would not represent TRAT's interests. Department staff contends, however, that because both TRAT and Karta have an interest in opposition to permit revocation, Karta will adequately represent TRAT's interest. However, Karta is in bankruptcy proceedings, and could potentially have less interest in defending the permit than TRAT, which seeks to continue the operation at the facility into the foreseeable future. In addition, to the extent Karta seeks to establish TRAT's responsibility for the alleged violations, TRAT's and Karta's interests are clearly adverse.

Department staff raises several objections to granting TRAT's motion to intervene. First, staff argues that the only private rights recognized under section 622.10(f)(3) are private environmental rights. Staff contends that TRAT's interest is merely pecuniary and that pecuniary private interests are not within the scope of section 622.10(f)(3). Applying the plain meaning of section 622.10(f)(3), however, no basis exists for reading the term "environmental" into the requirement for a "private right." If the Department had intended to so limit the private rights required to be established by a proposed intervenor, it could have supplied the term when section 622.10(f)(3) was drafted. This is exemplified by the Department's Permit Hearing Procedures (6 NYCRR part 624 ["Part 624"]), in which the Department expressly requires proposed intervenors to make a showing of an environmental interest, among other things, to obtain party status in a permit hearing proceeding (see 6 NYCRR 624.5[b][1][ii]). The Department could have, but did not, include such an express term in section 622.10(f).

Moreover, it is certainly true that the Department's jurisdiction over solid waste facilities are due to such facilities' potential environmental impacts. However, it does not necessarily follow that because the Department has jurisdiction over environmental violations, access to administrative adjudicatory proceedings are provided only for those with environmental interests. Rather, administrative adjudicatory enforcement proceedings are provided to protect a person's due process rights (see State Administrative Procedure Act § 102[3]). As noted above, the intent of section 622.10 was to allow parties with private property interests not otherwise represented by parties to the enforcement proceeding to intervene to defend those interests, including third parties with property interests in the subject property (see Terminix, supra).

Second, Department staff asserts that Department-initiated revocation proceedings are intended to be a summary proceeding, and that granting intervention to a third party will result in a "full-blown enforcement hearing" (Transcript [10-2-07], at 89). The summary aspects of Department-initiated revocation proceedings, however, are those provisions of section 621.13 that streamline the pleading process, the referral to OHMS for hearing, and the time for decision (see 6 NYCRR 621.13[c], [d], [g]). Otherwise, all other provisions of Part 622 apply. In contrast, for summary abatement or summary suspension proceedings, Part 622 expressly limits the applicable procedural provisions (see 6 NYCRR 622.14[b]). If intervention was intended to have been eliminated from Department-initiated revocation proceedings, Part 622 could have so expressly provided.[3]

Third, Department staff contends that the relative culpability of Karta and TRAT is not relevant to the present proceedings and, thus, should not provide a basis for intervention. Citing the Department's Civil Penalty Policy (Commissioner Policy DEE-1 [1990]), Department staff notes that relative culpability might be considered in mitigation of any monetary penalty imposed. However, in this proceeding, staff does not seek a penalty, but rather permit revocation. Staff argues that because the permit was issued to Karta, Karta is strictly liable for any violations at the facility, whether violations were caused by Karta or TRAT, as its agent. Accordingly, staff contends that if violations occurred at the

[3] Even in summary abatement or summary suspension proceedings, intervention pursuant to section 622.10(f) is applicable and has not been expressly excluded (see 6 NYCRR 622.14[c]).

facility, the permit must be revoked.

I disagree that relative culpability is irrelevant in Department initiated permit revocation proceedings. Pursuant to section 621.13, the Commissioner has broad discretion to fashion an appropriate remedy in a Department initiated permit modification, suspension or revocation proceeding (see 6 NYCRR 621.13[h]). Specifically, after the hearing, the Commissioner may continue the permit in effect as originally issued, modify the permit, suspend the permit for a stated period of time or upon stated conditions, or revoke the permit (see id.). Assuming without deciding that Karta is strictly liable for all violations established at the facility without regard to relative culpability of the actors on-site (see Matter of Johnson (Robert), ALJ Ruling, Nov. 22, 1993, at 8-10), relative culpability is nonetheless relevant to the significance of the violations by Karta and whether such violations warrant permit revocation, or some less drastic remedy.

Finally, Department staff contends that if TRAT's contractual interest is sufficient to warrant party status, any party with a contractual interest with Karta, including Karta's employees, could be allowed party status. Staff's contention is overstated. In most circumstances, Karta would adequately represent the interests of parties in contractual privity with it, such as its employees. TRAT's status is significantly different than Karta's employees, however. Most significantly, TRAT has its own private interest in its record of compliance as it seeks future relations with the Department. TRAT is also a key element of Karta's judicially sanctioned bankruptcy reorganization. These factors, among others, distinguish TRAT from Karta's employees or other ordinary contractors.

Accordingly, TRAT's application is granted. However, as noted on the record during oral argument, TRAT's role as an intervenor is limited to defending its record of compliance and its other private interests with respect to issues of liability for the violations alleged and the appropriate relief to be imposed in this case. Issues concerning the Department's review of any permit modification applications before it are outside the scope and not a proper subject of this proceeding.[4]

[4] I have made no determinations yet concerning the validity of any defenses either Karta or TRAT might seek to raise in this proceeding.

RULING

TRAT's motion to intervene is granted, subject to the limitations indicated in this ruling.

MOTION FOR LEAVE TO FILE AN EXPEDITED APPEAL

Department staff indicated its desire to seek leave to appeal from this ruling to the Commissioner. Upon staff's request, I have adjourned the hearing pending any such motion and any appeal that might follow (see 6 NYCRR 622.10[d][7]).

By agreement of the parties, the schedule for filing motions for leave to file an expedited appeal is as follows. Motions for leave to file an expedited appeal are due by close of business on Friday, November 2, 2007. Responses to any motion for leave to appeal are due by close of business on Tuesday, November 13, 2007.

Motions and responses thereto should be addressed to Commissioner Alexander B. Grannis (Attn: Louis A. Alexander, Assistant Commissioner), Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York, 12233-1010. Two copies of any submissions should be sent to me, and one copy to each of the remaining parties, at the same time and in the same manner as filings are submitted to the Commissioner. Electronic submissions are authorized, provided that a conforming hard copy is sent by regular mail and postmarked by the due date.

On any motion for leave to file an expedited appeal, the parties are requested to limit their comments to the grounds for granting leave to appeal specified at 6 NYCRR 622.10(d)(2)(ii). If leave to appeal is granted by the Commissioner, a schedule for submitting briefs on the merits of the appeal will be established.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: October 17, 2007
Albany, New York

TO: Attached Service List