STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 27 and 71 of the New York State Environmental Conservation Law and Part 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

DEC Case No. R1-20150212-16

- by -

LAMAY & SONS, INC. and GREG LAMAY,

Respondents.

RULING ON MOTION FOR ORDER WITHOUT HEARING

Staff of the New York State Department of Environmental Conservation ("Department" or "staff") commenced this proceeding by service of a notice of motion for order without hearing in lieu of complaint, dated September 29, 2015. Staff's motion asserts one cause of action, alleging that respondents LaMay & Sons, Inc. and Greg LaMay ("respondents") "violated 6 NYCRR [§] 360-1.7(a)(1)(i) by causing or allowing the construction and operation of an unauthorized solid waste management facility" at 275A East Main Street, Yaphank, New York. See Affirmation of Susan H. Schindler, Esq. in Support of Motion for Order Without Hearing, dated September 2015 ("Schindler Aff.") ¶ 19.[1] Staff seeks a penalty of $7,500 for the alleged violations. See id. ¶ 20. In addition to the notice of motion and the Schindler Aff., staff has submitted the following documents in support of its motion for order without hearing: (i) the affidavit of Pappachan Daniel, sworn to September 29, 2015 ("Daniel Aff.") attaching seven exhibits; and (ii) and an undated memorandum of law.

In response to staff's motion, respondents served an affirmation of counsel dated November 17, 2015 ("Gruder Aff.") attaching one exhibit, and an affidavit of respondent Greg LaMay, sworn to November 13, 2015 ("LaMay Aff.").

For the reasons discussed below, I deny staff's motion for an order without hearing.

[1] The caption in all of the documents submitted by staff in support of its motion for order without hearing refers to "alleged violations of articles 27 and 71 of the New York State Environmental Conservation Law." In addition, the Notice of Motion includes staff's request for a holding that respondents violated ECL articles 27 and 71. The "Cause of Action" asserted in the affirmation of counsel, however, alleges only a violation of 6 NYCRR § 360-1.7(a)(1)(i), and makes no allegation of a violation of any statute.

Legal Standard

A motion for order without hearing is governed by the same standards as those applicable to motions for summary judgment under the CPLR. See 6 NYCRR § 622.12(d). A summary judgment movant has the burden of establishing entitlement to judgment as a matter of law, and can satisfy this burden by submitting evidence, such as affidavits of individuals with personal knowledge of material facts, and relevant documents, sufficient to demonstrate the absence of any genuine issue of material fact. See Matter of Locaparra, Final Decision and Order of the Commissioner, June 16, 2003, at 4; see also Matter of Kincade, Summary Report, March 15, 2013, at 6, affd by Decision and Order of the Commissioner, June 11, 2015. Once the movant meets its initial burden, non-movant must proffer competent evidence sufficient to raise a question of fact requiring a hearing. See e.g. Ramos v. Howard Indus., Inc., 10 N.Y.3d 224 (2008).

When deciding a motion for order without hearing, as on a motion for summary judgment, "issue finding and not issue resolution" is the proper analytical focus. Cruz v. American Express Lines, 67 N.Y.2d 1, 13 (1986); see also Matter of Locaparra, at 3-4. The burden on the moving party "is a heavy one," and facts must be viewed in the light most favorable to the non-moving party. Jacobsen v. New York City Health and Hosp. Corp., 22 N.Y.3d 824, 833 (2014). It is not the role of the administrative law judge ("ALJ") on such a motion to assess credibility. See Ferrante v. American Lung Assn., 90 N.Y.2d 623, 631 (1997); see also Matter of Tractor Supply Co., Decision and Order of the Commissioner, Aug. 8, 2008, at 3, and all inferences are drawn in favor of the non-moving party. See Cruz, 67 N.Y.2d at 13; see also Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 505 (2012). The motion should not be granted where the ALJ has any doubt that a factual issue exists warranting a hearing, or where the issue is "arguable." Glick & Dolleck, Inc. v. Tri-Pac Export Corp., 22 N.Y.2d 439, 441 (1968); Asabor v. Archdiocese of New York, 102 A.D.3d 524, 527 (1st Dep't 2013).

I. Positions of the Parties

A. Staff's Allegations

Staff alleges that, on July 19, 2013, the Town of Brookhaven ("Town") obtained a registration to operate a solid waste management facility at 275A East Main Street in Yaphank ("site" or "facility"), for the sole purpose of dewatering dredge material from Yaphank Lakes. See Schindler Aff. ¶ 13; see also Daniel Aff. ¶ 6; see id. Exhibit ("Ex.") B (July 19, 2013 cover letter, Registration # 52W185R, and document entitled "Settlement & Dewatering Area Plan Including Berm & Weir Details" ("Dewatering Area Plan drawing") dated May 24, 2013). The registration document identified Randolph Froehlich, who owned the real property at that time, as facility owner. See Daniel Aff. Ex. B; id. Ex. C (Suffolk County Clerk's office list of deeds); see also Schindler Aff. ¶ 13. The registration identified the Town as facility operator. See Daniel Aff. Ex. B. Neither respondent is identified in the registration.

The Dewatering Area Plan drawing includes an area of 3.0 acres of the site, surrounded by a berm, identified as the "Mulch Storage Area," located in the upper right hand corner of the drawn area in the Plan. See id.[2] The Plan also includes the following text:

> MULCH AREA NOTE: - BERM AROUND MULCH STORAGE AREA TO BE MONITORED TO ENSURE WATER/DREDGE SPOILS DO NOT ENTER STORAGE AREA AND ALSO TO ENSURE MULCH AND/OR OTHER ORGANIC MATERIALS DO NOT ENTER THE SETTLEMENT AREA.

Staff alleges that the registration allowed for disposal of dredge material in "approved areas only." Daniel Aff. ¶ 6; see also Schindler Aff. ¶ 14 ("[p]ursuant to the site plan attached to the Registration, the 'SETTLEMENT AND SPOILS AREA' was specifically delineated as the only authorized area to store the dredge material").

Staff further alleges that, shortly before the dredge dewatering project, the Department and property owner Froehlich entered into a consent order resolving unrelated solid waste violations for storing, among other solid waste, leaves, compost, and wood, for a period longer than allowed. See Daniel Aff. ¶ 5; see also id. Ex. A (consent order effective July 11, 2013, attaching Compliance Schedule A) ("July 2013 order"). The July 2013 order states that Froehlich "is the owner and operator of a solid waste management facility located at 275A East Main Street, Yaphank." Daniel Aff. Ex. A, ¶ 5. The schedule of compliance attached to the July 2013 order addresses, among other things, the schedule for processing and removing "leaves/windrows, finished compost and wood, located in northern portion of the Facility." Id., Compliance Schedule A. According to staff, "[u]pon information and belief," Froehlich thereafter hired respondents LaMay & Sons, Inc. and Greg LaMay "to remove and dispose of the leaves, compost and wood material on [sic], as required by the July 2013 order." Daniel Aff. ¶ 7.

Mr. Daniel states in his affidavit that, during a September 4, 2014 inspection of the site, he "observed a pile of approximately 100 cubic yards of dredge material in the cleanup area." Daniel Aff. ¶ 9. According to Mr. Daniel, two Town employees "confirmed" that the dredge material in the "cleanup area" had come from the "Town of Brookhaven registered area." Id. Mr. Daniel does not define "registered area." Mr. Daniel took four photographs of the dredge material, and prepared an inspection report. See id. ¶ 9, and Ex. D. Mr. Daniel also states that respondent Greg LaMay "confirmed" during a September 4, 2014 telephone conversation that he had "moved the dredge material from the registered area to the cleanup area." Id. ¶ 10.

B. Respondents' Submissions

In response to staff's motion, respondent Greg LaMay has submitted an affidavit in which he states, among other things, the following:

> 3. Sometime in the Fall of 2014, on my own and not acting on behalf of Respondent LaMay and Sons, Inc., I moved approximately 100 cubic yards of

[2] The Dewatering Area Plan drawing contains no orientation of the cardinal points (north, south, east or west).

dredge spoils within the Yaphank site where it was being dried, approximately 50 yards away, and within *the approved area*.

4. It was my intention that the dredge spoils, primarily being plantlike material, could be integrated into compost.

5. I only did this on one particular occasion. I never made the compost, and I never removed any of the material from the Yaphank site.

LaMay Aff. ¶¶ 3-5 (italics added).

In addition, respondents have submitted a copy of a Department permit issued to the Town, effective March 21, 2013, authorizing the Town to "[h]ydraulically dredge Upper and Lower Lakes to control invasive aquatic plants." Gruder Aff., Ex. A, at 1. The permit provides combined authorizations under ECL article 24 (freshwater wetlands), Clean Water Act Section 401 (water quality certification), ECL article 15, title 27 (wild, scenic & recreational rivers), and ECL article 15, title 5 (excavation & fill in navigable waters) ("combined permit"). Id. Although the combined permit does not authorize the operation of a solid waste management facility, it states the following with respect to material to be dredged under the combined permit: "Resultant 112,300 cubic yards of dredged spoil will be dewatered *at an upland site* for 6 to 9 months, then placed in the Brookhaven landfill." Id. (italics added). The permit does not define "upland site."

One of the "Natural Resource Permit Conditions" in the combined permit discusses "Work Area Limits," and states in relevant part as follows:

> Staging areas, dewatering plumbing routes and dewatering locations for vegetation harvested are limited to the existing cleared areas at those locations listed in the approved narrative …. Final disposition of dewatered vegetation will be at an *upland location*, greater than 100 feet from any wetland boundary and approved by the Department.

Id. at 3 (italics added). "Upland location" is not defined in the combined permit, but this provision makes clear that such location must be both (i) greater than 100 feet from a wetland boundary, and (ii) approved by the Department.

II. Discussion

A. Liability of LaMay & Sons, Inc.

Counsel for staff asserts that "[t]he Department has documented that Respondent LaMay & Sons, Inc. is a domestic business corporation organized and existing under and by virtue of the laws of the State of New York." Schindler Aff. ¶ 6. Staff has submitted no document supporting this statement of counsel, and a search of the name "LaMay & Sons, Inc.," or a search of the word "LaMay" on the website of corporate records maintained by the New York State Department of State ("NYSDOS"), of which I may take official notice, see 6 NYCRR §

622.11(a)(5), does not reveal the existence of an entity named "LaMay & Sons, Inc." An entity named "La May & Sons, Inc." – that is, with a space between "La" and "May" – is, however, listed on the NYSDOS website. See https://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=173825&p_corpid=145664&p_entity_name=%6C%61%20%6D%61%79&p_name_type=%25&p_search_type=%43%4F%4E%54%41%49%4E%53&p_srch_results_page=0. According to the NYSDOS website, the entity named "La May & Sons, Inc." is located at the same address as the address at which staff claims respondent "LaMay & Sons, Inc." is located. See Schindler Aff. ¶ 7.[3]

For purposes of the present motion, however, even assuming the entity staff intended to name as a respondent is "La May & Sons, Inc.," staff has submitted no proof of any actions that such entity – whatever its name – may have taken with respect to the facts alleged and the cause of action asserted here. Staff alleges only, "[u]pon information and belief," that Mr. Froehlich hired LaMay & Sons, Inc. (and Greg LaMay) "to remove and dispose of the leaves, compost and wood material." Daniel Aff. ¶ 7. The motion papers do not include any contract, correspondence, invoice, photograph, other documents, or other evidence that would prove as a matter of law that LaMay & Sons, Inc. was indeed hired to do something, or actually did anything, at the Site. Indeed, there is no proof in this record that LaMay & Sons, Inc. has ever been to the site. An assertion that, "upon information and belief," the entity was hired to do something – even if true – is not proof that the entity did anything, including activities that would comprise a violation.

Because staff has failed to satisfy its initial burden of demonstrating that no genuine issue of material fact exists with respect to the liability of LaMay & Sons, Inc., I deny staff's motion for order without hearing with respect to that respondent.

B. Liability of Greg LaMay

1. Factual Assertions and Responses

Staff alleges that it has "documented that Respondent Greg LaMay is an owner and/or operator of Respondent LaMay & Sons, Inc.," Schindler Aff. ¶ 7, but has submitted no proof to support this assertion by counsel. Staff also alleges, "[u]pon information and belief," that Mr. Froehlich hired Greg LaMay "to remove and dispose of the leaves, compost and wood material." Daniel Aff. ¶ 7, but has submitted no documentation or other evidence to support this assertion. Moreover, Staff does not assert that respondents committed the alleged violations when acting pursuant to their alleged relationship with Froehlich. Staff has also submitted evidence that the property was transferred in October 2013 and then again August 2014, see Daniel Aff. Ex. C, but does not allege that respondents had any relationship with the subsequent owners, or provide any discussion of the relevance, if any, of the property transfers or transferees.[4]

[3] The NYSDOS website also contains entity information sheets for two other corporations with the same address as the respondent, but with no space between "La" and "May" in their names: (i) "LaMay Management Corp.;" and (ii) "LaMay Building Systems, Inc."

[4] It bears mention that staff has not named as respondents Froehlich, the two subsequent property owners, or the Town.

With respect to the cause of action asserted here, staff engineer Daniel submitted a sworn affidavit stating that (i) on September 4, 2014, he inspected the site and "observed a pile of approximately 100 cubic yards of dredge material in the cleanup area," Daniel Aff. ¶ 9; (ii) Greg LaMay was not present at the site at the time of Mr. Daniel's inspection, id.; and (iii) Mr. Daniel and Mr. LaMay had a telephone conversation on September 4, 2014 during which Mr. LaMay "confirmed to [Daniel] that he moved the dredge material from the registered area to the cleanup area." Id. ¶ 10. Mr. Daniel has also submitted a copy of his inspection report dated September 4, 2014, and four photographs that he took on the day of the inspection. See Daniel Aff. Ex. D. The inspection report contains the following handwritten language:

> I also went to LaMay Site. There was no activity at the Site. There was a pile of dredge material in his area. Mr. LaMay was ~~not~~ advised [earlier] not to take any dredge material at his area. Took some pictures.

Id. (strikethrough in original; the word "earlier" was added above sentence in original).[5] Mr. Daniel does not define "LaMay Site" in his affidavit or any attached exhibit; nor do staff's other papers provide a definition. The photographs submitted do not provide any orientation information.

In response to staff's motion, respondent Greg LaMay states that, "[s]ometime in the Fall of 2014, on my own … I moved approximately 100 cubic yards of dredge spoils within the Yaphank site … approximately 50 yards away, and *within the approved area*." LaMay Aff. ¶ 3 (italics added). Mr. LaMay does not define "the approved area." Mr. LaMay describes the dredge spoils as "primarily being plantlike material," and states that "[i]t was my intention that the dredge spoils … could be integrated into compost." Id.

The record on this motion lacks clarity with respect to identifying the locations of dredge spoils and other materials such as "leaves, compost and wood material," Daniel Aff. ¶ 7, or "leaves/windrows, finished compost and wood." Daniel Aff. Ex. A, Schedule of Compliance. Counsel for staff and staff witness Daniel both refer to a "cleanup area," but counsel defines "cleanup area" as "the *northwest* area of the Site," whereas Mr. Daniel defines "cleanup area" as "located at the *northeast* section of the property." Compare Schindler Aff. ¶ 14 (italics added) with Daniel Aff. ¶ 5 (italics added).

Staff witness Daniel also refers to a "registered area" and a "LaMay Site" but does not define the terms. The Town's registration and combined permit refer to an "upland site" and "upland location," but do not define those terms. The Dewatering Area Plan drawing submitted with the Town's registration document shows areas referred to as "Mulch Storage Area" and "Settlement & Spoils Area," but the drawing provides no cardinal point orientation, and none of the papers submitted on the motion explains the connection of these term with "cleanup area,"

[5] In paragraph 7 of Mr. Daniel's affidavit, in which he asserts that LaMay was hired to remove the leaves, compost and wood material, he also states that he advised Mr. LaMay "that the receipt and/or storage of dredge material in the cleanup area at the Site was prohibited." Daniel Aff. ¶ 7. Daniel does not provide the date upon which he is alleged to have provided Mr. LaMay with this information.

"upland site," "upland location," "registered area" or "LaMay Site."[6] Mr. LaMay has admitted that he moved dredge spoils at the Yaphank site, but claims that the material was moved "within the approved area," a term he does not define. Staff witness Daniel states that the registration "allows for disposal of dredge material in approved areas only." Daniel Aff. ¶ 6.

Certain documents may clarify the meaning of these terms, the scope of various authorizations, and the locations at the site. For example, the combined permit refers to "approved plans … prepared by Nelson, Pope, and Voohis, LLC" which include a 21 page narrative and six pages of plans, "all NYSDEC stamped approved on 3/20/13." Neither party has submitted a copy of such plans. In addition, the cover letter enclosing the Town's registration states that the validation of the registration is "contingent upon terms as outlined by your registration narratives dated July 2, 2013 and revised July 17, 2013." Daniel Aff. Ex. B; see also combined permit, Gruder Aff., Ex. A, at 3 (referring to "the approved narrative"). These narratives were not submitted with the motion.

Moreover, testimony at hearing may similarly clarify relevant issues including the meaning and relationship of the many terms recited above, the relationship between the combined permit and registration, issues concerning the Dewatering Area Plan drawing, respondent LaMay's actions, and whether he was, or was not, "advised [earlier] not to take any dredge material at his area." Daniel Aff. Ex. D.

As set forth above, all facts must on this motion be viewed in the light most favorable to, and all inferences must be resolved in favor of, non-movant respondent. See e.g. Jacobsen, 22 N.Y.3d at 833; Cruz, 67 N.Y.2d at 13. Based on the parties' submissions, I am constrained on this record to deny staff's motion.

2. Legal Issues and Mixed Factual/Legal Issues

Nor do the parties' legal arguments, or discussion of mixed questions of fact and law, lend themselves to summary disposition of this matter.

Staff's single cause of action alleges that respondents violated 6 NYCRR § 360-1.7(a)(1)(i) "by causing or allowing the construction and operation of an unauthorized solid waste management facility at 275A East Main [S]treet, Yaphank, New York." Schindler Aff. ¶ 19. Section 360-1.7(a)(1)(i) states in relevant part as follows: "[N]o person shall … construct or operate a solid waste management facility, or any phase of it, except in accordance with a valid permit issued pursuant to this Part."

According to staff's papers, both the Town and Froehlich have authority to operate a solid waste management facility at the site. See Schindler Aff. ¶ 13; Daniel Aff. ¶ 6, and Ex. B; see also Daniel Aff. Ex. A, ¶ 5 (July 2013 order states that Froehlich "is the owner and operator of a solid waste management facility located at 275A East Main Street, Yaphank"). Staff's papers do not explain how respondent LaMay's movement of dredge spoils at the site comprises

[6] In addition, although the Dewatering Area Plan drawing is submitted as part of Exhibit B to the Daniel Aff., which Exhibit includes a cover letter and the Town's registration, neither the cover letter nor the registration refers to or incorporates the Dewatering Area Plan drawing.

construction or operation of a solid waste management facility, rather than (or in addition to) the unauthorized disposal of solid waste. See 6 NYCRR §§ 360-1.5(a) and 360-1.2(a)(3). Nor do staff's papers explain whether LaMay was acting as an agent under the solid waste authorizations for the Town, Froehlich, or both, or subsequent property owners, or whether he was acting at the site without any authority.[7]

In opposition to staff's motion, respondents argue that "dredge spoils taken and stored pursuant to an Article 15 Permit, Article 24 Permit or Water Quality Certification are not 'solid waste' as defined by the DEC's own regulations." Gruder Aff. ¶ 5; see also id. ¶¶ 11-16. Thus, respondents apparently argue that the combined permit exempts the dredge material from coverage by Part 360[8], as per the following regulatory provision:

> The following are not solid waste for the purposes of this Part:
>
> * * *
>
> (ix) material dredged or excavated from the waters of the State and placed or disposed in accordance with a permit(s) issued under article 15, 24, 25, or 34 of the [ECL] or a water quality certification issued under section 401 of the Federal Water Pollution Control Act to the extent that both the excavation and disposal of the material is regulated by such permit(s) or certification. However, any excavation or disposal not regulated by such permits remains subject to regulation under this Part. Dredge or excavated material generated by manufacturing or industrial processes are industrial waste subject to regulation under this Part.

6 NYCRR § 360-1.2(a)(4)(ix).

Although respondents argue in effect that the dredge spoils are not "solid waste" because they are governed by the combined permit (permit relating to ECL articles 15 and 24, and a water quality certification), respondents do not address the provisions in the combined permit (i) stating that "dewatering locations for vegetation harvested are limited to the existing cleared areas at those locations listed in the approved narrative;" or (ii) requiring that the "upland location" at which dewatered vegetation may be disposed "must be approved by the Department." Gruder Aff. Ex. A, at 3, ¶ 4. Indeed, the "approved narrative" or other evidence may clarify whether the locations of LaMay's actions were authorized, and the registration and the Dewatering Area Plan drawing (if it is indeed associated with the registration) may define those portions of the "upland location" at which disposal was, and was not, "approved by the Department."

These mixed questions of fact and law will be addressed at the hearing in this matter.

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[7] Staff has submitted an October 13, 2014 letter from the Town to Yaphank Land Associates, the current property owner, stating in relevant part that the Town "was notified that Greg LaMay a tenant of Yaphank Land Associates moved lake spoils to an unauthorized non-designated area." Daniels Aff. Ex. G. The motion papers do not otherwise elaborate on an alleged "tenancy" involving Mr. LaMay and Yaphank Land Associates.

[8] Staff did not seek leave to submit any reply papers to address respondents' arguments relating to the combined permit.

III. Conclusion and Ruling

Department staff's motion for order without hearing is denied. I will schedule a conference call with the parties to discuss the remaining schedule in this matter.

/s/

D. Scott Bassinson
Administrative Law Judge

Dated: February 16, 2016
Albany, New York