

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Articles 17, 25 and 71 of the Environmental Conservation Law ("ECL"), Parts 661 and 750 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), and SPDES Permit NY-0026247,

**RULING ON MOTION
FOR STAY OF
PROCEEDINGS**

- by -

**NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION and THE
CITY OF NEW YORK,**

DEC Case No.
R2-20040305-85

Respondents.

Facility: North River Sewage Treatment Plant

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**NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION and THE
CITY OF NEW YORK,**

DEC Case No.
R2-20040305-86

Respondents.

Facility: Red Hook Sewage Treatment Plant

Appearances:

-- Louis P. Oliva, Regional Attorney, DEC Region 2, for

the New York State Department of Environmental Conservation

-- Michael A. Cardozo, Corporation Counsel (Susan E. Amron and Tracy L. Triplett of counsel), for respondents

RULING ON MOTION FOR STAY OF PROCEEDINGS

Respondents New York City Department of Environmental Protection ("NYCDEP") and the City of New York (the "City" (collectively "respondents") move for a stay of the two above-referenced administrative enforcement proceedings pending resolution of a related ongoing federal criminal investigation. For the reasons that follow, respondents' motion for a stay is denied.

Proceedings

Respondent City owns, and respondent NYCDEP operates, fourteen water pollution control plants ("WPCP") in the City of New York, including the North River WPCP in upper Manhattan and the Red Hook WPCP in Brooklyn. NYCDEP operates the North River WPCP under State Pollutant Discharge Elimination System ("SPDES") permit NY-0026247, and the Red Hook WPCP under SPDES permit NY-0027073.

Staff of the Department of Environmental Conservation ("Department") commenced the two above-captioned administrative enforcement proceedings by service upon respondents of two complaints dated September 27, 2004. The complaints alleged that during the massive power failure that occurred on August 14, 2003, and affected much of New York State and the east coast of the United States, the back-up emergency generators at the North River and Red Hook WPCPs, respectively, failed. As a result of the failure, the complaints alleged, millions of gallons of raw, untreated sewage bypassed the treatment plants and, on August 14 and 15, 2003, were discharged into the Hudson River from the North River WPCP, and into the East River from the Red Hook WPCP. Department staff claimed that the alleged discharges violated various provisions of Environmental Conservation Law ("ECL") article 17 (Water Pollution Control) and article 25 (Tidal Wetlands Act) and their implementing regulations, as well as the SPDES permits applicable to each WPCP.

In addition to the violations allegedly resulting from or related to the discharges on August 14 and 15, 2003, the

complaints alleged respondents failed to meet certain sampling requirements on August 14 and 15, 2003, failed to submit by August 19, 2003 sufficient written reports of the bypasses at each of the facilities, and failed to respond by January 29, 2004 to a Departmental inquiry dated November 25, 2003. In one cause of action pleaded in each complaint, Department staff also alleged a continuing violation of the respective SPDES permits beginning August 14, 2003. As a consequence of the violations, the complaints seek the imposition of civil penalties and orders of the Commissioner directing respondents to cease and desist from any and all future violations of the ECL, its regulations, and the SPDES permits.

On August 31, 2005, respondents filed a motion for a stay of the two administrative enforcement proceedings with the Department's Chief Administrative Law Judge ("Chief ALJ") (see 6 NYCRR 622.6[c][1]). The papers submitted on the motion include a notice of motion, an affirmation of Susan E. Amron, Esq., Assistant Corporation Counsel, and a memorandum of law, all dated August 31, 2005.

In their papers, respondents contend that since at least November 2003, the United States Attorney's Office for the Southern District of New York has been conducting a federal criminal investigation into respondents' operations at the same two WPCPs during the blackout. Specifically, respondents state that on or about November 13, 2003, NYCDEP received five subpoenas from the U.S. Attorney's Office seeking documents related to the emergency generators at the North River and Red Hook WPCPs, and that since November 13, 2003, NYCDEP has received approximately 18 additional document subpoenas. In addition, numerous NYCDEP employees have been interviewed by representatives of the U.S. Attorney's Office, or have testified before a federal grand jury.

As a result of this ongoing federal investigation, respondents requested several adjournments of these Departmental proceedings, to which Department staff consented. On July 25, 2005, however, the Department's Regional Attorney for Region 2 informed respondents that no further adjournments would be agreed to, and that respondents were required to answer the complaints by September 1, 2005. Accordingly, respondent filed the present motion seeking a stay of the above-captioned administrative enforcement proceedings until after the resolution of the ongoing federal criminal investigation, and an extension of the time to answer the administrative complaints pending decision on this motion.

By agreement of the parties, Department staff was given until October 3, 2005, to respond to the motion. Department staff timely filed its response, consisting of a September 30, 2005 memorandum of law in opposition to the motion. In its response, Department staff requests that respondents' motion for a stay be denied.

Discussion

As noted by respondents, under the Department's uniform enforcement hearing procedures, the time to answer an administrative complaint may be extended by consent of Department staff or by a ruling of the ALJ (see 6 NYCRR 622.4[a]). The Department's regulations provide no further guidance in determining whether to adjourn an enforcement proceeding pending resolution of an ongoing federal criminal investigation.

Absent such guidance, I consider it appropriate to employ the standards and consider the factors used by courts when determining whether to grant a discretionary stay of civil proceedings under CPLR 2201. In determining whether to exercise the discretion to stay a civil action pending resolution of a related criminal action, the factors courts consider include avoiding the risk of inconsistent adjudications, duplication of proof, and the potential waste of judicial resources (see Britt v International Bus Servs., Inc., 255 AD2d 143, 144 [1st Dept 1998]; El Greco Inc. v Cohn, 139 AD2d 615, 617 [2d Dept 1988]). In assessing the risk of inconsistent adjudications, the courts consider the extent to which the two actions arise out of the same transaction, and involve the same parties and similar issues (see People v Zimmer, 166 Misc 2d 256, 259 [Sup Ct, Bronx County 1995]). Another compelling factor is a situation where a defendant is prejudiced in the presentation of a defense because a witness whose testimony is critical and necessary to the civil action has clearly indicated the intention to invoke the right against self incrimination (see Britt, 255 AD2d at 144). Weighed against any potential prejudice to the defendant, however, is the public interest in going forward with the civil proceeding (see Matter of Photo Medic Equip., Inc. v Suffolk County Dept. of Health Servs., 122 AD2d 882, 884 [2d Dept 1986]).*

* Although articulated in slightly different terms, federal courts consider substantially similar factors. Categorizing the stay of a civil case as an "extraordinary remedy" (see Citibank, N.A. v Hakim, 1993 WL 481335, *1 [SDNY 1993]), the factors the federal courts consider include: (1) the extent to which the issues in the criminal and civil cases overlap; (2) the status of

Considering the above factors, I conclude that respondents have failed to make a sufficient showing warranting the grant of a stay. As an initial matter, no federal indictment has been issued against respondents, nor is there any indication that indictments have been issued against any of respondents' employees. Because no federal criminal prosecution has been commenced, no risk of inconsistent adjudications exists at present.

In support of their motion, respondents claim that, notwithstanding the lack of criminal indictments, so long as the federal criminal investigation is pending, they will be prejudiced in their ability to answer the complaints and defend themselves during these administrative proceedings. This contention is premised upon the circumstance that numerous NYCDEP employees with knowledge of the factual assertions underlying the administrative complaints are involved in the criminal investigation, have been interviewed by representatives of the U.S. Attorney's Office, or have testified before a federal grand jury. Respondents also assert that approximately forty-five of those employees have been provided by the City with outside counsel and that, as governmental agencies, respondents cannot compel those employees to waive constitutional rights. Respondents also claim that they cannot compel these employees to assist respondents in answering the complaints or to provide testimony at any evidentiary hearing that may be held. Respondents conclude that "[t]he City believes that without the cooperation of many of these DEP employees, it will be unable to adequately address the allegations raised in the administrative complaint" (Respondents' Memorandum of Law, at 5).

Respondents' assertions and speculation are insufficient to establish the prejudice they claim. Nothing in respondents' submissions indicates that the employees referred to have in fact declined to assist respondents in the preparation of

the case, including whether the defendants have been indicted; (3) the plaintiff's interest in proceeding expeditiously weighed against the prejudice to plaintiff caused by a delay; (4) the private interests of and burden on the defendants; (5) the interest of the court; and (6) the public interest (see, e.g., Trustees of Plumbers and Pipefitters Nat. Pension Fund v Transworld Mechanical, Inc., 886 F Supp 1134, 1139 [SDNY 1995]). With respect to the second factor, it has been noted that in the Second Circuit, district courts generally grant the extraordinary remedy of a stay only after the defendant seeking the stay has been indicted (see Citibank, 1993 WL 481335, at *1).

respondents' defense or have otherwise asserted any privilege against self-incrimination. Moreover, without a more precise showing of the nature of the testimony and evidence respondents have been denied access to, if any, respondents' conclusory claim that they cannot effectively defend themselves cannot be evaluated, and no determination can be made whether that testimony and evidence is "critical and necessary" to their defense. Respondents also fail to demonstrate that they cannot mount a defense with evidence obtained from sources other than the referenced employees. Thus, respondents' claim of "substantial prejudice" is entirely speculative and not supported.

Respondents also assert that a stay of the administrative enforcement proceedings will not prejudice Department staff's ability to pursue the complaints. Respondents contend that all but one of the causes of action alleged in each complaint concern actions that occurred between one and two years ago and, thus, no urgency exists for resolving those claims. With respect to the two causes of action alleging continuing violations at the North River WPCP and Red Hook WPCP, respectively, respondents argue those claims are "generic" and lack any factual support. Moreover, respondents cite to Department staff's willingness to grant several adjournments of respondents' time to respond to the complaints as an indication that the claims of continuing harm do not require immediate resolution of the administrative proceedings. Any sense of urgency, respondents contend, is further reduced as a result of actions taken by respondents to address the alleged violations underlying the complaints, including measures taken to address the problems with the emergency generators.

Respondents' assertions are unconvincing. The public has a strong interest in the efficient and expeditious enforcement of the State's environmental laws, including the water pollution control and tidal wetlands protection laws involved in these proceedings. Department staff's willingness to accommodate respondents by extending their time to respond to the administrative complaints should not be seen as a waiver of that public interest. Moreover, respondents' assertions that no continuing violations exist and that the violations underlying the complaints have been addressed cannot be accepted on this motion. These are factual assertions that must be resolved through the administrative enforcement hearing process.

Ruling

Department staff's public interest in proceeding with

the above-captioned administrative enforcement proceedings more than outweighs any prejudice to respondents that might arise from the pendency of the related federal criminal investigation. Accordingly, in the exercise of discretion, respondents' motion for a stay of the two above-captioned administrative enforcement proceedings is denied. Respondents are hereby directed to serve answers to the administrative complaints upon Department staff within 20 days after receiving this ruling.

In light of the foregoing, respondents' request for adjournment of the time to answer pending decision on this motion is otherwise denied as academic.

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

Dated: Albany, New York
October 31, 2005

TO: Susan E. Amron, Esq. (by Certified Mail)
Assistant Corporation Counsel
City of New York Law Department
100 Church Street
New York, New York 10007-2601

Louis P. Oliva, Esq. (by Regular Mail)
Regional Attorney, Region 2
New York State Department of
Environmental Conservation
47-40 21st Street
Long Island City, New York 11101-5407