STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Notice of Intent to Revoke the Air State Facility Permit of:

RULING

NYC Energy LLC,

DEC Permit ID No.
2-6101-00349/00011

Permittee.

Appearances of Counsel:

-- Thomas S. Berkman, Deputy Commissioner and General Counsel (Karen L. Mintzer, Regional Attorney of counsel), for staff of the Department of Environmental Conservation

-- The Dax Law Firm, P.C. (John W. Dax of counsel), for permittee NYC Energy LLC

Proceedings

By notice of intent to revoke permit dated March 8, 2017, staff of the New York State Department of Environmental Conservation (Department or DEC) notified NYC Energy LLC (permittee) that the Department intended to revoke permittee's Air State Facility (ASF) permit (DEC Permit ID No. 2-6101-00349/00011) pursuant to 6 NYCRR 621.13(a)(4) and (5). The bases for the revocation was "[b]ecause of material changes in applicable law and regulations since the ASF was issued in December 2000, and because the ASF permit no longer satisfies current regulatory requirements applicable to the permitted activity[.]" The notice of intent to revoke also notified permittee that permittee had fifteen calendar days to provide reasons why the permit should not be revoked, request a hearing, or both; and failure to do so would result in the revocation of the ASF permit on April 7, 2017.

By letter dated March 10, 2017, permittee provided reasons why the ASF permit should not be revoked, mainly that a Title V permit application would be submitted to the Department before the April 7, 2017 deadline set by staff's notice of intent to revoke. Department staff rejected permittee's explanation by letter dated March 17, 2017. By letter dated March 20, 2017, permittee requested a hearing pursuant to 6 NYCRR 621.13(d). On April 3, 2017, the matter was assigned to the undersigned administrative law judge.

Following an April 25, 2017 telephone conference with the parties, I advised the parties that, based on the wording of staff's notice of intent to revoke, 6 NYCRR part 624 (Permit Hearing Procedures [part 624]) applies to this revocation proceeding rather than 6 NYCRR part 622 (Uniform Enforcement Hearing Procedures [part 622]). By letter dated May 11, 2017 (May 11, 2017 Department letter), Department staff argues that part 622 applies to this revocation proceeding. Permittee responded by letter dated May 17, 2017 (May 17, 2017 permittee response), arguing that part 624 applies to this proceeding. This ruling addresses the procedural question.

I. Summary of the Parties' Positions

A. Department Staff

Department staff argues that permittee's hearing request resulted from staff's March 8, 2017 notice of intent to revoke, and staff's service of the notice of intent to revoke constitutes a "notification of intent to take a specified action which will become final unless a hearing is requested" pursuant to 6 NYCRR 622.3(b)(2). Therefore, staff argues the notice constitutes the complaint and the request for hearing constitutes the answer, and because an enforcement proceeding has been commenced under 6 NYCRR 622.3(b)(2), the matter is governed by part 622 (see May 11, 2017 Department letter at 1).

Second, staff cites 6 NYCRR 624.1(a)(5) in support of staff's argument that part 622 governs "where the basis for revocation is founded on matters which, in whole or in substantial part, constitute a violation of the ECL or its implementing regulations" (id.). Staff argues that the notice of intent to revoke is founded on matters that constitute violations of the ECL or its implementing regulations. Staff alleges that staff advised NYC Energy LLC in May 2016 that "regulatory changes since the date of issuance of the ASF permit required an updated permit application reflecting such changes and asked NYC Energy LLC to submit an updated application within 90 days" (id.). Staff alleges permittee failed to do so in violation of 6 NYCRR 201-5.3(b) and ECL 71-2103(1).

Last, staff argues that the ASF permit is not valid due to post-issuance material changes in the law. As a result, staff argues that the permit conflicts with the ECL and the regulations, which now require a facility needing a Title IV permit to obtain a Title V permit. Therefore, staff states that if NYC Energy LLC commenced construction of the facility under the ASF permit, such construction would constitute an additional violation (see id. at 2).

Staff concludes that because the proceeding was commenced pursuant to 6 NYCRR 622.3(b)(2) and NYC Energy LLC's failure to submit an updated ASF permit application caused Department staff to issue the notice of intent to revoke, that 6 NYCRR 622.1(a)(6) and (8) are applicable and this matter should proceed pursuant to part 622 (see id.).

B. Permittee

NYC Energy LLC argues that staff's attempt to use 6 NYCRR 622.3(b)(2) to color this proceeding as an enforcement proceeding governed by part 622 ignores the applicability sections of parts 622 and 624 and the plain language contained therein (see May 17, 2017 permittee response at 1-2). Permittee argues that staff never alleged any violation prior to the notice of intent to revoke, and argues that staff based the notice of intent to revoke on a material change in applicable law since the ASF permit was issued to NYC Energy LLC (see id. at 2).

Permittee argues that having stated the reason for the revocation notice, staff is estopped from arguing new grounds for issuing the notice of intent to revoke. Permittee also takes issue with Department staff's claim that permittee was in violation of 6 NYCRR 201-5.3(b) for failing to submit a revised ASF permit application within 90 days of receipt of notification from the Department (see id.). Permittee argues that the correspondence Department staff claims was a demand for a revised application does not contain a demand or constitute notification to submit an application (see id. at 3-4).

During discussions between Department staff and permittee it was determined that permittee would need to file a Title V permit, not an updated ASF permit. Permittee argues that because a Title V permit is required, permittee cannot be required to submit an updated ASF permit or be in violation of 6 NYCRR 201-5.3(b) as subpart 201-5 applies to ASF permits not Title V permits (see 6 NYCRR 201-5.1[a]) (see May 17, 2017 permittee response at 4-5).

II. Discussion

The issue presented is which procedural regulations apply to the proceeding commenced by Department staff's service of a notice of intent to revoke permit and permittee's request for a hearing. Department staff takes the position that 6 NYCRR part 622 "Uniform Enforcement Hearing Procedures" should be applied to the proceeding. Permittee, NYC Energy LLC, argues that 6 NYCRR part 624 "Permit Hearing Procedures" applies to the proceeding. While this is a case of first impression, it involves the plain language of the Department's regulations governing hearings.

The issue presented turns, in part, on a question of regulatory construction. In such matters, a tribunal must first examine the text's plain meaning as that is the clearest indication of legislative intent. (See Majewski v Broadalbin-Perth Cent. Sch. Dist., 91 NY2d 577, 583 [1998]). "In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning" (id. [quoting Tompkins v Hunter, 149 NY 117, 122-123 (1896)]). It is also well settled that a regulation must be construed as a whole and so interpreted to give effect to every part of the regulation. (See East Acupuncture, P.C. v Allstate Ins. Co., 61 AD3d 202, 209 [2d Dept 2009]).

A. Commencement of the proceeding

Department staff first argues that because staff commenced a proceeding under 6 NYCRR 622.3(b)(2) with a notice of intent to take specified action which will become final unless a hearing is requested, the matter must proceed under part 622. This argument not only ignores the applicability sections of part 622 and part 624, but also results in every notice of intent to revoke a permit being prosecuted under part 622. Such a result is not supported by the plain language of the regulations, discussed below, or any general rule of statutory construction.

A notice of intent to take specified action which will become final unless a hearing is requested may also proceed under part 624 (see 6 NYCRR 624.1[a][5]). The application of 6 NYCRR 622.3(b)(2), where the notice of intent is treated as the complaint and the request for hearing the answer, is dependent on the matter first falling within the jurisdiction of part 622 pursuant to 6 NYCRR 622.1 or the exception to part 624 referenced in 6 NYCRR 624.1(a)(5).

B. Violation of the ECL or regulations

Department staff argues that the notice of intent to revoke is founded on matters that constitute violations of the ECL and the regulations and cites 6 NYCRR 624.1(a)(5) in support of staff's argument that part 622 applies to this proceeding. Staff states that part 622 applies "where the basis for modification, suspension or revocation is founded on matters which, in whole or in substantial part, constitute a violation of the ECL or its implementing regulations." Paragraph 624.1(a)(5) reads:

> "(a) This Part [624] is applicable to hearings conducted by the department arising out of the following circumstances and supersedes any inconsistent regulations except to the extent explicitly noted:
>
> * * *
>
> "(5) a request made by a permittee in conformance with the provisions of section 621.13(d) of this Title (based on department staff's proposed modification, suspension or revocation of a permit); except, where the basis for modification, suspension or revocation is founded on matters which, in whole or in substantial part, constitute a violation of the ECL, its implementing regulations, an order, permit, license or other entitlement issued by the department. In such cases the provisions of Part 622 of this Title govern."

Therefore, in order for part 622 to govern this revocation proceeding, Department staff's notice of intent to revoke must be founded on matters that, in whole or in substantial part, constitute a violation of the ECL or regulations. Otherwise, part 624 applies to the proceeding.

At this point, it is not a matter of determining whether a violation occurred. The question is whether the notice of intent stated that the permit was being revoked due to, in whole or

substantial part, a violation of the ECL or regulations. Department staff argues that it does. I disagree for the following reasons.

Department staff's March 8, 2017 notice of intent to revoke permit describes the content of correspondence from staff to NYC Energy LLC dated May 11 and May 26, 2016. Staff stated those letters explained the change in the law and regulations and that the May 11, 2016 letter provided notice to NYC Energy LLC that a new application must be submitted within 90 days (see March 8, 2017 Notice of Intent to Revoke Permit at 1). The notice of intent to revoke permit states that the Department had not received an updated permit application from NYC Energy LLC, and further advised the permittee that the Department had the authority to revoke permits pursuant to 6 NYCRR 621.13(a)(4) and (5) "based on material changes in environmental conditions, relevant technology or applicable law or regulations since the issuance of the existing permit and noncompliance with any provisions of the Environmental Conservation Law or regulations of the department related to the permitted activity" (id. at 2). The notice of intent to revoke continues, "Because of material changes in applicable law and regulations since the ASF permit was issued in December 2000, and because the ASF permit no longer satisfies current regulatory requirements applicable to the permitted activity, NYC Energy LLC's ASF permit will be revoked on April 7, 2017, thirty (30) days after the date of this notice" (id.).

NYC Energy LLC argues that staff based the revocation on material changes in applicable law and regulations, and staff is estopped from expanding the stated reason at this point of the proceeding. Furthermore, permittee argues that the May 11 and May 26, 2016 letters from Department staff do not contain a demand from staff for permittee to submit an updated application for an ASF permit within 90 days. Moreover, Department staff and permittee determined that permittee must submit an application for a Title V permit instead of an updated ASF permit. Permittee argues that this fact makes 6 NYCRR subpart 201-5 inapplicable and staff's noted violation a nullity.

Although, Department staff references potential violations in the opening paragraphs of the notice of intent to revoke and staff states that permits may be revoked for noncompliance with the ECL or regulations, staff's expressly stated reasons for revocation are the material change in law and regulations, and that the permit no longer satisfies current regulatory requirements. If NYC Energy LLC's ASF permit no longer satisfies current regulatory requirements, it is because of the material change in law and regulations, not due to any acts of noncompliance or violations committed by permittee related to the permitted activity.

The notice of intent to revoke permit makes no mention of violations or noncompliance by permittee in the stated reasons for revocation. Accordingly, I conclude that the notice of intent to revoke permit is not based on permittee's alleged violations or noncompliance, in whole or substantial part.

C. Validity of ASF permit

Department staff takes the position that the ASF permit is no longer valid due to post-issuance material changes in the law, and any attempt to construct the facility under the ASF permit would constitute an additional violation. Whether a material change in law has occurred

and whether a facility can be constructed under the current ASF permit are legal issues to be addressed during the course of this proceeding. The validity of the ASF permit, however, is reviewed for the purposes of this proceeding under the Uniform Procedures regulations.

Pursuant to 6 NYCRR 621.13(e), when the Department proposes to revoke a permit and the permittee timely requests a hearing on the revocation, the original permit conditions or permit status will remain in effect until a decision is issued by the Commissioner. NYC Energy LLC's ASF permit has no expiration date. Accordingly, I conclude that the ASF permit remains in effect.

III. Ruling

Based on the foregoing, I conclude 6 NYCRR part 624 is applicable to this proceeding. A conference call will be convened to schedule the notice of hearing, legislative hearing, issues conference and adjudicatory hearing. Pursuant to 6 NYCRR 624.4(c)(8), the only issues that may be adjudicated are those related to the basis for revocation cited in the Department staff's March 8, 2017 notice of intent to revoke permit. Those issues are: (1) whether a material change in law and regulations has occurred applicable to the permitted activity; and (2) whether the ASF permit no longer satisfies current regulatory requirements related to the permitted activity.

Because the issues appear to be legal issues, which do not depend on the resolution of disputed issues of fact, argument on the legal issues may be presented at the issues conference pursuant to 6 NYCRR 624.4(b)(2)(iv).

/s/
Michael S. Caruso
Administrative Law Judge

Dated: June 27, 2017
Albany, New York