

In the Matter of the Application
of the City of New York Department of
Sanitation for a Solid Waste Management
Permit pursuant to Environmental
Conservation Law article 27 (Spring
Creek Yard Waste Composting Facility)

RULING

June 11, 2009

DEC Application No. 2-6105-00666/00001

The deadline for post-hearing briefs in the hearing on the above application is June 12, 2009 (mailing date, as stated in my May 13, 2009 e-mail). On May 26, 2009, Concerned Homeowners Association and Ronald J. Dillon ("CHA") made three motions, requesting: (1) that the deadline for briefs be suspended; (2) that the New York State Department of Environmental Conservation ("DEC") be directed to seek a formal ruling from the New York City Department of Buildings about whether the proposed project is consistent with the City's zoning resolution; and (3) that CHA be allowed to conduct discovery of materials associated with the application by CMW Industries, LLC for a solid waste management permit.

On May 26, 2009, I notified the parties by e-mail that replies to the motions could be submitted on or before June 5, 2009. The New York City Department of Sanitation ("Applicant") and the Staff of the DEC ("DEC Staff") each submitted a reply on June 5, 2009. The other party to the hearing, New York/New Jersey Baykeeper ("Baykeeper"), did not submit a reply.

The application by CMW Industries, LLC ("CMW") is an application to DEC for a solid waste management permit pursuant to Environmental Conservation Law ("ECL") article 27 and parts 360 and 370 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") for construction and operation of a regulated medical waste transfer station at a site in the Brooklyn neighborhood of Canarsie. The CMW application was the subject of a DEC permit hearing, under the procedures of 6 NYCRR part 624.

On March 24, 2009, Administrative Law Judge ("ALJ") Helene G. Goldberger issued a ruling, concluding that the intervenors in the CMW hearing had not presented any substantive and significant issues for adjudication. Among other proposed issues, the intervenors had argued that the CMW project was inconsistent with the zoning at its site and that DEC Staff had conducted an inadequate review of the project under the State Environmental

Quality Review Act ("SEQRA," ECL article 8)(CMW issues ruling, at 12-14, 26-28, 33). ALJ Goldberger's ruling made several directives with regard to permit conditions, made a recommendation about a complaint hot-line and/or ombudsman, and directed DEC Staff to continue processing the CMW permit in accordance with the ruling (CMW issues ruling, at 33).

CHA's motion in the Spring Creek compost facility hearing argued that actions taken by DEC Staff concerning the CMW application, after the March 24, 2009 issues ruling, were inconsistent with DEC Staff's actions in reviewing the Spring Creek permit application. CHA stated that, on or about April 8, 2009, DEC Staff directed CMW to submit a completely revised environmental assessment form and to submit a consistency determination from the New York City ("NYC") Department of Buildings demonstrating that the CMW project is consistent with local zoning.

CHA argued that it had sought, in the Spring Creek hearing, to raise issues concerning review of the compost facility application under SEQRA and the facility's consistency with zoning, but that these issues were excluded from the Spring Creek hearing. CHA argued that DEC Staff's recent decisions in the CMW case, to require information about consistency with zoning and additional environmental review, post-date the exclusion of similar issues in the Spring Creek hearing and should take precedence over them. CHA argued that DEC Staff should be directed to seek an opinion from the NYC Department of Buildings about whether the Spring Creek facility is consistent with zoning.

CHA's motion cited mailings from New York State Senator John Sampson and City Councilman Charles Barron that discussed the CMW application. CHA described its efforts to obtain a copy of recent state legislation, discussed in Senator Sampson's mailing, that would require transfer stations to comply with local zoning.

The Applicant opposed CHA's three motions, citing the Deputy Commissioner's interim decision in the present hearing as stating that DEC lacks the authority to adjudicate legal issues concerning compliance with local government zoning. The Applicant also stated that the recent legislation to which CHA referred is probably a bill that applies to facilities for treatment, storage and disposal of regulated medical waste, not to yard waste composting facilities such as the present proposal. A copy of the bill was attached with the Applicant's response. The Applicant opposed CHA's request for discovery on the basis that CMW's application is irrelevant to that of the Applicant.

DEC Staff also opposed CHA's motions. DEC Staff stated that the two applications are for different types of facilities, and that DEC was the lead agency for SEQRA review of the CMW application but not for the Spring Creek application. DEC Staff stated that the new legislation applies only to regulated medical waste facilities. DEC Staff stated that the April 8, 2009 letter regarding CMW was withdrawn and that the issues ruling in the CMW case had concluded DEC lacked authority to adjudicate zoning issues.

DEC Staff transmitted, with its reply, copies of the following letters:

1) March 4, 2009 letter from Derek Lee, R.A., Brooklyn Borough Commissioner of Buildings to Assemblyman N. Nick Perry, stating the Buildings Department's interpretation of the zoning at the CMW site, and a fax cover sheet for the March 18, 2009 transmittal of this letter to DEC Staff.

2) April 8, 2009 letter from Michelle M. Moore, Environmental Analyst, DEC Region 2 to Gershon Klein of CMW, stating that review of the CMW application was suspended and requesting a revised Environmental Assessment Form, a zoning consistency determination from the Department of Buildings, and specified project modifications. The letter stated the SEQRA negative declaration for the CMW project was withdrawn.

3) May 26, 2009 letter from DEC Region 2 Attorney Louis P. Oliva to Jeffrey S. Baker, Esq. (attorney for CMW) that withdrew Ms. Moore's April 8, 2009 letter and stated that the negative declaration was not withdrawn. The May 26 letter provided a copy of chapter 14 of the laws of 2009 and stated that, pursuant to this new law, CMW would need to provide certification that its proposed facility conforms with zoning.

DEC Staff stated that, if Mr. Dillon wishes to review additional SEQRA information in the CMW permit file, he should make a Freedom of Information Law ("FOIL") request.

Discussion

Chapter 14 of the Laws of 2009 was signed by the Governor on April 7, 2009. It amends ECL 27-1513(5) to add a condition for approval of permits for facilities for the treatment, storage and disposal of regulated medical waste. The added condition is that the operator provide "certification that such activities conform with existing local zoning laws or ordinances." A copy of the

bill text and bill status chronology, obtained through the New York State Senate web site, are attached with the paper copies of this ruling.

This law pertains to regulated medical waste treatment, storage and disposal facilities, but not to yard waste composting facilities or solid waste management facilities other than ones for regulated medical waste. It is not applicable to the Spring Creek yard waste composting facility. The certification about zoning that this law requires is not required for a yard waste composting facility. The interim decision in the Spring Creek hearing stated that zoning was not an issue for adjudication, and the recent legislation does not require that decision to be revisited. It is also not necessary, as part of this hearing, for the Applicant to obtain a certification about its project's consistency with zoning.

Although CHA's motion referred to the Spring Creek facility as a "solid waste processing and transfer station," and to the CMW facility as a "solid waste transfer station - medical waste," the issues ruling in the present hearing found that the Spring Creek facility is not a "transfer station." This question pertained to arguments by CHA and Baykeeper about a requirement applicable to transfer stations (Spring Creek issues ruling, at 9).

With regard to the SEQRA process, the Applicant is lead agency for review of the Spring Creek project and the Applicant issued a negative declaration. The issues ruling in the present case concluded, for reasons discussed in the issues ruling, that issues related to SEQRA would not be included in the hearing (Spring Creek issues ruling, at 2, 9 - 10; see also, 6 NYCRR 624.4[c][6] regarding SEQRA issues in DEC permit hearings).

Although DEC Staff's June 5, 2009 response stated that it was lead agency for the environmental review of CMW's application, this conflicts with the statements in the CMW project's notice of complete application that a coordinated review was not performed and that no SEQRA lead agency was designated (see, CMW notice of complete application, Environmental Notice Bulletin, August 20, 2008, http://www.dec.ny.gov/enb/20080820_req2.html). This disparity, however, does not affect the ruling on CHA's motions. Whether DEC was lead agency or whether it made a negative declaration following uncoordinated review, in either event, DEC made a SEQRA determination about the CMW application and was not bound by a SEQRA determination made by another agency. Further, DEC Staff's April 8, 2009 letter has now been withdrawn, and the May 26, 2009

letter states that DEC's negative declaration for the CMW project "is still in effect subject to further administrative or judicial proceedings."

Because the Applicant does not need to obtain a zoning consistency certification as part of the review of its part 360 application for the Spring Creek yard waste composting facility, and because issues concerning the SEQRA review of this project are not part of the hearing, it is not necessary to suspend the schedule for briefs nor to allow discovery concerning review of the CMW permit application. Nothing in this ruling precludes CHA from making a FOIL request for records concerning the CMW application.

Ruling: CHA's three May 26, 2009 motions are denied. The briefs remain due to be mailed on June 12, 2009.

Albany, New York
June 11, 2009

_____/s/_____
Susan J. DuBois
Administrative Law Judge

To: Ramin Pejan, Esq.
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