

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

November 21, 2006

DEC Application No. 2-6105-00666/00001

Summary

The consolidated party consisting of Ronald J. Dillon and the Concerned Homeowners Association (collectively, "CHA"), an intervenor in this hearing, moved for a directed ruling for denial of the above application, based on arguments about the existing record and about events that have occurred during the hearing to date. CHA argued that it would be an abuse of process to compel it to continue in the hearing when the record shows there is no basis upon which to recommend that the permit be issued. The motion is denied.

Background

The issues to be adjudicated in the hearing on the above application were identified in an issues ruling dated August 30, 2004 and a supplemental issues ruling dated February 8, 2005 that were subsequently modified by the June 14, 2006 Interim Decision of Executive Deputy Commissioner Lynette M. Stark. The hearing was scheduled to take place in October 2006, but was adjourned without date on October 10, 2006, as discussed in my memoranda dated October 10 and October 24, 2006. The hearing remains adjourned without date at present.

On November 1, 2006, the consolidated party consisting of Ronald J. Dillon and the Concerned Homeowners Association (collectively, "CHA") submitted a letter in which they moved for "a directed ruling for a denial of the permits sought by the applicant." The letter stated 13 reasons in support of the motion. It concluded by stating that it would be an abuse of process to compel the intervenors, with limited resources, to continue participating in a hearing when the record already demonstrates unequivocally that there is no basis upon which to recommend issuance of the permit.

On November 6, 2006, both the Department of Environmental Conservation Staff ("DEC Staff") and the New York City Department of Sanitation ("Applicant," represented in this matter by the New York City Department of Law) submitted letters opposing the motion. The other party to the hearing, New York/New Jersey Baykeeper ("Baykeeper") did not submit correspondence concerning the motion.

The motion

The arguments set forth in CHA's November 1, 2006 letter, in support of its motion, may be briefly summarized as follows:

1. "The Applicant constructed and operated the subject facility without obtaining the requisite permits."
2. The Applicant continues to operate the facility without permits.
3. The application "is predicated on nothing more than suppositions and assertions which have not withstood even cursory examination."
4. The Applicant has a history of violations at solid waste processing facilities.
5. "The Applicant has engaged in violations at the subject facility."
6. DEC "has neither the manpower nor the will to enforce" regulations or permit conditions governing such facilities.
7. DEC "has conspired with the applicant" to allow the facility to operate without the necessary permit.
8. The Applicant has not identified who owns the property on which the facility is located, and does not intend to provide such records.
9. The Applicant's activity at the site constitutes an alienation of parkland; the Interim Decision "imposes an impossible burden" on CHA, of taking a separate legal action.
10. The Applicant has refused to provide certain information to CHA in the discovery process of this hearing, concerning operation of the Applicant's other composting facilities.

11. The Applicant allegedly tampered with CHA's expert witness, whose participation is irreplaceable. The witness was Christopher Boyd, who withdrew from participating as a witness for CHA and Baykeeper.

12. The Applicant provided misleading and false information in response to CHA's discovery request, relating to codes and variables in the Applicant's operational data.

13. DEC Staff cannot produce a coastal consistency determination for this project that would both allow issuance of a permit and be free of defects, particularly because the current document relies on a remediation site that does not exist.

Replies to the motion

DEC Staff argued that the motion should be denied in its entirety because "[i]t is simply a restatement of CHA's prior unproven assertions, and concerns almost entirely issues that have been previously held to be not for adjudication in this permit hearing." DEC Staff also stated that CHA's arguments about the discovery process are untimely because the Applicant and DEC Staff have until November 20, 2006 to respond to CHA's motions to compel, and no ruling has been made on those motions. DEC Staff also argued that "allegations concerning potential witnesses are properly matters for law enforcement or attorney disciplinary authorities, should any party wish to pursue them."

The Applicant argued that CHA failed to identify any basis in the DEC permit hearing procedures or in the Civil Practice Law and Rules (CPLR) for its "motion for directed judgment," but compared it with a motion for judgment during trial (CPLR § 4401). This section allows for motions for judgment as a matter of law, after the close of the evidence presented by the opposing party. The Applicant argued that the only "evidence submitted for entry into the record," on the issues identified for adjudication, supports issuance of the permit, and that the adjudicatory hearing will provide a rational process for determining that the facility can operate in compliance with the relevant regulations. The Applicant also stated that sanctions against CHA would be appropriate, for frivolous conduct, and asked that CHA be directed to refrain from any further motion practice without prior consultation with the Administrative Law Judge ("ALJ").

Discussion

The DEC permit hearing procedures, part 624 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR part 624") do not provide for motions for directed rulings, motions for directed judgment, or similar procedures. Part 624 also does not prohibit such motions. Section 624.6(d) provides procedures for motions made during hearing proceedings, but does not identify the nature of motions that could be made.

The present motion, however, seeks relief that is inconsistent with the DEC permit hearing process in general, as well as with decisions and rulings already made in this case.

The issues ruling and the interim decision have identified issues that necessitate adjudication and have determined that other issues will not be adjudicated. CHA's motion attempts to re-argue questions that have already been decided about identifying issues. The existence of an adjudicable issue is a reason to proceed with the adjudicatory hearing, not a reason to deny the application without an adjudicatory hearing.

To date, issues have been identified for adjudication but no exhibits have been received in evidence and no witnesses have testified under oath. CHA's assertion that the application has not withstood examination (No. 3, above) is based on two statements in the issues ruling. One of these statements concerns changes the Applicant made in its coastal consistency assessment form, which changes are not an issue for adjudication. The other statement, concerning noise, is not a reason why the application should be denied at present without further hearing; instead, it is a reason why the outcome of this issue may result in a major modification of the project, imposition of significant additional permit conditions, or denial of the application, and thus it is a reason why adjudication of this issue is necessary.

The majority of the reasons CHA stated in support of its motion relate to matters that the issues rulings, the interim decision, or both concluded were not issues for adjudication in this hearing (Nos. 1, 2, 4 through 7, and 9).

CHA stated that the Applicant, in its response to CHA's discovery request, failed to provide information concerning ownership of the property on which the facility is located (No. 8). The Applicant had already provided, to the parties and to me, a copy of the record map of Spring Creek Park, which shows specific parcels in and around the park with annotations regarding when they were added to or surrendered from the park.

This map was transmitted by the Applicant with its April 26, 2004 letter. The discovery request cited by CHA is for documents that include copies of real estate transactions that transferred the project site from private individuals to the City. The request appears to relate to parkland alienation, a subject the Interim Decision concluded was not an issue for adjudication in this hearing, and CHA has not identified any other subject to which this information relates.

The arguments CHA listed as its tenth and twelfth reasons supporting its motion relate to discovery disputes about operational data for the Applicant's other composting facilities. This information is also the subject of CHA's motion to compel, which is pending. I anticipate making a ruling on the motion to compel after the deadline for the Applicant's response to that motion. Discovery disputes in DEC permit hearings are dealt with under the processes set forth in 6 NYCRR 624.7(d), rather than through submissions such as CHA's November 1, 2006 motion.

The eleventh reason CHA stated in support of its motion concerns Mr. Boyd's withdrawal from participating as a witness in this hearing. Although Mr. Boyd withdrew, Baykeeper stated it is attempting to locate an expert witness to replace Mr. Boyd (see, October 17, 2006 affirmation of Daniel E. Estrin, Esq., paragraph 9). This witness may enable one or both intervenors to put into the record testimony similar to the testimony Mr. Boyd was going to provide. To the extent Mr. Boyd's withdrawal from the hearing prejudices a party's ability to present certain portions of its case, this could be the subject of an offer of proof at the hearing or argument about how lack of Mr. Boyd's testimony should affect evaluation of the hearing record. Although CHA and Baykeeper have each alleged that Mr. Boyd withdrew from the hearing because of witness tampering directed against him, it is important to note that the Applicant has denied this, and at present it remains an unproven allegation.

The thirteenth and last reason stated by CHA concerns the Waterfront Revitalization review. The Interim Decision described the procedure to be followed by DEC in reviewing the consistency of projects with local waterfront revitalization programs, and identified steps to be taken by DEC Staff and the ALJ with regard to the consistency certification for the Spring Creek composting facility. The consistency review is not an issue for adjudication. On September 20, 2006, DEC Staff submitted a coastal assessment form and a revised certification. In a memorandum dated September 27, 2006, I posed several follow-up questions to DEC Staff, to which John Nehila, Esq. responded on October 6, 2006.

I have not yet made a determination concerning whether DEC Staff's consistency certification is rational and not affected by an error of law. If the certification is rational and not affected by an error of law, it will be filed with the Secretary of State by DEC Staff. In that event, the coastal consistency review would not be a basis for denying the permit, and this coastal review process would be complete (see, Interim Decision, at 26). If I were to determine that the new consistency certification is irrational or affected by an error of law, I would remand it to DEC Staff for further revisions, a process similar to what would happen with a determination of significance under the State Environmental Quality Review Act (see, Interim Decision, at 24).

At the close of its response, the Applicant asked that Mr. Dillon be directed to refrain from any further motion practice without prior consultation with the ALJ. I decline to direct this, because CHA's November 1, 2006 motion does not warrant this response and because such a direction might complicate the hearing process rather than expedite it.

Ruling: The motion essentially asked that the permit be denied on the basis of the existing record and without further proceedings including an adjudicatory hearing. The motion is denied.

Albany, New York
November 21, 2006

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

To: Persons on 9/27/06 service list