

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

February 6, 2007

DEC Application No. 2-6105-00666/00001

This ruling concerns a dispute about discovery in the hearing on the above application. The procedures for discovery in Department of Environmental Conservation ("DEC" or "Department") permit hearings are set forth in section 624.7 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR 624.7"). The ruling also addresses an unresolved dispute between the parties concerning whether the intervenors can call expert witnesses on issues other than noise.

On June 14, 2006, the Executive Deputy Commissioner issued an interim decision that provided the final designation of issues to be adjudicated in the hearing. Accordingly, the parties then had a ten day period within which to serve discovery demands upon the other parties, as provided in 6 NYCRR 624.7(b). Following extensions of the time period, the parties served discovery demands on or about July 28, 2006. As stated in my memorandum of July 20, 2006, responses were due to be mailed on or before August 25, 2006.

During late September and early October, 2006, correspondence was exchanged and three conference calls occurred among the parties and me concerning disputes about the discovery requests. Among other correspondence, the consolidated party consisting of Concerned Homeowners Association and Ronald J. Dillon (collectively, "CHA") sent a letter on September 29, 2006 asking leave to submit a supplemental discovery request. On October 4, 2006, I authorized this additional discovery to the extent that the requested information is relevant to the issues identified for adjudication.

Representatives of CHA and of New York/New Jersey Baykeeper ("Baykeeper") reviewed documents at the office of the New York City Department of Sanitation ("Applicant") on September 14, 2006 and, as of the time of the September 20, 2006 conference call, they planned to return and review additional documents on September 27, 2006.

The discovery disputes are discussed in memoranda I sent to the parties on September 27, 2006 and October 24, 2006. In the latter memorandum, I set a schedule for correspondence concerning the discovery disputes. Parties that had made discovery requests, had not obtained the discovery, and still wished to pursue these requests were to make motions to compel, pursuant to 6 NYCRR 624.7(d)(2), by November 6, 2006 (date of receipt). Replies to such motions were due to be received on or before November 20, 2006.

CHA submitted motions to compel regarding its two discovery demands that were addressed to the Applicant and to DEC Staff. The Applicant and DEC Staff each replied on November 20, 2006. No other party submitted a motion to compel.

Discovery demanded of Applicant

On July 27, 2006, CHA served a discovery demand on the Applicant, who responded on August 25, 2006 objecting to much of the demand. In addition, CHA transmitted a supplemental discovery demand to the Applicant on September 29, 2006 along with a letter criticizing the Applicant's August 25, 2006 response.

The initial discovery demand consisted of requests for admission, interrogatories, and requests for production of documents. The Applicant objected to all of the interrogatories on the basis that the ALJ had not authorized use of interrogatories (6 NYCRR 624.7(c)). In an electronic mail message dated September 13, 2006, I confirmed that such permission would be required and that no party had asked permission to serve interrogatories. Following additional correspondence and discussion, Mr. Dillon stated during the September 20, 2006 conference call that the interrogatories were preliminary questions associated with the requests for production of documents.

In response to the requests for admission, the Applicant admitted or denied certain assertions, but objected to most of the requests as being vague, unclear and not reasonably calculated to lead to discovery of material and necessary evidence. CHA's September 29, 2006 letter identified subjects to which it stated the requests were relevant.

In response to the requests for production of documents, the Applicant objected to some of the requests and did not otherwise respond, and for other requests stated that responsive documents

are available for review at the Applicant's office at 44 Beaver Street, New York City. In response to five of the requests (#7, 8, 10, 11 and 12), the Applicant objected to them as "overbroad, overly burdensome and not reasonably calculated to lead to discovery of material and necessary evidence," but also stated that the Applicant "will produce a witness at the adjudicatory hearing with first-hand knowledge of the operations at the Facility."

On September 14, 2006, Mr. Dillon and a representative of Baykeeper reviewed documents at 44 Beaver Street. Mr. Dillon submitted a letter on September 20, 2006 objecting to conditions he said the Applicant's staff sought to impose on the document review. This dispute was discussed during the September 20, 2006 conference call. During the conference call, I directed that the Applicant provide the data from the Sanitation Control and Analysis Network ("SCAN") system that Baykeeper and CHA had requested, in the data format they had requested. As of September 20, 2006, the parties anticipated there would be an additional opportunity for CHA and Baykeeper to review the Applicant's documents.

On September 29, 2006, CHA transmitted to the Applicant a supplemental discovery request. This request asked, in detail, for documents and data extracts concerning delivery and removal of materials ("operational data") at all compost facilities owned and/or operated by or for the City of New York, since January 1, 1995. The request sought additional information concerning the resumé and qualifications of G. Noemi Santiago, the Applicant's proposed witness concerning noise, and the resumé of a person who reviewed the Applicant's January 2006 noise analysis. The request also sought to review a copy of the users manual for the noise software used in the Applicant's noise analysis (Cadna-A acoustical analysis software package), and the input data and assumptions used in the analysis. The Applicant objected to most of these requests, during the October 5 and 10 conference calls, and stated among other things that the delivery and removal data would be burdensome to produce and was relevant only to traffic, which is not an issue being adjudicated in this case.

CHA's motion to compel, with respect to discovery addressed to the Applicant, focused primarily on the three areas of information in its September 29, 2006 discovery request. The motion also stated, however, that it incorporated all of CHA's "previous submitted discovery requests, objections, and comments."

Discussion

Looking first at the records requested by the September 29, 2006 supplemental request, the operational data for the Applicant's compost facilities is relevant to issues identified for adjudication, and the Applicant must provide access to this data. During the conference calls, the Applicant argued that the operational data is relevant to truck traffic, an issue that will not be adjudicated. CHA and Baykeeper asserted the information is relevant to the assumptions, used in the Applicant's noise study, regarding how many trucks would be on site under various operating scenarios for different seasons and times of day. In its September 29, 2006 transmittal letter for the supplemental discovery, CHA stated that the collected yard waste materials are "fungible," that materials that might have been taken to Spring Creek were redirected to other facilities during the course of this hearing, and that data from all facilities is necessary in order to understand the compost operation. The Applicant argued that it would be burdensome to provide the data because it is on a complex data base involving numerous reports; CHA argued that the data system is capable of providing extracts of data.

Based upon correspondence sent to me by CHA and the Applicant, operational data for some of the composting facilities has already been provided in discovery, undercutting the assertion that it is burdensome to provide such information. The request for data from the additional composting facilities is reasonably calculated to lead to evidence relevant to testing the assumptions used in the noise study. The data includes the year, date and time the waste loads were received, and the weight and type of waste material (see October 4, 2006 e-mail from Michael Burger, Esq., and the prior messages attached with it). This information is relevant to the assumptions about the number of trucks that would be on the site. The time of day at which waste is delivered is relevant because the noise limits in 6 NYCRR 360-1.14 (p) differ between day and night time periods. Even though the Applicant's consultant may not have used the SCAN data in arriving at the assumptions used in the noise study, the data is relevant to the validity of those assumptions and to the expected noise levels. Discovery is not limited solely to those documents the Applicant or its consultants chose to use.

The resumé of Ms. Santiago, whose prefiled testimony was submitted by the Applicant, is in an acceptable format. The Applicant is to provide, however, the duration and dates of the projects listed in the resume that involve noise analysis.

As of the October 10, 2006 conference call, CHA and the Applicant were going to discuss access to the information concerning the Cadna-A noise analysis program. Mr. Burger, counsel for the Applicant, notified me on October 24, 2006 that he had been informed by the Applicant's consultant that the users manual is "copyrighted material that cannot be provided to Mr. Dillon by us." CHA questioned this claim, stated that CHA would be willing to review the manual rather than making a physical copy of it, and argued that if the manual is not made available the study that used the Cadna-A program should not be admitted in evidence.

In its reply to the motion, the Applicant stated the request for "proprietary, copyrighted information that is not in its possession is without any basis." The Applicant stated it is not in a vendor-vendee relationship with the software's manufacturer. The Applicant stated it had previously directed Mr. Dillon "to the company's website, where publicly-available information, including contact information, is posted."

Based upon the discussion in CHA's supplemental discovery demand, CHA is seeking the users manual in order to test the inputs and assumptions used by the Applicant's consultant in modeling noise expected at the facility boundary, and whether these comport with how the Cadna-A model is to be used. This document is relevant to an issue identified for adjudication, and might be used in cross-examining the Applicant's witness on this subject or in presenting testimony by a witness for one or more intervenors. A document is not exempt from disclosure solely due to its being copyrighted (Evans v Lerch, 182 Misc2d 887, 890, 700 NYS2d 400, 402 [Sup Ct, New York County 1999]; see also Washington Post Co. v N.Y. State Ins. Dept., 114 Misc2d 601, 607, 452 NYS2d 163, 167 [Sup Ct., New York County 1982], reversed on other grounds 94 AD2d 648, 462 NYS2d 208, reversed on other grounds 61 NY2d 557, 475 NYS2d 263). The Applicant did not argue that the users manual is trade secret information. Although the Applicant may not own the software or its accompanying documentation, it appears likely that the Applicant's consultant does because the Applicant's proposed witness used the Cadna-A program in preparing the Final Noise Analysis Report. The Applicant must allow CHA to inspect the user's manual (or similar document, if it has a different title) for the Cadna-A program.

With regard to CHA's original (July 2006) discovery request, most of the requests have been answered by the Applicant or are not relevant to the issues to be adjudicated. CHA never sought leave to serve interrogatories. During the September 20, 2006 conference call, Mr. Dillon stated that the interrogatories were

preliminary questions associated with requests for production of documents. I am not requiring the Applicant to respond further to the interrogatories.

CHA's original discovery request also included requests for admission, most of which relate to issues that are not being adjudicated (record of compliance, enforcement, traffic, alienation of parkland, bird habitat). Although CHA asserted that the questions concerning Crescent Street relate to noise, among other subjects, the questions have to do with whether Crescent Street would be used by trucks, whether it is a truck route, and whether it is in a residential area. These questions do not relate to whether the facility will meet the noise requirements of 6 NYCRR part 360. For the questions related to Crescent Street, as well as other questions, CHA asserted that, "It is within the normal purview of a legal proceeding for one party to ascertain the veracity of statements made by other parties." Testing the credibility of statements by the Applicant or its witnesses is not a basis for demanding discovery about subjects that are not relevant to the issues to be adjudicated. With regard to several questions concerning the New York City Solid Waste Management Plan, CHA asserted that the Applicant had brought this plan into the proceedings by mentioning it in a June 29, 2006 letter to me. The Applicant mentioned this plan in the context of a request to discuss the hearing schedule, and this mention does not make requests for admission #9 and 10 (concerning Borough self-sufficiency for waste handling) relevant to the issues in this hearing.

Several requests for admission (#13 through 17) concerned the Jamaica Bay ecosystem and migratory birds. CHA's September 29, 2006 response referred to the issue of variances from setback distances, presumably as the subject to which these requests are relevant. The setbacks at issue are those between the site perimeter and the property line, places of business, residences and surface waters (see issues ruling, at 27 - 32; supplemental issues ruling, at 3 - 5). Of these, the distance to surface waters appears to be the setback to which some of these questions may relate. All but one of the questions, however, involve scientific knowledge and judgments, and are not statements "free from substantial dispute" (Siegel, *New York Practice*, at 602 [4th ed]; *Civil Practice Law and Rules* 3123(a); Falkowitz v Kings Highway Hospital, 43 AD2d 696, 349 NYS2d 790 [2d Dept 1973]).¹

¹ For example, "Admit that Jamaica Bay and its immediate environs are ecologically and environmentally sensitive areas" (Request #13); "Admit that the Jamaica Bay ecosystem is an

They are not the kind of statement that a party could be compelled to admit. Of these requests, the Applicant must respond to #14 (whether Old Mill Creek and Spring Creek are part of the Jamaica Bay ecosystem), but need not respond to #13, 15, 16 and 17.

CHA's original discovery request included requests for production of documents. In an electronic mail message dated September 29, 2006, CHA discussed the requests for production to which the Applicant had responded in a manner CHA described as deficient. As with the requests for admissions, many of the requests for production of documents relate to subjects that are not issues for adjudication in the hearing and are not discussed again here.

The Applicant adequately responded to request for production #9 (waste to compost conversion factor) by providing a reference to the section of the Engineering Report that identifies the quantity of each material. Although some testimony about operation of the Canarsie composting facility will be relevant (interim decision, at 15), the siting process for that facility is not relevant (requests for production # 20 and 21).

Request for production of documents #7 seeks the names and addresses of all persons "present at" the facility while waste matter was present. Based upon how this request and the following one, concerning work activities, are phrased, it appears to include a request for identification of persons who worked at the facility after it was in place (circa 2001) and while solid waste was present. This portion of requests #7 and 8 must be answered by the Applicant, because it would reveal the names of persons who witnessed the facility operations, including measures to control odor, litter, dust and vectors, and the effectiveness of control measures during the past operation of the facility. The response must include both City employees and employees of any contractors that operated the facility on behalf of City agencies. The Applicant's statement that it "will produce a witness at the adjudicatory hearing with first-hand knowledge of the operations at the Facility" does not exempt the Applicant from identifying employees (of the City or of its contractors) who have knowledge of these operations.

Request for production #10 seeks the names, addresses and telephone numbers of persons removing "the resultant end product"

important, integral, well-acknowledged part of the North American migratory bird Atlantic Flyway" (Request #15).

from the facility, and request #11 seeks the names, addresses and telephone numbers of the owners of the vehicles removing waste as well as the type of vehicle registration (passenger, commercial, etc.). Request #12 seeks the locations at which products of the facility were placed. To each of these requests, the Applicant responded that it "objects to this request on the grounds that it is overbroad, overly burdensome and not reasonably calculated to lead to discovery of material and necessary evidence. Notwithstanding these objections, [the Applicant] states that it will produce a witness at the adjudicatory hearing with first-hand knowledge of the operations at the Facility."

CHA's September 29, 2006 response states that "the refusal of the City of New York to identify the individuals requested prevents the petitioners from adequately preparing for the hearing and from preparing a final witness list. The petitioners would file a formal objection to the attempt by the City of New York to limiting [sic] access by the petitioners to only those individuals vetted by the City of New York in this matter."

Requests #10, 11 and 12 seek more information than identity of potential witnesses. The other information appears to go to the proposed issues of parkland alienation and environmental justice, that are not being adjudicated in this hearing. It is also unclear whether the Applicant possesses all the requested information, although it has not stated it does not have documents responsive to the requests. The Applicant's assertion that this information is irrelevant is inconsistent with its suggestion that it will present evidence that in some way responds to the requests. If the locations at which the compost was used are not relevant, they are not a subject on which the Applicant should present testimony. Although the Applicant's July 28, 2006 witness list stated one of its witnesses would testify about the "purpose and need for the Spring Creek Facility," this is not an issue for adjudication. If the Applicant were allowed to present testimony on this subject, the other parties would also need to be allowed to present testimony contesting this position.

Persons who removed end products from the facility while yard waste and/or compost were on site would be potential witnesses, because they had an opportunity to observe conditions at the facility that are relevant to issues in this hearing. Their observations, however, would have been infrequent and of short duration compared to those of witnesses already identified by CHA and Baykeeper, which witnesses live or work near the facility. Additional testimony by persons who visited the site to get compost appears to be duplicative and of limited value.

Thus, the Applicant does not need to identify the persons who removed end products from the facility. If, however, the Applicant calls such persons to testify about their observations, CHA may renew its request for the names and addresses of persons who removed end products from the facility.

The persons who served as park manager while the facility has been in place would have had a greater opportunity to observe relevant conditions at the site. Their names, work addresses and work phone numbers will need to be provided (request #46), but reports prepared by those persons prior to construction of the compost facility do not need to be provided (request #47).

Requests #36 and 37 concern the Applicant's proposed expert witnesses. The Applicant objected to these, although request #36 is a close paraphrase of 6 NYCRR 624.7(b)(2), but the Applicant also stated its July 28 and August 25 witness lists provide the requested information. The Applicant did present a witness list on July 28, but on August 25 only confirmed that there were no additions to its list. On September 28, 2006, the Applicant added to its witness list, in response to testimony proposed by the intervenors, and stated it would qualify Beng Leong and Phil Simmons as experts. The Applicant provided Mr. Simmons resumé on October 5, 2006, but has not yet provided Mr. Beng's resumé. The Applicant provided Ms. Santiago's resumé with her prefiled testimony. If the Applicant still proposes to call Mr. Beng as a witness, it must provide his resumé including his work address, employer, education and experience, and publications.

Ruling: CHA's motion to compel disclosure by the Applicant is granted with respect to the following things, as described above: (a) the operational data from the Applicant's additional composting facilities for which such data has not yet been provided; (b) the duration and dates of the projects listed in Ms. Santiago's resumé that involve noise analysis; (c) inspection of the user's manual (or similar document, if it has a different title) for the Cadna-A noise analysis program; (d) response to request for admission #14; (e) names and work addresses of all persons who worked at the facility while solid waste was present, whether City employees or employees of contractors operating the facility for the City; (f) identification of the persons who served as park manager while the facility has been in place; and (g) the resumé of Beng Leong, if the Applicant still proposes to call him as an expert witness. In all other respects, CHA's motion to compel disclosure by the Applicant is denied.

Discovery demanded of DEC Staff

CHA also transmitted a discovery demand to DEC Staff, who responded on August 25, 2006. The discovery demand was in the form of a mixture of interrogatories and requests for production. DEC Staff provided information in response to most of the questions, noting that CHA had not requested permission from the Administrative Law Judge (ALJ) to submit interrogatories but that DEC Staff was responding to them in order to facilitate the proceeding. In response to the requests for production, DEC Staff made documents available for inspection at the DEC Region 2 office, and stated that it had no documents responsive to some of the requests. DEC Staff also objected to some of the interrogatories and requests for production on the basis of irrelevance. It is my understanding that CHA reviewed documents at the Region 2 office in mid-September, 2006.

In its November 2, 2006 motion to compel, CHA focused on two categories of information that DEC Staff declined to provide: (1) materials that address DEC's policies and procedures governing its oversight of solid waste processing facilities; and (2) the qualifications and activities of those individuals who would be charged with enforcement of permit conditions, or who would be making certifications such as the coastal consistency certification.

In support of its motion, CHA asserted that "it has been ruled" (presumably in the Interim Decision) "that the intervenors may raise questions as to whether there would be compliance with the conditions and restrictions of an issued permit. There are two (2) aspects of this issue. First is whether the conditions in and of themselves are protective. Second is whether should there be non-compliance is there a mechanism for identifying the non-compliance and effecting compliance. It is to the second aspect that the intervenors' Discovery is relevant." (November 2, 2006 letter of Ronald J. Dillon, at 2). CHA also stated that the intra-agency documents concerning inspection of solid waste management facilities, described by DEC Staff as privileged, should be identified in detail so that CHA could move that they be reviewed by the ALJ or a third party.

In response to this motion, DEC Staff stated that there are no written policies or procedures specifically for inspection of compost facilities. DEC Staff noted it had provided to CHA a blank copy of DEC's inspection form for compost facilities. DEC Staff stated that internal documents exist generally concerning inspection of solid waste management facilities, but that "these are privileged and not discoverable, as they are internal agency

enforcement documents." DEC Staff also stated that its enforcement efforts, "whether past or future, are not adjudicable issues" and that its coastal consistency is also not an adjudicable issue.

Discussion

In its petition for party status, CHA had proposed adjudicating certain claims about litter and other problems during the prior operation of the facility, about other aspects of the Applicant's record of compliance with environmental laws, and about lack of enforcement of solid waste management regulations by DEC Staff and the Applicant (see, August 30, 2004 issues ruling, at 21 - 27). An issue for adjudication exists concerning odor, litter, dust and vectors (see, interim decision, at 13 - 16), but I excluded most of the proposed record of compliance and enforcement issues, and the Executive Deputy Commissioner excluded the remainder of these proposed issues (see, interim decision, at 15 - 17). Among other things, the interim decision stated that CHA's allegations concerning the Applicant's exercise of prosecutorial discretion in response to complaints about privately-owned waste facilities were not sufficient to raise questions about the Applicant's ability to operate its own yard waste composting facility in compliance with applicable requirements, and that "[t]he Department's enforcement procedures are also irrelevant to the issue of [the Applicant's] compliance history" (interim decision, at 17).

Thus, it is not necessary that the internal documents withheld by DEC Staff be specifically identified, nor that they be provided for my review with regard to whether they are privileged. The documents are not relevant to the issues that will be adjudicated.

The interim decision stated that DEC Staff's coastal consistency review did not require adjudication, although certain additional administrative review was required concerning this subject. There is no issue requiring adjudication concerning the coastal consistency determination. The qualifications of the person making the DEC coastal consistency determination are also not relevant to the issues that will be adjudicated.

CHA's discovery request sought production of documents concerning alienation of parkland (interrogatory #7 and requests for production #9 and #10). These requests are not relevant because this proposed issue will not be adjudicated (see, interim decision at 9 - 12). To the extent that CHA's motion seeks a

ruling requiring DEC Staff to provide this information, the motion is denied.

Ruling: CHA's motion to compel disclosure by DEC Staff is denied.

Expert witnesses

In the correspondence about both discovery and Mr. Boyd's participation in the hearing, as well as during the conference calls, the parties have stated opposing positions regarding whether the interim decision prohibits the intervenors from calling expert witnesses.

The Applicant and DEC Staff have asserted that the interim decision limits the intervenors to presenting only lay witness testimony concerning odor, litter, dust and vectors, and that because the intervenors failed to offer an expert witness on these subjects at the issues conference, they have been precluded from "bringing one into the adjudicatory hearing."² Baykeeper and CHA argue that the interim decision's discussion of the proposed testimony does not bar the intervenors from presenting expert testimony on these subjects, and that calling an expert witness in the present situation is also not prohibited under the regulations governing the hearing process.³

The parties expressed this disagreement during the September 20, 2006 conference call. In my September 27, 2006 memorandum to the parties, I stated my initial reaction was "that the Interim Decision was silent on this question, that it discussed presentation of fact witness testimony by the intervenors because that was the kind of testimony they had proposed, and that the Interim Decision does not preclude expert testimony. I stated [in the conference call] that if the Applicant or DEC Staff wishes to have such testimony precluded, a motion concerning this should be submitted." (9/27/06 memorandum, at 4).

Neither the Applicant nor DEC Staff submitted such a motion. Notwithstanding this, in subsequent correspondence these parties

² December 12 and 13, 2006 letters from Mr. Burger to ALJ DuBois; November 20, 2006 letter from John Nehila, Esq. to ALJ DuBois.

³ December 12, 2006 letter from Daniel E. Estrin, Esq. to ALJ DuBois; December 14, 2006 letter from Mr. Dillon to ALJ DuBois, at 5.

opposed CHA's motion to compel (DEC Staff November 20, 2006 correspondence) and sought to expedite scheduling the adjudicatory hearing (Applicant's December 12 and 13, 2006 correspondence) based in part on their interpretations that the interim decision precludes the intervenors from calling expert witnesses on certain issues.

The position asserted by the Applicant and DEC Staff is at odds with what I said in the conference call and the September 27, 2006 memorandum. Because this question has re-surfaced in the context of both discovery and the hearing schedule, and might be repeatedly debated among the parties as the hearing progresses, I am ruling on it here.

The issues conference took place on March 31, 2004. Following additional submissions by the parties, I made a ruling on August 30, 2004 that identified issues for adjudication and the parties that would participate in the adjudicatory hearing. Among the issues were odor, litter, dust and vector impacts of the facility and related control measures, as further described in the issues ruling (issues ruling, at 19 - 25). These issues relate to the project's compliance with 6 NYCRR 360-1.14(j) through (m). The August 30, 2004 issues ruling also requested or allowed the Applicant, CHA and DEC Staff to submit certain additional information. I made a supplemental ruling on issues on February 8, 2005. Appeals were taken, and the Executive Deputy Commissioner issued an interim decision on the appeals on June 14, 2006.

At the time of the issues conference, Baykeeper and CHA had proposed lay witness testimony concerning odor, litter, dust and vector impacts but had not proposed expert testimony on these subjects. The Applicant and DEC Staff opposed adjudication of these issues for several reasons, including that the intervenors had not offered expert testimony that would show the application, as conditioned by the draft permit, was inadequate (see, issues ruling, at 22, and arguments cited on that page). I stated that expert testimony would not be necessary in order to raise issues on these subjects, and that the offers of proof raised sufficient doubt about the project's compliance with part 360 such that a reasonable person would require further inquiry (issues ruling, at 23 -25).

The interim decision affirmed the ruling that these issues would be adjudicated, but modified the issue by stating that the adequacy of the City's "311" complaint line is not relevant to the permit issuance determination. The interim decision stated that a proposed intervenor need not offer expert testimony to

raise an adjudicable issue, and went on to discuss aspects of the issue to which lay testimony, as opposed to expert testimony, would be relevant (interim decision, at 13 - 16).

Although the Applicant asserted that the interim decision "explicitly limits the scope of intervenor's testimony on odor, dust, litter and vectors to lay testimony only," (December 12, 2006 letter), the Applicant's December 13, 2006 letter failed to identify where this is stated in the interim decision despite being challenged in Baykeeper's December 12, 2006 letter to provide a reference to an explicit limitation. In response, the Applicant's December 13 letter stated, "The language of that decision is clear on its face."

DEC Staff's November 20, 2006 letter quoted a portion of a sentence from the interim decision in this regard, but put it in a context that changed its meaning. DEC Staff's letter stated: "As stated below, the DEC Executive Deputy Commissioner ruled on June 14, 2006 that only lay testimony 'concerning the adequacy and effectiveness of control measures already in place [for odor, litter, dust and vectors], either at the facility at issue [Spring Creek] or at another facility operated in a manner substantially similar to the subject facility, are adjudicable issues. (Interim Decision at pg. 14)."⁴

What the interim decision actually said is as follows:

"The ALJ is correct that a proposed intervenor need not offer expert testimony to raise an adjudicable issue. However, where only lay testimony is offered, lay witnesses are competent to testify only *concerning the adequacy and effectiveness of control measures already in place, either at the facility at issue or at another facility operated in a manner substantially similar to the subject facility*. As noted above, the facility has been used for composting yard wastes. Review of the issues conference record reveals that some of the measures proposed in the draft permit to control odors, litter, dust and vectors have already been implemented at the facility. For example, the record reveals that the facility is already surrounded by a fence to prevent blowing litter. Intervenors' proposed testimony by lay witnesses concerning litter problems during the composting operations that have occurred on the site raises

⁴ DEC Staff's quotation from the interim decision included an opening quotation mark but no closing quotation mark.

an adjudicable issue requiring further inquiry concerning the fence's effectiveness in preventing litter.

"Although intervenors' offer of lay testimony is sufficient to raise adjudicable issues concerning the potential impacts of DOS's operations, the relevancy of such testimony will need to be examined during hearings. To the extent intervenors can establish that the impacts they seek to prove are caused by the alleged failure of current control measures at the facility, and that those current controls are substantially similar to the control measures imposed in the draft permit, such evidence would be relevant and competent on the issue of the adequacy of the control measures imposed in the draft permit. However, where the draft permit conditions impose control measures that go beyond those currently implemented at the facility, intervenors' lay testimony will be insufficient to challenge those conditions. For that, intervenors would need experts qualified to testify concerning the effectiveness of such control measures. Intervenors, however, have not offered to provide such expert testimony.

"Similarly, with respect to DOS's operation of the Canarsie facility, lay evidence concerning the effectiveness of the odor control measures implemented at that facility is relevant in this proceeding only to the extent those odor control measures were substantially similar to the odor control measures proposed in the draft permit. To the extent the control measures proposed in the draft permit differ from the control measures implemented at the Canarsie facility, the lay testimony offered by intervenors will not be relevant." (Emphasis added).

The interim decision does not preclude the intervenors from presenting expert witness testimony on this issue, but instead discusses limitations on the relevance and consequences of lay witness testimony if the intervenors provide no expert testimony.

The issues ruling and the interim decision dealt with the intervenors' offers of proof on this issue as they existed at the time the issues ruling was written. Based on offers of lay testimony alone, the intervenors raised a substantive and significant issue about the project's ability to comply with portions of part 360. If the intervenors now present expert testimony on that issue, in addition to lay witness testimony, this will result in a more complete record. It will also result in a more thorough examination of aspects of the project identified, by both the ALJ and the Commissioner, for further

inquiry with regard to how the project might need to be conditioned or modified in order to meet the relevant criteria.

Further, the Applicant has not been limited from providing post-issues conference information, including possible changes to the project. To date the Applicant has provided: (a) three post-issues conference submissions concerning noise, one of which was at my request (September 10, 2004 noise information; the January 23, 2006 "Final Noise Analysis Report" that the Applicant submitted on June 29, 2006; October 5, 2006 letter and table of "Revised Predicted Noise Levels Without Trommel"); (b) proposal for noise mitigation options consisting of either increasing the height of berms or restricting where night-time operations would occur (Final Noise Analysis Report, at 39); (c) a September 13, 2006 New York City local law that made several changes to the City's administrative code in relation to yard waste composting⁵; (d) a corrected New York City coastal assessment form; and (e) addition of two expert witnesses (Mr. Simmons and Mr. Beng) in response to Baykeeper's and CHA's witness lists.

In addition to the above, it is possible that DEC Staff may amend the draft permit. It is not unusual for DEC Staff to modify a draft permit, including doing so after the issues conference, and part 624 allows for this to occur.

Applicant and DEC Staff are not limited to what they had presented as of the issues conference, and similarly the intervenors' cases are not frozen at that stage. To the extent additional testimony is relevant to the issues already identified for adjudication, and is not unduly repetitious or otherwise inappropriate (see, 6 NYCRR 624.8(b)(1)(x)), it is not precluded solely because the witnesses were not identified at the time of the issues conference. The issues conference serves as a process for identifying issues that are substantive and significant, and therefore require adjudication, not as a means for restricting how a party will develop the record concerning those issues.

⁵ These changes included a requirement that generators of yard waste, except for persons engaged in a business that generates yard waste, shall "separate, tie, bundle or place into paper bags, or rigid containers" any yard waste set out for collection by the Applicant (local law attached with Mr. Burger's letter of October 25, 2006). This change may relate to the litter issue as well as to noise (see, issues ruling, at 24 - 25).

The often-quoted decision in Matter of Halfmoon Water Improvement Area No. 1 (Decision of the Commissioner, April 2, 1982) states, "the issues conference is not the point at which an intervenor should be deciding that it will have to locate an expert to substantiate the allegations made at the conference." The Halfmoon decision also states, "The issues or pre-hearing conference is the point at which the *subject matter* for the hearing is defined" (emphasis added.) In the present case, the intervenors substantiated their allegations to the extent that they raised issues concerning odor, litter, dust and vector impacts and control measures for these. While part 624 requires that witnesses be identified as part of an offer of proof in support of identifying an issue for adjudication (6 NYCRR 624.5(b)(2)(ii), demands for witness lists are made in the discovery period after service of the final designation of the issues (6 NYCRR 624.7(b)(2)). The final designation of issues, in the Spring Creek hearing, was the interim decision deciding the appeals of the issues ruling and supplemental issues ruling.

Although the witnesses who testify at adjudicatory hearings are often the same as those identified in the offers of proof, it can happen that additional or different witnesses testify without having been identified at the time of the issues ruling (see, Matter of Palumbo Block Company, Issues Ruling [February 9, 2001] at 22, and Decision of the Commissioner [August 18, 2003] at 23 - 24 of the hearing report accompanying the decision).

Ruling: The interim decision does not prohibit one or both intervenors from presenting an expert witness or expert witnesses on the issue of odor, litter, dust and vector impacts of the facility and related control measures.

Albany, New York
February 6, 2007

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

To: Persons on 9/27/06 service list