STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

May 8, 2007

DEC Application No. 2-6105-00666/00001

Summary

Concerned Homeowners Association and Ronald J. Dillon (collectively, "CHA") moved to exclude from the record of the hearing all data concerning materials delivered to or removed from the Spring Creek yard waste composting facility and all conclusions about the project's impacts that were based upon this data, arguing that the data were not accurate. CHA also moved that the City of New York be held in contempt for failure to provide information CHA sought in discovery. For reasons discussed below, both motions are denied. The Department of Sanitation of the City of New York ("Applicant"), however, is directed to provide additional information. Deficiencies in the Applicant's data and any failures to comply with rulings concerning discovery can be considered in weighing the evidence and in drawing inferences about the hearing record, and may also affect the hearing schedule.

Motion for contempt

On April 13, 2007, CHA moved that the City of New York be held in contempt for failure to provide materials CHA sought through discovery, after the February 6, 2007 ruling that required the Applicant to provide certain information to CHA in discovery. The motion cited a February 23, 2007 letter, sent by Michael Burger, Esq. on behalf of the Applicant, that placed limitations on CHA's review of the user's manual for the Cadna-A noise software used by a witness for the Applicant. The motion also stated that the Applicant failed to respond to a request for admission to which the February 6, 2007 ruling directed the Applicant to respond, and failed to provide other information the ruling directed the Applicant provide.

The motion also argued that the Applicant had provided to CHA incomplete operational information for its compost facilities, contrary to what the February 6, 2007 ruling required. Omissions cited by CHA included lack of data about

removal of materials from the compost facilities (as opposed to waste deliveries), omission of certain waste types, and lack of data about materials delivered to the facilities by agencies other than the New York City Department of Sanitation.

The motion sought that certain findings be made about the hearing process thus far, that the application be denied based upon the Applicant's actions and their impact on CHA's ability to present its case, and that inferences be drawn from the materials demanded but not provided. Alternatively, if the application is not denied, CHA requested that the adjudicatory hearing be postponed and the Applicant be directed to provide the requested information.

After reviewing the motion, I asked CHA to provide a copy of the February 23, 2007 letter cited in the motion, because I had not received that letter. Mr. Dillon provided the letter on April 19, 2007 by forwarding the February 23, 2007 electronic mail message from Mr. Burger to which the letter was attached. Although the letter itself stated, in the "cc" list, that a copy had been sent to me, the letter was only transmitted by e-mail and the e-mail was not copied to me in February.

On April 23, 2007, the Applicant responded to both the motion for contempt and CHA's motion to exclude certain information. The Applicant argued that CHA had never raised any of its objections with the Applicant before filing the motion. The Applicant stated that the Department of Environmental Conservation ("DEC") permit hearing procedures do not provide for parties to be held in contempt for failing to comply with a discovery demand, but instead allow for preclusion of the information or adverse inferences against the noncomplying party.[1] The Applicant responded to CHA's specific assertions about failure to provide information and argued it had complied with the February 6, 2007 ruling on discovery. The Applicant also argued that CHA had said it was willing to review the Cadna-A manual rather than making a physical copy of it, that nothing prevents CHA from taking notes on it, and that if CHA "would like to obtain a copy of the copyrighted material" the Applicant had already provided to CHA the internet address of the company that manufactures the software. The Applicant, in its April 23, 2007 letter, provided the address of the former manager of Spring

[1] Section 624.7(d)(2) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR 624.7(d)(2)).

Creek Park and stated it was unaware of persons who had worked at the facility beyond those already identified to CHA.

The arguments made by CHA in support of its two motions overlap to some extent, particularly with regard to the sufficiency of the Applicant's response to CHA's discovery requests related to operational data from the Applicant's compost facilities. A review of the recent correspondence shows that the Applicant failed to respond to certain portions of the discovery requests for which I granted CHA's motion to compel discovery.

If the Applicant disagreed with the February 6, 2007 ruling on discovery, it could have noted its objections while complying with the ruling or it could have requested leave to appeal the ruling to the Commissioner (see, February 8, 2007 memorandum to the parties concerning appeals; see also, 6 NYCRR 624.8(d)). The Applicant did not seek leave to appeal, did not provide portions of the data, and even failed to send to me the February 23, 2007 letter in which it limited CHA's use of the user's manual and objected to answering a request for admission I had directed it to answer.

The permit hearing procedures of 6 NYCRR part 624, and the authority of presiding officers under section 3 of the State Administrative Procedure Act, do not authorize DEC administrative law judges (ALJs) to hold parties or individuals in contempt.

Part 624 does, however, authorize ALJs to establish rules for and direct disclosure under the procedures of 6 NYCRR section 624.7 (6 NYCRR 624.8(b)(1)(vii)). The ALJ may direct that any party failing to comply with discovery after being directed to do so by the ALJ suffer preclusion from the hearing of the material demanded. A failure to comply with the ALJ's direction will allow the ALJ or the Commissioner to draw the inference that the material demanded is unfavorable to the noncomplying party's position (624.7(d)(2)). Part 624 also authorizes the ALJ to schedule the hearing, including recesses and adjournments, and to take any measures necessary for maintaining order and the efficient conduct of the hearing (6 NYCRR 624.8(b)(1)(ii) and (xv)). In the present case, this may involve postponing certain testimony or allowing certain witnesses to be recalled for additional testimony if information that should have been provided in discovery was not available in a timely manner.

I have reviewed the recent correspondence, the February 6, 2007 discovery ruling, and earlier correspondence related to the current disputes. The correspondence is extensive, and only a limited time is available for preparing the present ruling in

view of the hearing schedule. If there are actions I have directed the parties to take that are not re-stated in this ruling and memorandum, the parties are not relieved from complying with those earlier directions on the basis of their omission from this document.

The intervenors and the Applicant have argued extensively about whether documents and data extracts concerning delivery and removal of materials ("operational data") at the compost facilities owned and/or operated by or for the City of New York are relevant to issues identified for adjudication, particularly the issue whether or not the project would comply with the noise standards for solid waste management facilities found at 6 NYCRR 360-1.14(p). The Applicant has argued that most of these data are only relevant to a proposed traffic issue that was not identified for adjudication, while the intervenors have argued that these data are relevant to the noise issue as well.

In its April 23, 2007 letter, the Applicant states, at page 2, "Here, the issue of truck traffic at Spring Creek was held by you [the ALJ] not to be an adjudicable issue. *See* August 30, 2004 Issues Ruling at 39. Indeed, you specifically rejected the issue proposed in Baykeeper's[2] supplemental petition regarding 'the Applicant's estimates of traffic and traffic analysis.' *Id*." The April 23 letter goes on to cite the Applicant's "estimates of traffic and traffic analysis" in certain pages of the engineering report that discuss numbers of trucks at the facility, and argues that although the February 8, 2005 supplemental issues ruling directed the Applicant to include trucks in the noise analysis, it did not revive the "challenge to the truck traffic analysis contained in the Engineering Report."

The Applicant's April 23, 2007 letter misquotes the issues ruling and ignores subsequent rulings. Page 39 of the issues ruling actually states, "In its May 20, 2004 supplemental petition (at 3), Baykeeper proposed testimony, by Christopher Boyd of the New York City Comptroller's Office, that the Applicant's estimates of traffic and analysis of traffic impacts are not accurate" (emphasis added). At the time of the issues ruling, CHA and Baykeeper had proposed issues concerning traffic that dealt with the adequacy of certain intersections, truck use of residential streets, the adequacy of traffic analysis in the application, and an assertion by CHA that DEC records document more truck traffic than that claimed by the Applicant (Issues

[2] New York/New Jersey Baykeeper ("Baykeeper") is the other intervenor with full party status in this hearing.

ruling at 39). Based on the offers of proof in the record at that time, and DEC's lack of jurisdiction over adequacy of roads and violations of city traffic restrictions, I ruled that the proposed traffic issues were not issues for adjudication in this hearing. This proposed issue was focused on traffic impacts, not trucks as a source of noise.

At the time of the August 30, 2004 issues ruling, no party could have challenged assumptions made by the Applicant about quantifying trucks as a source of noise because the application materials in the record at that time (and indeed at the time of the February 8, 2005 supplemental issues ruling) did not include such assumptions in their discussion of noise and contained only limited information about noise (issues ruling, at 41 - 43; supplemental ruling, at 12 - 16). In response to noise information submitted by the Applicant after the issues ruling, CHA presented criticisms including that truck noise was not taken into account, and an offer of proof that included testimony by Mr. Boyd about assessing the amount of truck traffic to include in the noise analysis. Based upon the record as it had been further developed by that time, I ruled on February 8, 2005 that the noise issue was adjudicable. On June 14, 2006, the Executive Deputy Commissioner upheld this ruling, stating among other things, "As the ALJ noted, intervenors identified deficiencies and omissions in DOS's noise analysis that reasonably require further inquiry" (Interim Decision, at 18).

Information about trucks delivering and removing materials at the site would be relevant both to traffic impacts on local intersections and similar "traffic" issues, and to the assumptions to be made in analyzing noise at the site. The exclusion of the traffic issue does not make the truck-related assumptions in the Applicant's noise analysis immune from examination.

With regard to the operational data provided by the Applicant thus far, the main arguments raised by CHA are that the Applicant provided data on waste deliveries but not on removal of materials, that it omitted certain types of waste material (reporting Sanitation Department leaf deliveries and Christmas trees, but not other wastes such as commercial landscaper waste and manure), and that it omitted deliveries by entities other than the Sanitation Department.

CHA stated there is evidence that deliveries of materials were made for which the materials were not weighed and no weight was recorded (Motion for contempt, at 5 - 6). CHA also argued that the operational records provided to it by the Applicant are

defective, contain duplicate entries and contain internally inconsistent information. CHA argued that the Applicant was required to provide complete and accurate operational data, and that because such data was not provided the application should be denied.

The Applicant's April 23, 2007 letter presented numerous arguments about why the operational data not yet provided to CHA was not subject to discovery, including arguments about relevance, interpretations of the February 6, 2007 discovery ruling, and claims that CHA had never before requested the documents.

CHA replied on April 25, 2007, disputing the Applicant's arguments. Baykeeper's April 24, 2007 letter disputed the Applicant's argument about relevance, mainly related to the traffic/noise question discussed above. The Applicant submitted an additional letter (dated April 25, 2007 but e-mailed late on April 26, 2007) in response to these letters from CHA and Baykeeper. The Applicant's April 25 letter stated, among other things, that "the additional, previously unrequested data now sought by Mr. Dillon - data regarding removals of material, delivery of commercial waste and horse manure, and deliveries by other City agencies - either does not exist, or else is maintained separately from the SCAN system data. To the extent such data exists, [the Applicant] will provide it to intervenors as soon as possible." The letter also stated that the Applicant had provided intervenors the SCAN system data CHA sought.

CHA responded further on April 30, 2007, stating it had not been provided the data sought in CHA's July 27, 2006 discovery request and September 29, 2006 supplemental request, and reproducing as footnotes sections of the discovery requests. CHA's letter included an additional request for computer code, plus identification and resumés of persons involved, for the Applicant's actions in providing data from the SCAN database to CHA.

On May 1 and May 4, 2007, the Applicant sent e-mail messages transmitting summaries of deliveries to certain composting sites by two other city agencies and commercial landscapers, stating that the latter data is based on the "PCLS data," maintained separately from the SCAN system. As recently as May 7, 2007, it appeared that the Applicant had not yet provided information necessary to de-code the landscaper data, and discovery about other aspects of the operational data remained incomplete.

The Applicant has not complied with aspects of the February 6, 2007 discovery ruling, nor with earlier direction in my September 27, 2006 memorandum to the parties. In that memorandum, I noted that during a conference call on September 20, 2006, I had directed the Applicant to provide the data from the SCAN system that Baykeeper and CHA had requested, in comma separated variable format.

Although the Applicant's April 25, 2007 letter describes data regarding removals of material, delivery of commercial waste and horse manure, and deliveries by other City agencies as "previously unrequested data," CHA's discovery requests asked for documents that included all these categories.

The Applicant's April 23, 2007 letter, at page 5, asserted that the February 6, 2007 ruling addresses only the delivery of material to compost facilities and does not address material removal. The ruling, however, states that CHA's September 29, 2006 supplemental discovery request sought "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" (Ruling, page 3). The ruling goes on to state, "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" (Ruling, at 4).

In its April 23, 2007 letter, the Applicant suggested that the ruling limited discovery to "the year, date and time waste loads were received, and the weight and type of waste material" and states that the other data subsets "were never before discussed" (Letter, at 3). The ruling did not limit discovery in this manner, but instead cited these data subsets as part of the reasons why the operational data sought by CHA is relevant to an issue identified for adjudication (Ruling, at 4). The Applicant has not identified for the record the full range of data subsets in its computerized and paper records of materials deliveries and removals at the compost facilities, and the lack of discussion about each category does not relieve the Applicant from providing the documents and electronic records it has been required to provide.

The Applicant cited the ruling's statement (at page 9) that "the Applicant does not need to identify the persons who removed end products from the facility" in support of its position that it was not required to provide data about removal of materials from the compost facilities. This portion of the ruling,

however, did not pertain to operational data about waste removal but instead addressed CHA's Requests for Production Nos. 10 and 11, that sought the names, addresses and telephone numbers of persons removing "the resultant end product," the names, addresses and telephone numbers of the owners of vehicles removing waste, and the type of vehicle registration of these vehicles (Ruling, at 7 - 9).

With respect to operational data about waste categories other than Sanitation Department leaf deliveries and Christmas trees, the Applicant's April 23, 2007 letter claims it is unclear what other "yard waste" CHA refers to, beyond horse manure and landscaper deliveries, and that this material was not previously requested (Letter, at 5). The draft permit, however, at page 1, would authorize the Applicant to accept only "leaves, grass clippings, discarded Christmas trees, brush, logs, trees, stumps, horse manure, and wood chips (hereinafter, 'yard waste')." Section 360-1.2(b)(185) of 6 NYCRR contains a definition of "yard waste." The list of material codes for the SCAN system, sent with Mr. Burger's October 4, 2006 e-mail, lists material types that overlap with these descriptions, including "grass (compost)". Further, CHA's September 29, 2006 supplemental discovery request sought data regarding "material" delivered to or removed from these facilities (Requests for Production Nos. 112 through 115). These requests pertained to materials delivered or removed, regardless of what entity delivered or removed them.

The ruling required the Applicant to provide the data it had that responded to a discovery request. If the Applicant does not have complete and/or accurate data concerning waste deliveries and material removal from its facilities, such data could not be provided in discovery. Indeed, it might be impossible to reconstruct a complete record of the operational data if it was never recorded by the Applicant at the time the compost operations occurred. The absence of such data, however, could be weighed in evaluating the evidence presented by the Applicant that relates to or depends on these data.

CHA's April 30, 2007 letter to me asked leave to serve additional discovery demands on the Applicant, for a copy of computer code used to generate electronic files the Applicant provided to CHA, and names, qualifications and other information concerning the persons involved with certain aspects of the Applicant's data processing. I am not granting this request for additional discovery at this time.

With respect to the Cadna-A user's manual, CHA's September 29, 2006 supplemental discovery request asked the Applicant to produce a copy of the Cadna-A user's manual (Request for production 119). In its November 2, 2006 motion to compel discovery, CHA stated it would be willing to review the manual rather than make a physical copy of it. On February 6, 2007 I ruled that CHA would be allowed to inspect the user's manual for Cadna-A (Ruling, at 5 and 9). I did not specifically allow nor prohibit copying of the manual by CHA , as that was not in dispute at that time. In its February 23, 2007 letter, the Applicant told CHA it would not be allowed to make any copies of any portions of the manual. CHA, in its April 13, 2007 motion for contempt, objected to this restriction on its use of the manual.

Recently, in an e-mail sent on the afternoon of May 2, 2007, Baykeeper stated it and CHA had reviewed the Cadna-A manual the previous week and decided it (Baykeeper) would likely need to use the manual during direct or cross-examination. Baykeeper requested that the Applicant provide it a copy of the manual, and stated the manual is responsive to Baykeeper's previous discovery requests to the Applicant. In an e-mail later on May 2, 2007, the Applicant stated that "HDR, the City's consultant on noise, has determined that copyright laws prohibit it from allowing copies of the manual to be made and distributed," but stated the Applicant would make available at the hearing the copy of the manual HDR had made for CHA's review. Baykeeper responded that the Applicant should be directed to provide the manual to all of the intervenors forthwith, but that Baykeeper would not object to a protective order requiring any use of the material to be limited to purposes of the hearing.

The DEC permit hearing procedures allow for document discovery in general conformance with Civil Practice Law and Rules (CPLR) section 3120(1)(i) (6 NYCRR 624.7(b)(1)). CPLR 3120(1)(i) provides for notices or subpoenae "to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served."

The reason given by the Applicant for withholding or limiting access to the Cadna-A manual is that the document is copyrighted. As stated in the February 6, 2007 ruling on discovery, a document is not exempt from disclosure solely due to its being copyrighted (Ruling, at 5). The Applicant has not shown why the Cadna-A user's manual would be exempt from disclosure, why restrictions should be placed on the other

parties copying it for use in this hearing, or why photocopying it for use in this hearing would not be allowed as "fair use" of a copyrighted work (see, 17 U.S. Code 107; Evans v Lerch, 182 Misc 2d 887, 890, 700 NYS2d 400, 402 [Sup Ct, New York County 1999]). As already stated in my May 3, 2007 e-mail to the parties, the Applicant is directed to provide copies of the Cadna-A users manual to CHA and Baykeeper forthwith, in view of the hearing schedule and the deadline for prefiled testimony. The parties are reminded that their use of the manual is to remain within the "fair use" allowed under 17 USC 107.

The Applicant's February 23, 2007 letter, which I received from CHA on April 19, 2007, stated that the Applicant objected to responding to CHA's request for admission number 14 ("Admit that the Old Mill Creek and its tributary, Spring Creek, are parts of the Jamaica Bay ecosystem"). In my February 6, 2007 ruling on discovery, I had already directed the Applicant to respond to that request for admission (Ruling, at 7). The Applicant is again directed to respond to that request for admission, on or before May 11, 2007. If the Applicant does not respond by that date, the statement will be deemed admitted (Civil Practice Law and Rules 3123(a)).

CHA's motion for contempt asserted that the Applicant failed to provide the park manager's work address and work telephone numbers although this information was required by the February 6, 2007 ruling. The Applicant provided this information in its April 23, 2007 letter, although it suggested the information had not been required. The information was required under the February 6, 2007 ruling, both in the discussion at the top of page 9 and in the "ruling" section at the bottom of that page that granted the motion to compel disclosure "with respect to the following things, as described above" (emphasis added).

CHA's motion for contempt also stated the Applicant failed to provide a complete list of names and work addresses of persons who worked at the facility while solid waste was present, whether City employees or employees of contractors operating the facility for the City. Mr. Dillon stated he was aware of one specific individual who worked at the facility but had not been identified, plus others not known by name. The Applicant responded that it was unaware of any other persons who worked at the facility at that time.

The Applicant must check to make sure that the list it provided is complete and provides the information required by the ruling. This review must include checking about employees of other New York City agencies (for example, the Parks Department)

and of contractors working for other city agencies. The Applicant is to provide any additional names and work address, or confirmation that the existing list is complete, by May 11, 2007.

For reasons discussed above, the Applicant has not yet complied with the February 6, 2007 ruling. The next question is what consequences follow from this failure to comply. As noted above, it is not within my authority to hold a party in contempt. It is also not appropriate to terminate the adjudicatory hearing and to recommend denial of the application at this point in the process, because the record would need to be developed further in order to evaluate the significance of the omitted disclosure, even assuming the Applicant does not fully comply with the February 6, 2007 ruling on discovery.

Two consequences will occur, however. To the extent the Applicant was required to provide documents (including electronic records) and responses but fails to provide these, the parties can present arguments regarding inferences the Commissioner and I should draw. In addition, once the currently scheduled hearing dates have occurred and the pending discovery has been completed, I will consider requests that may be made to re-call witnesses for additional direct testimony and/or cross-examination to cover questions that could not be asked due to lack of, or delay in receiving, the materials required to be disclosed. I anticipate keeping the hearing record open until I determine that this is resolved.

Motion to exclude

On April 11, 2007, CHA moved to exclude all materials delivery and materials removal data. CHA's motion also sought to exclude "all statements, conclusions, findings, studies, et al." based on such data, with prejudice to the Applicant, essentially excluding the Applicant's statements regarding the issues identified for adjudication and regarding the coastal consistency review. CHA's motion was based on its assertion that the materials delivery and removal data provided by the Applicant thus far are internally inconsistent, defective and contain duplicate copies of entries.

The Applicant, in its April 23, 2007 response, joined in moving that the data should be excluded, but for a different reason: its assertion that these data are irrelevant to the issues identified for adjudication.

CHA's motion and the Applicant's motion are both denied. The data that the Applicant was required to provide is relevant. To the extent the Applicant failed to provide all the discovery it was required to provide, those omissions should be in the process of being corrected, as discussed above. If the data itself contains deficiencies, inconsistencies and other defects in reporting deliveries and removals of materials from the Applicant's compost facilities, such defects and omissions could be weighed in evaluating the evidence presented by the Applicant that relates to or depends on these data.

The adjudicatory hearing remains scheduled to begin on May 15, 2007. There is testimony that can begin even though some discovery is still pending. CHA's request for oral argument on the two motions addressed in this ruling is denied. It is premature to make findings of fact in this hearing, including the findings proposed in CHA's April 13, 2007 motion.

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Albany, New York
May 8, 2007

Susan J. DuBois
Administrative Law Judge

To: Persons on 9/27/06 service list