

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 25, 2007

DEC Application No. 2-6105-00666/00001

The present ruling responds to an offer of proof submitted by New York/New Jersey Baykeeper (Baykeeper) and to responses from the New York City Department of Sanitation (Applicant), Staff of the New York State Department of Environmental Conservation (DEC Staff), and the consolidated party of Concerned Homeowners Association and Ronald J. Dillon (CHA). All of the responses opposed the position taken by Baykeeper, but for different reasons.

The offer of proof concerns testimony that Baykeeper states would have been given by Christopher Boyd, who was proposed as an expert witness by both Baykeeper and CHA in the hearing on the above application. The adjudicatory hearing had been scheduled to begin on October 16, 2006. On October 10, 2006, Daniel E. Estrin, Esq. submitted a motion on behalf of Baykeeper to adjourn the adjudicatory hearing. The motion requested an adjournment so that Baykeeper could locate and retain a new expert witness to testify at the hearing. The motion was accompanied by Mr. Estrin's affirmation that made certain allegations concerning a decision by Mr. Boyd to withdraw from testifying as a witness on behalf of intervenors in this hearing. The affirmation made reference to the New York City Law Department having "tampered with intervenors' expert witness" (Estrin 10/10/06 affirmation, paragraph 6), and to Mr. Boyd having determined "that his continued participation in this matter could jeopardize his career or otherwise have negative impacts on his life and on the welfare of his family" (Estrin 10/10/06 affirmation, paragraph 4).

The Applicant did not object to the requested adjournment, and the hearing was adjourned without date on October 10, 2006. During a conference phone call on that date, Michael Burger, Esq. (on behalf of the Applicant) said the Applicant disagreed with Baykeeper's description of why Mr. Boyd withdrew from the hearing, and would respond to the allegations.

On October 17, 2006, Mr. Burger submitted an affirmation in response to Baykeeper's motion to adjourn. Mr. Burger's

affirmation described Mr. Estrin's affirmation as having "set forth several ill-considered and baseless allegations" regarding Mr. Boyd's withdrawal from the hearing (Burger affirmation, paragraph 2). Mr. Burger's affirmation also stated, "Mr. Estrin's unprofessional and unsubstantiated affirmation alleges that the Law Department tampered with Baykeeper's witness, and threatened and intimidated him, all in an effort to force Mr. Boyd to remove himself from the proceeding. These allegations are false." (Burger affirmation, paragraph 3).

Later on October 17, 2006, Mr. Estrin submitted a reply affirmation that made additional allegations, based upon information and belief, and cited communications he had with a then-unnamed attorney in the New York City Comptroller's office and an additional unnamed source "with personal knowledge" of the alleged transactions between the NYC Law Department and the NYC Comptroller's office. Mr. Estrin's October 17, 2006 affirmation states, "NY/NJ Baykeeper stands by its allegations, including the use of the term 'witness tampering,' and believes that the plain language of the New York Penal Code quite clearly supports such terminology. See N.Y. Penal Code § 215.10 (copy annexed as Exhibit A)." (Estrin 10/17/06 affirmation, paragraph 4).

On November 6, 2006, I notified the parties that this situation had been referred by the DEC Office of Hearings and Mediation Services to the DEC Acting General Counsel and the Assistant Commissioner for Public Protection, for appropriate action. It is my understanding that an investigation is ongoing, but I do not know when the outcome of the investigation will be known.

On November 1, 2006, CHA moved for "a directed ruling for a denial of the permits sought by the applicant." Among the reasons CHA presented in support of its motion was the allegation that the Applicant tampered with CHA's expert witness. I denied the motion, in a ruling dated November 21, 2006. At that time, Baykeeper had stated it was attempting to find an expert witness to replace Mr. Boyd. The ruling stated, "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" (11/21/06 ruling, at 5).

On April 16, 2007, Baykeeper notified the parties and me that it intended to proffer Brian Ketcham, P.E. to offer opinion testimony regarding "the reasonableness (or lack thereof) of certain assumptions upon which the conclusion set forth in the applicant's noise analysis are based." On May 1, 2007, Baykeeper stated it was negotiating with an additional expert witness, Ellen Z. Harrison of the Cornell Waste Management Institute, to testify on the remaining issues in the hearing. Baykeeper's May 8, 2007 witness list confirmed that it would call Ms. Harrison. CHA stated, in a May 8, 2007 e-mail and possibly earlier, that it had relied on Mr. Boyd for expert testimony and was no longer able to present expert testimony.

The adjudicatory hearing began on May 15, 2007.¹ During cross-examination of the Applicant's first witness, Baykeeper posed questions that related to the circumstances of Mr. Boyd's withdrawal from the hearing. The Applicant objected to this line of questioning. I initially directed Baykeeper to move to its other questions for that witness, and later in the day I stated I would not allow questions at that time about the circumstances of Mr. Boyd's withdrawal. Instead, I would allow Baykeeper to present an offer of proof about inferences Baykeeper would seek to have the Commissioner and the administrative law judge draw if Mr. Boyd's participation was indeed tampered with by the Applicant. I also allowed for a response by the Applicant to the offer of proof.

On May 16, 2007, Baykeeper stated it would not present testimony by Mr. Ketcham, because he did not have time to participate, but would instead present an offer of proof concerning testimony Mr. Boyd would have provided.

Baykeeper submitted its offer of proof in writing on May 18, 2007, consisting of an affirmation by Mr. Estrin, his description of the opinions Mr. Boyd communicated to him on the day before Mr. Boyd withdrew from the hearing, Baykeeper's expert disclosure concerning Mr. Boyd, and Mr. Boyd's resumé. Baykeeper's offer of proof stated Mr. Boyd was of the opinion that certain statements in the application were incorrect or were based upon assumptions

¹ The Office of Hearings and Mediation Services does not have the transcript of the May 15 and 16, 2007 adjudicatory hearing dates at present and this ruling's statements about the hearing are based on my notes and memory.

that disregarded the Applicant's own data about how its compost facilities operated. The offer of proof included statements about numbers of truck deliveries, quantities of waste, the timing of waste deliveries, and whether trucks could indeed queue within the facility.² Mr. Estrin's May 18, 2007 affirmation incorporated by reference his October 10 and 17, 2006 affirmations and also identified the New York City Comptroller's Office attorney mentioned in Mr. Estrin's October 17, 2006 affirmation. The recent affirmation asked that negative inferences be drawn against the Applicant including that Mr. Boyd's testimony would have been damaging to the Applicant's position.

CHA replied on May 21, 2007, opposing inclusion of the offer of proof into the record of the hearing. CHA stated Mr. Boyd believed he needed "to divorce himself completely from these proceedings" in response to threats against himself and his family. CHA stated that Mr. Dillon, both individually and on behalf of Concerned Homeowners Association, had promised Mr. Boyd to do nothing that would cause Mr. Boyd's continued involvement in this matter. CHA stated that Baykeeper's offer of proof is premature on the basis that the Applicant has not yet made a prima facie case. CHA also stated that data necessary to the intervenors is either part of the record or can be made available without Mr. Boyd's involvement.

The Applicant replied on May 22, 2007, stating there is no basis in the DEC permit hearing regulations for drawing negative inferences against a party "due to the voluntary withdrawal of another party's expert witness." The Applicant incorporated by reference Mr. Burger's October 17, 2007 affirmation. The

² The offer of proof, at page 5, mischaracterizes the engineering report with respect to the number of trucks the report states could queue within the facility, identifying this as maximum of 10 to 12 trucks. The engineering report actually would predict, at page 4-10, that a total of 15 to 17 trucks could queue within the facility (one on the scale, four behind it on the entrance road, and "an additional 10 to 12" in "the 56 by 80 foot area to the northwest of the scale"). Notwithstanding Baykeeper's misstatement, the 34 trucks Baykeeper states came into the facility in one hour during the Applicant's operation of the Spring Creek facility in 2001, a season when it received a substantially lower quantity of waste than would be allowed under the permit, along with other assertions by Baykeeper would call into question assumptions in the application materials including ones related to noise impacts.

Applicant stated it had not objected to an adjournment that allowed Baykeeper time to locate a replacement expert witness, that Baykeeper had then located Mr. Ketcham who subsequently decided not to participate, and that Baykeeper was not looking further for an expert to replace Mr. Ketcham. The Applicant speculated that Mr. Ketcham had withdrawn because he decided there was no case to be made against the Applicant. The Applicant presented arguments that Mr. Boyd is not an expert in "truck traffic analysis" and that the proffered testimony is irrelevant to the issues identified for adjudication. The Applicant stated the subject of Mr. Boyd's "purported opinions" does not require expertise and that the fact-finders could understand the facts and form a reasonable opinion themselves.

DEC Staff's reply, dated May 23, 2007, stated that "expert testimony about traffic" is not required or relevant in this hearing. DEC Staff also stated Baykeeper's offer of proof indicates Mr. Boyd would have provided factual testimony about truck data in New York City's "SCAN" system and the application materials, and that the proffered testimony could be introduced through any competent lay witness.

Based upon the above submissions, it is not necessary to delve further into determining why Mr. Boyd withdrew from the hearing or deciding on inferences to be drawn based upon his withdrawal. As noted above, Baykeeper's offer of proof states Mr. Boyd was of the opinion that certain statements in the application were incorrect or were based upon assumptions that disregarded the Applicant's own data about how its compost facilities operated. The offer of proof cites the Applicant's data, and statements in the application and the noise study, that were the basis for the opinions. Most, if not all, of the opinions are actually conclusions one could evaluate by looking at the cited documents themselves, or totals calculated from those documents, rather than being expert opinions.

Mr. Boyd's testimony would not have been necessary in order to include in the record the documents on which he based his conclusions, and to include in the record total values he or others may have calculated from those documents. The documents themselves either are already in evidence (the application and engineering report), will probably be received in evidence (the noise study), or could be put in evidence by stipulation between the parties or by testimony of a fact witness. This last group of documents consists of documents the Applicant provided to Baykeeper in discovery (for example, records of waste deliveries at Spring Creek and other Department of Sanitation compost facilities), apparently prior to Mr. Boyd's withdrawal from the

hearing. The factual information cited in the offer of proof is relevant to the issues identified for adjudication.³ Assuming the authenticity of this information is shown, the Commissioner and I can evaluate this information, with the record as a whole, in finding facts and drawing conclusions.

If Mr. Boyd's testimony is not necessary, it will not be necessary for the record of this hearing to include evidence concerning the circumstances of Mr. Boyd's withdrawal from the hearing.

/s/

Albany, New York
May 25, 2007

Susan J. DuBois
Administrative Law Judge

To: Persons on 9/27/06 service list

³ The Applicant's arguments about relevance were already discussed in my February 6 and May 8, 2007 rulings, and found to be without merit.