

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 ON
ADDITIONAL
PROPOSED ISSUE

November 20, 2007

DEC Application No. 2-6105-00666/00001

The present ruling concerns an offer of proof submitted by New York/New Jersey Baykeeper ("Baykeeper") on September 27, 2007. The offer of proof concerns the replacement of Organic Recycling, Inc. ("ORI") by WeCare Organics, LLC ("WeCare") as the operations contractor for the proposed Spring Creek yard waste composting facility. Baykeeper argued that information in WeCare's proposal raises an issue about whether WeCare will be able to operate the facility in compliance with the applicable regulations or, alternatively, that WeCare's proposal is relevant to existing adjudicable issues.

Background

The hearing on this application began in March 2004.¹ On August 30, 2004, I made a ruling ("issues ruling") that identified certain issues for adjudication in the adjudicatory portion of the hearing, and identified the parties that would participate. The issues ruling also provided for the parties to submit additional information on certain proposed issues. Following these submissions, I made a ruling on February 8, 2005 ("supplemental issues ruling"). Various parties appealed the rulings. On June 14, 2006, the Executive Deputy Commissioner issued an interim decision that decided the appeals and determined the scope of the adjudicatory hearing.

Following discovery and adjournments, testimony in this hearing began on May 15, 2007 and continued on 11 additional days, with October 25, 2007 being the most recent hearing date. On June 22, 2007, between the fourth and the fifth days of the adjudicatory hearing, John Nehila, Esq., on behalf of DEC Staff,

¹ The hearing is governed by the Department of Environmental Conservation's ("DEC's") permit hearing procedures, part 624 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR part 624).

informed the parties and me that the New York City Department of Sanitation ("Applicant") had notified DEC Staff that management of the Applicant's composting sites would be transferred from ORI to WeCare effective July 1, 2007. DEC Staff had received this notification in a letter dated June 21, 2007 from the Applicant to DEC Region 2.

As of June 21, 2007, the draft permit for the Spring Creek facility identified the permittee as "NYC Department of Sanitation, John Doherty, Commissioner, as owner & operator, and Organic Recycling, Incorporated, Beng Leong Ooi, President, as operations contractor" (Exhibit 30 of the hearing record). The issued permits for the Applicant's Fresh Kills and Soundview compost facilities also identified the permittees in this manner.

On June 25, 2007, the consolidated party of Concerned Homeowners Association and Ronald J. Dillon ("CHA") moved for adjournment of the June 28, July 11 and July 12 hearing dates, in view of the new information about the operations contractor. Baykeeper joined in the motion insofar as it sought adjournment of the June 28 date. DEC Staff and the Applicant opposed the request for adjournment. On June 25, 2007, prior to ruling on whether the hearing would be adjourned, I wrote to the Applicant and inquired whether the Applicant had applied to transfer the Spring Creek permit application to DOS and WeCare, under the DEC policy on permit transfers.² I also asked whether the proposed operation of the Spring Creek composting facility by WeCare would differ from the operation described in the application, as modified by subsequent correspondence from the Applicant and as conditioned by the draft permit.

On June 26, 2007, the Applicant responded that it had not formally submitted an application form to DEC to transfer the pending permit application to WeCare, nor had DEC Region 2 requested that this occur. The Applicant stated it had notified DEC Staff that WeCare was selected to replace ORI, and that a meeting between the Applicant and DEC Staff was scheduled for June 27, 2007 after which the Applicant anticipated DEC Staff would approve the proposed transfer. The Applicant also stated that operation of the Spring Creek facility would follow the exact same procedures as proposed by the Applicant and conditioned by the draft permit.

² Program Policy DEP-01-1, Transfers of Permits and Pending Applications. "DEP," in this context, stands for the DEC's Division of Environmental Permits.

As stated in a June 26, 2007 memorandum to the parties, I denied the intervenors' request for adjournment of the June 28 hearing date, and the hearing went forward on June 28, 2007. During the hearing, Baykeeper and CHA asked for the materials submitted by WeCare and ORI in response to the Applicant's Request for Proposals (RFP)³ for operation of its yard waste composting facilities, as well as evaluation sheets. The Applicant questioned the relevance of this information and stated the request was a stalling tactic, but also stated it would provide access to the documents that were publicly available and not privileged. DEC Staff argued that the change in operations contractors was not relevant to the issues in the hearing. I stated that the hearing would proceed as scheduled on July 11 and 12, and asked the parties to facilitate review of the information requested by the intervenors (6/28/07 Transcript ("Tr.") 101-113).

In letters dated June 29, 2007, DEC Staff approved WeCare as the operations contractor for the Fresh Kills and Soundview yard waste composting facilities, and acknowledged that WeCare is the proposed operations contractor of the Spring Creek yard waste composting facility. On July 10, 2007, DEC Staff notified the Applicant that the permits for the Fresh Kills and Soundview yard waste composting facilities were revised to identify the permittee of each permit as "NYC Department of Sanitation and John Doherty, Commissioner, as owner and operator" and that WeCare is the operations contractor of both facilities.

At the hearing on September 20, 2007, Baykeeper stated that the documents it requested on June 28 were made available for review shortly after the change in operations contractors, and that Baykeeper had requested copies and received them on September 19, 2007. Baykeeper proposed to make an offer of proof regarding a new hearing issue concerning the change in operations contractors (9/20/07 Tr. 197 - 199). Baykeeper submitted this offer of proof on September 27, 2007. The other parties replied on October 5, 2007.

Offer of proof regarding operations contractor

Baykeeper's September 27, 2007 offer of proof argued that "WeCare's lack of experience in the operation of open-air turned-windrow composting facilities in urban environments and WeCare's

³ The RFP is Exhibit 38, in evidence in the hearing record.

absurdly low bid to operate the City's composting facilities raise significant doubts that the facility can be operated within the parameters of" 6 NYCRR part 360 [capitalization omitted]. Baykeeper also argued that "even if the change of contractor does not give rise to an independent adjudicable issue, WeCare's lack of experience and radically lower-priced proposal are relevant to existing adjudicable issues" [capitalization omitted].

Baykeeper cited a comparison of the cost proposals submitted by ORI and WeCare for a portion of the tasks identified in the Applicant's RFP for operating its compost facilities, and noted that WeCare's cost proposals for these are from 23 to 93 percent lower than those of ORI. Baykeeper described WeCare's technical proposal as demonstrating that it operates no facility comparable to the Spring Creek facility. Baykeeper argued that the "gross" differences in proposed fees, coupled with WeCare's lack of experience, raise an issue whether the Applicant will receive services necessary to comply with 6 NYCRR part 360. Baykeeper stated this information is also relevant to the issues currently being adjudicated of odor, dust, litter, vectors, and noise, as well as the requested variances from three setback distances.

Baykeeper proposed to recall Kenneth Brezner, P.E., a witness for DEC Staff who testified on September 19, to inquire about his familiarity with the reputation of WeCare as compared with ORI in operating open-air turned-windrow compost facilities. Baykeeper also proposed to ask Mr. Brezner whether he told Ellen Harrison (a witness for Baykeeper) that he was not concerned about the Spring Creek facility because he trusted the president of ORI. Baykeeper's offer of proof said it would consider whether additional sworn testimony from Ms. Harrison would be necessary, but to date Baykeeper has not stated it intends to recall Ms. Harrison.

Responses from other parties

CHA supported adjudicating the issue proposed by Baykeeper but also proposed that the issue be expanded to include the identity of the site owner and the operator of the facility. CHA contended that the New York City Department of Parks and Recreation (Parks) is the site owner, that ORI was the facility operator and that WeCare has now become the facility operator. CHA argued that the application should be denied because the New York City Department of Sanitation is neither the owner nor the operator of the facility, and thus cannot be the permittee.

CHA also moved that four documents or groups of documents be provided by the Applicant and marked as exhibits for identification. These documents are: 1) ORI's response to the RFP; 2) WeCare's response to the RFP; 3) the Applicant's rating sheets and related documents used in evaluating the responses to the RFP; and 4) transcripts of any hearings, information sessions or equivalent meetings connected with submission of responses to the RFP plus any guidance with respect to submission of such responses.

The Applicant opposed adjudicating the additional issue and also argued that the change in operations contractors is not relevant to existing adjudicable issues. The Applicant described Baykeeper's assertions about WeCare's experience and cost proposal as speculative and noted that Baykeeper had failed to offer any testimony in support of its assertions. It described Baykeeper's intention to question Mr. Brezner and possibly Ms. Harrison as a "fishing expedition." The Applicant asserted that WeCare is amply qualified to operate the Spring Creek facility.

The Applicant noted that it received DEC Staff's written approval to change operations contractors for its composting facilities. The Applicant argued that the change in operations contractors is irrelevant to the existing issues because nothing in the identification of these issues would require an inquiry into whether the Applicant's operations contractor is capable of implementing the measures for controlling odor and other impacts. The Applicant also argued that this hearing is not the place to consider the Applicant's selection of operations contractors and that doing so would subvert the City of New York's procurement process.

DEC Staff cited 6 NYCRR parts 621 and 360 concerning the identity of permittees in solid waste management facility (SWMF) permits, stated that the Spring Creek permit would be issued to "NYC Department of Sanitation, John Doherty, Commissioner, as owner and operator," and stated there is no legal basis to issue a permit to an entity which is not the owner, lessee or operator of a SWMF. DEC Staff argued that the identity of the operations contractor is not a significant issue when the Applicant remains responsible as an owner, operator and permittee of the facility.

DEC Staff described Baykeeper's offer of proof as "pure conjecture about WeCare's inability to properly run" the Spring Creek facility and stated the offer of proof does not raise an issue for adjudication. DEC Staff stated that Baykeeper did not give reasons why any of WeCare's specific budget items are gross

underestimations of real costs. DEC Staff also stated that Baykeeper did not identify anything that raises a legitimate question about WeCare's ability to operate the Applicant's composting facilities, nor any problems with WeCare's operation of its existing compost facilities.

The responses of the other parties were due on the same date as CHA's response that included motions to mark various documents as exhibits. No party has responded to CHA's October 5, 2007 motions or sought an opportunity to respond.

Discussion

In its offer of proof, Baykeeper stated it "intends to further explore with Mr. Brezner whether in December 2006 he told Ellen Harrison that he was not concerned about the Spring Creek composting facility because he trusted Beng Ooi, President of ORI." Even if Mr. Brezner made this statement, and if it was part of how he evaluated the application, this does not necessarily mean that the change in operations contractors should be the subject of testimony. WeCare might be more reliable than ORI, less reliable, or similar. Baykeeper has not asserted that Mr. Brezner has knowledge of WeCare's reliability.

Baykeeper has not proposed any issue regarding WeCare's record of compliance, as that concept is used in DEC permit reviews⁴ but instead focused on WeCare's price proposal and experience. With respect to experience, the documents submitted by the parties indicate that WeCare has other composting experience and operates several in-vessel composting facilities plus an approximately 6,000 ton per year yard waste composting facility in Jordan, New York. The rural location of Jordan, in contrast with the urban location of the Spring Creek facility, is not a basis for concluding that WeCare lacks the experience necessary to comply with 6 NYCRR part 360 in operating the Spring Creek facility. Baykeeper has not offered any expert testimony regarding WeCare's level of experience or how this would affect its ability to operate the Spring Creek facility.

Although Baykeeper pointed out large differences between the price proposals submitted by WeCare and ORI for the same tasks in

⁴ Record of Compliance Enforcement Guidance Memorandum (Commissioner Policy DEE-16, issued on August 8, 1991 and revised on March 5, 1993).

the RFP,⁵ Baykeeper did not propose any expert testimony that would put these costs into a context that could be evaluated. CHA also did not propose such testimony. On the other hand, the Applicant and DEC Staff have not argued that ORI's proposed costs were excessive, nor have these parties provided any information regarding typical operating costs for composting facilities. These parties did not argue that Baykeeper misquoted or misunderstood the cost aspects of the proposals.

The proposals themselves will be included in the record as exhibits for identification, and the parties may argue how they should be considered, if at all, by the Commissioner in arriving at his decision concerning the application. The proposals will also be marked as exhibits due to the references to ORI's proposal during Mr. Simmons's testimony, at a time when CHA and Baykeeper had not received copies of the documents (see July 11, 2007 Tr., 131 - 140]. In response to several questions about statements attributed to ORI's proposal, Mr. Simmons's reply cited the "context" (presumably of the RFP and the proposals) as being necessary in order to evaluate the statement.

CHA also asked that two additional documents or groups of documents be marked as exhibits for identification (Motion 3, rating sheets and Motion 4, meeting transcripts). There is no indication how voluminous these documents are, and the reasons presented by CHA for including them as exhibits relate more to how the Applicant chose a new operations contractor than to issues in this hearing. These documents or groups of documents will not be marked as exhibits, absent a specific reason why they or portions of them are necessary in understanding the RFP or the proposals.

The operating budget of a proposed yard waste composting facility is not information required in an application for such a facility, and adequacy of the budget is not a permit issuance

⁵ The proposals present the prices for the first group of tasks ("objective 1") in a different format than the prices for the second group of tasks ("objective 2"), which may mean that the amount of money available for objective 2 tasks is not as limited as Baykeeper's comparison shows. At the same time, WeCare's proposals for task 1.1 (maintaining the Applicant's composting facilities and equipment), which are annual fee prices, are approximately half or less those of ORI (see, Ex. 38, at 7 - 21; Baykeeper's September 27, 2007 offer of proof, attachments 2 and 3).

standard. While the budget could be relevant to other issues in a hearing such as this, Baykeeper and CHA have not proposed any testimony, expert or otherwise, concerning the prices identified in the proposals. No adjudication will take place on this subject. As discussed above, Baykeeper's offer of proof also does not raise an adjudicable issue regarding WeCare's level of experience.

The Applicant, as permittee, would be responsible for complying with the permit, and it would be up to the permittee to ensure that the contractor carries out the work necessary to comply with the permit.

Ruling: No additional issue for adjudication has been raised by Baykeeper's September 27, 2007 offer of proof, and no additional testimony is necessary regarding the matters asserted in this offer of proof. CHA's motions that WeCare's proposal and ORI's proposal be marked as exhibits for identification are granted. The Applicant is directed to provide copies of the ORI and WeCare proposals to the parties and to me by December 14, 2007. CHA's October 5, 2007 motions 3 and 4 are denied.

* * * * *

As noted above, CHA argued that Baykeeper's proposed issue should be expanded to include the question of who is the site owner. CHA asserted that Parks is the site owner. The application form states that the facility owner is the New York City Department of Sanitation (the Applicant in this hearing), the facility operator is the New York City Department of Sanitation, and the site owner is the New York City Department of Parks and Recreation. The application form was signed by Robert Lange, Director of the Bureau of Waste Prevention, Reuse and Recycling of the New York City Department of Sanitation (Ex. 3, section 1.A).

At the hearing, however, counsel for the Applicant stated, "Parks does not own the site, nor does Sanitation. The owner of the site is the City of New York as the municipal corporation." DEC Staff noted that the facility owner is different from the property owner (6/28/07 Tr. 171 - 172).⁶ Earlier in the hearing,

⁶ The term "owner" is defined in part 360 as "a person who owns a solid waste management facility or part of one" (360-

Mr. Lange testified that City properties can be designated or assigned to City agencies by the Department of Citywide Administrative Services (5/15/07 Tr. 127 - 128).

The application form and the June 28 statement by the Applicant are inconsistent concerning the identity of the site owner. This does not raise an issue for adjudication, but it will need to be clarified by the Applicant. This clarification is due on or before December 14, 2007.

I note that DEC Staff's identification of the permittees in the issued and draft permits for the Applicant's yard waste composting facilities includes the Commissioner of the Department of Sanitation, identified by name. It is unclear why a particular individual is named as the permittee in addition to the governmental entity. DEC Staff will need to provide any directive or guidance that it may use in identifying permittees for solid waste management facilities, or for Uniform Procedures Act⁷ permits generally, that relates to this question. This submission, or a statement that no such directive or guidance exists, is due on or before December 14, 2007.

Further schedule of the hearing

In a letter dated October 2, 2007, CHA moved to recall three witnesses who had testified on September 19 and 20, 2007, dates on which no representative of CHA was at the hearing. CHA also moved that a witness whose affidavit was received in evidence on September 19, 2007 be available for testimony concerning the affidavit. In my memorandum of October 5, 2007, I denied these motions.

On October 17, 2007, CHA moved for leave to file an expedited appeal (see, 6 NYCRR 624.8(d)). The Applicant and DEC Staff opposed the motion. On November 13, 2007, Assistant Commissioner Louis A. Alexander wrote to CHA, stating that

1.2(b)(114)). Section 360-1.2(b) does not contain a definition of "facility" but does define "solid waste management facility," and states that the latter term "includes all structures, appurtenances, and improvements on the land used for the management or disposal of solid waste."

⁷ Environmental Conservation Law article 70.

Commissioner Alexander B. Grannis denied CHA's motion for leave to appeal.

Accordingly, the additional testimony requested by CHA will not take place. As discussed above, the hearing will not reconvene for testimony concerning the change in operations contractors. No further testimony is scheduled at this time, and it is possible that the testimony has concluded.

In addition to the submissions required in the initial section of this ruling (WeCare's and ORI's proposals, identification of the site owner, and DEC Staff response concerning identification of permittees), several other items of information remain outstanding. The other information includes the maps the Applicant needs to provide (see, September 25, 2007 memorandum to the parties), statements of position by the Applicant and DEC Staff concerning additional noise mitigation measures (see below), any comments from the intervenors concerning the revised coastal review (see, November 8, 2007 memorandum to the parties), and a decision by me concerning CHA's offer of several exhibits as evidence.

The submissions regarding noise mitigation concern additional measures that were identified in testimony but have not been incorporated into draft permit conditions or as changes to the Applicant's proposal. These possible mitigation measures include increasing the height of the existing berms, moving certain equipment to a different location, and restricting the area within which nighttime operation of equipment could occur. In my September 25, 2007 memorandum, I stated that the Applicant and DEC Staff will be required to provide their positions on the additional mitigation but I did not establish a schedule for this to occur. I am now setting a deadline of December 14, 2007 for responses from those two parties on this subject. By that date, DEC Staff will need to transmit a statement of its position, including draft permit language if DEC Staff is of the opinion that one or more of the mitigation measures needs to be included in the project. By that same date, the Applicant will need to state its position concerning which, if any, additional noise mitigation measures it proposes to include in the project.

A schedule for closing briefs will be established at a later date. Although Baykeeper requested the opportunity to make its closing statement on the record, it is not necessary to reconvene the hearing for this purpose. The closing statements, which will be combined with post-hearing briefs, will be submitted in writing as is commonly done for multi-day DEC permit hearings. I

will consider whether to schedule reply briefs as well. Statements in writing, rather than on the record, will allow for replies; this may also produce a clearer record than would result from live closing statements at the hearing. The closing statements and briefs are to include specific transcript and exhibit references for the evidence cited.

Appeals

Pursuant to 6 NYCRR 624.6(e) and 624.8(d)(2)(i), this ruling on a proposed issue may be appealed in writing to the Commissioner, with some extension of the appeal deadline in view of the holidays. Appeals must be received on or before Tuesday, December 11, 2007. Any replies to appeals must be received on or before Tuesday, December 18, 2007. Any appeals and replies must be addressed to the office of the Commissioner, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1010 (to the attention of Assistant Commissioner Louis A. Alexander), and must be received by that office by 4:00 p.m. on the specified dates. One copy of all such appeals and replies must also be sent to Chief ALJ James T. McClymonds and one copy to ALJ Susan J. DuBois at the Department's Office of Hearings and Mediation Services, and one copy to each other party. Transmittal of documents shall be made at the same time and in the same manner to all persons.

/s/

Albany, New York
November 20, 2007

Susan J. DuBois
Administrative Law Judge

To: Persons on 9/25/07 service list