STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application of the **SULLIVAN COUNTY DIVISION OF SOLID WASTE** for permits for the Phase II expansion of the County landfill in the Village of Monticello, Sullivan County. (Application No. 3-4846-00079/00027)	**RULINGS OF THE ADMINISTRATIVE LAW JUDGE**

These rulings address two motions made jointly by the Sullivan County Division of Solid Waste ("the County") and Staff of the Department of Environmental Conservation ("Department Staff"). The first motion is to strike in its entirety the petition for full party status filed on behalf of Concerned Citizens of Sullivan County ("Concerned Citizens"), based on the manner in which it came forward. The second motion is to preclude consideration of air issues outlined in subsequent correspondence from Gary Abraham, Concerned Citizens' counsel, and Alan Shimada, Concerned Citizens' air expert. I hereby deny the first motion and grant the second.

Motion to Strike Concerned Citizens' Petition

The first of the two motions is to strike Concerned Citizens' petition in its entirety. This motion was first made in an e-mail by Department Staff counsel Jonah Triebwasser on June 1. County attorney Samuel Yasgur wrote an e-mail joining in the motion on June 2, and Concerned Citizens' counsel Mr. Abraham responded, also by e-mail, later that same day. During a June 3 conference call involving all parties' counsel, I said I was not inclined to strike the petition. However, as the call was not recorded, I said I would afford Department Staff and the County the opportunity they requested to make an oral motion on the stenographic record of the issues conference when it actually convened, and would defer making a final ruling until then.

Since that call, as part of an agreed-upon schedule of submissions on the second of the two motions, the County has resubmitted the first motion in papers dated July 22, 2005. Department Staff has made the same motion in papers dated July 26, 2005, and Mr. Abraham has responded to the County's motion, also by papers dated July 26, 2005. The schedule of submissions was not intended to address the first motion; however, based on this new record, the prior e-mails, and the discussion I had with the parties during the June 3 conference call, I see no basis to defer a formal ruling any longer, particularly as the County and Department Staff have taken this opportunity to reassert their previous positions, creating a new record that supplements the

prior e-mails and the discussion I had with all parties during the June 3 conference call.

The motion to strike Concerned Citizens' petition in its entirety is based on how the petition came forward. The hearing notice, dated March 23, 2005, said in bold print that all petitions requesting party status must be received at my office no later than 3:00 p.m. on June 1, 2005. The notice also said that copies of all petitions were to be furnished to counsel for the County and Department Staff at the same time and in the same manner that they were furnished to me, and that electronic filings and service by fax would not be accepted.

As explained to the parties during our June 3 conference call, Mr. Abraham left a phone message for me at 8:47 a.m. on June 1, 2005, saying he had been retained the prior evening by a group from Mountain Lodge Estates, near the landfill expansion site. He said that this group would like to petition for party status, making substantially the same arguments that Mr. Abraham had raised in a Phase II expansion comment letter he had already submitted on behalf of Special Protection of the Environment of the County of Sullivan (SPECS), his client in the Phase I expansion matter. (Mr. Abraham has since explained that due to its own "resource constraints," SPECS chose to file a comment letter but not a petition for party status, unlike for Phase I, where SPECS sought and received party status.)

That 16-page SPECS comment letter, dated May 20, 2005, was supplemented by a three-page letter dated May 23, 2005, which offered some minor corrections; both letters had exhibits attached to them, and appeared to have been copied to counsel for both the County and Department Staff. On May 25, 2005, I referenced these letters in correspondence to County and Department Staff counsel, pointing out that while comment letters are not the equivalent of petitions for party status and, as unsworn statements, do not constitute evidence, they may be considered (along with statements made at the legislative hearing) as a basis for the administrative law judge (ALJ) to inquire further of the parties and potential parties at the issues conference. (See 6 NYCRR 624.4(a)(4).) For that reason, in my May 25 letter, I said that the County and Department Staff should review all comments and be prepared to respond to them at the issues conference to the extent I determined this was necessary. I furnished copies of all comment letters - - including the May 20 letter from Mr. Abraham, as corrected on May 23, along with all his attached exhibits - - to the County and Department Staff before the June 1 deadline for petition filing.

In his June 1 phone message, Mr. Abraham said that Mountain Lodge Estates wanted to adopt the points in the May 20 SPECS comment letter as the issues in its petition. He requested a 24-hour extension of the petition filing deadline, then set for 3 p.m., and a rescheduling of the issues conference, then set for June 13 to 15, because it conflicted with Shavuot, a Jewish holiday observed by his new clients.

I received Mr. Abraham's message during the mid-morning of June 1 and promptly called him back. I told him I could not extend the filing deadline, or agree to any rescheduling of the issues conference, without discussing it first with the County and Department Staff, neither of whom Mr. Abraham had contacted. (As it turned out, all the conference participants later agreed to new conference dates, eliminating the scheduling conflict.) However, in view of his assertion that he had just been retained, I told Mr. Abraham that I would allow him to make his filing by fax, particularly as he said it would be short, essentially incorporating by reference the previously circulated May 20 letter (which he had written for SPECS) as a statement of issues for Mountain Lodge Estates.

I made the allowance for fax submission so that Mr. Abraham could prepare a petition and still meet the filing deadline, avoiding the need for a conference call about extending the deadline, which, given the timing of his call, could not likely have been arranged and held before the deadline passed. Though the hearing notice said that service of petitions by fax would not be accepted, this is a statement of office practice, not of statute or regulation, and the practice is maintained because of prior experience when many lengthy petitions were faxed to the office just prior to filing deadlines, overtaxing office equipment and exhausting paper supplies. Allowing for fax submission - - in lieu of courier delivery, which otherwise would have been required - - was meant to assure that the County and Department Staff did in fact receive copies of all petitions before the deadline to which they and I had previously agreed, thus giving them all the time they had argued was needed to prepare for the issues conference. As it turned out, Mr. Abraham's petition, only four pages long, was submitted before the deadline, along with a cover letter in which, at my request, he confirmed for the County and Department Staff the fact that he and I had spoken, and that I had allowed for the faxed filing under the circumstances, which included his retainer the prior evening.

Mr. Abraham's petition introduced his clients as Concerned Citizens of Sullivan County, described therein as an

unincorporated association whose mission is to ensure a healthy environment in Sullivan County. The petition states that Concerned Citizens' members live primarily at Mountain Lodge Estates and Beaver Valley Estates, two housing developments on Rose Valley Road in Monticello, both close to the landfill. However, in his subsequent July 15 letter, Mr. Abraham asserts that members of Concerned Citizens are all seasonal residents of Mountain Lodge Estates, and that residents of Beaver Lake Estates (referred to in the petition, apparently erroneously, as Beaver Valley Estates) are not members of the group. According to the July 15 letter, Mountain Lodge Estates includes 65 homes and 400 people in a development less than 300 feet from the boundary of the proposed landfill expansion footprint.

Addressing the regulatory requirement that a petition for party status identify the precise grounds of opposition to or support for a project (6 NYCRR 625.5(b)(1)(v)), the petition states that these grounds are set forth in the previously submitted SPECS comment letter, that the potential issues identified in those comments are incorporated into the petition in their entirety, and that the documents, records and exhibits referred to or attached to those comments provide the basis for Concerned Citizens' offers of proof. In addition, the petition states, Concerned Citizens offers the testimony of Mr. Shimada, its air quality consultant, to support the proposed issues involving erroneous air emissions estimations. These issues bear on the third of the three numbered assertions in the SPECS comment letter, which is that the landfill is a major source for volatile organic compound (VOC) emissions and that the Phase II expansion would result in potential emissions above the threshold triggering New Source Review (NSR), if such emissions were estimated properly.

In its June 1 e-mail, Department Staff moved to strike the Concerned Citizens petition in its entirety, objecting to what it described as ex parte contact that Mr. Abraham initiated with me and also to the filing of the petition contrary to the statement in the hearing notice that service by fax would not be accepted. Department Staff called the procedure used by Concerned Citizens "patently unfair" and questioned whether others might have petitioned if they had not been discouraged from filing by personal service "at the eleventh hour."

In its June 2 e-mail, the County joined Department Staff's application to strike, arguing too that an attorney initiating ex parte contact with an ALJ is clearly improper. The County said the Concerned Citizens' petition did not satisfy regulatory requirements, calling it a cover letter purporting to incorporate

an ill-defined, non-delineated series of prior legislative comments by others. The County argued that, as an attorney, Mr. Abraham should be held to procedural compliance standards because to do otherwise "would make a shambles of the process" and "needlessly waste" my time and resources and those of the other conference participants.

During the June 3 conference call, I addressed the motion to strike, saying that I was not inclined to grant it. I agreed with the County that comment letters, such as the one Mr. Abraham wrote for SPECS, are not the equivalent of petitions for party status, and that as unsworn statements, they do not constitute evidence. However, I said that because Concerned Citizens was adopting SPECS' comments and exhibits as their own statement of issues and offer of proof, I could treat them as such, in that they were incorporated by reference in Concerned Citizens' petition. This made particular sense here because the author of the comments, Mr. Abraham, would be the same person defending them at the conference, though for a client different from the one on whose behalf they were written.

As a practical matter, the County and Department Staff had SPECS' comment letter before the petition deadline, and I had directed these parties, in my May 25 letter, to review all comments as a basis for possible inquiry at the issues conference. Even if it were appropriate to strike Concerned Citizens' petition, I could still have used information in SPECS' comment letter as a basis for finding issues or requiring the submission of additional information. Also, the points in SPECS' comment letter are largely repeated in the petition filed separately by the Town of Thompson, which the County and Department Staff have not moved to strike.

I acknowledged during the conference call that it would have been better practice had Mr. Abraham contacted the other parties' counsel before calling me. However, it was not improper for him to call me on a procedural matter unrelated to the merits of the application. In fact, the hearing notice encouraged prospective parties to contact the ALJ with questions about filing requirements or other hearing procedures.

By offering Mr. Abraham the opportunity to file by fax, I was excepting him from an office practice rather than a law or regulation. The disallowance for faxed submissions had been put in the notice in the first place at my behest, not at the behest of the County or Department Staff. What the County and Department Staff had set with me was the filing deadline itself, which was met by Mr. Abraham. I negotiated the deadline with the

County and Department Staff to assure that the public had adequate time, from release of the hearing notice, to file petitions, and that at the same time the County and Department Staff had adequate time, after receiving any petitions, to review them in anticipation of the scheduled commencement of the issues conference. That objective was met here, and neither the County nor Department Staff have alleged any prejudice in terms of the time allowed to prepare for the issues conference, which, at any rate, due to adjournments all participants agreed to for reasons unrelated to Concerned Citizens' petition, still has not started. Addressing Department Staff's concern, I am also unaware of any prejudice to other parties that might have filed had fax service been authorized in the hearing notice itself. This matter has certainly been well-publicized, and no other group has stepped forward to claim such prejudice, perhaps to justify a late filing.

In its motion papers of July 22, the County argues that striking Concerned Citizens' petition in its entirety would not prejudice the group, because all its members are residents, albeit only for the summer months, of the Town of Thompson, whose petition the County concedes was properly submitted, though the County also argues that none of its issues require adjudication. While I concede that the Town's proposed issues substantially overlap those in the Concerned Citizens' petition, the Town represents a broader group of affected people, and its interests in this proceeding may not coincide exactly with those of people living in a particular development very close to the landfill expansion.

The County objects to the Concerned Citizens petition on the grounds that it does not identify precise grounds for opposition or support, as required by 6 NYCRR 624.5(b)(1)(v). However, the grounds for opposition are incorporated by reference to the previously submitted SPECS comment letter, which Mr. Abraham himself prepared. I have never understood, nor has Mr. Abraham ever maintained, that the petition was meant to incorporate anything more than that letter, such as oral comments made by SPECS members at the legislative hearing, despite the concern in this regard expressed by the County and Department Staff. As Mr. Abraham indicated in his June 2 e-mail, and he confirmed during the June 3 conference call, Concerned Citizens was adopting the issues set forth in the SPECS comments, "no more or less."

The County also maintains that the Concerned Citizens' petition does not identify any issue that is substantive and significant. That is not a basis for striking the petition, but is a point that the County can argue at the issues conference, to

be decided later in my rulings on issues and party status. By not striking the petition, I am not conceding that Concerned Citizens has an adjudicable issue or, for that matter, that it has made an adequate offer of proof on any of the claims alleged in the petition. Those are matters yet to be discussed and decided.

Finally, the County argues that Mr. Abraham's last-minute retention by Concerned Citizens is not a justifiable excuse for alleged deficiencies in the petition. According to the County, if, on May 31, 2005, Mr. Abraham, knowing what was required to prepare a proper petition, felt he did not have sufficient time to do so before the next-day filing deadline, he should have told his client so and refused to accept the retention. Likewise, the County argues that members of Mountain Lodge Estates participated in both the environmental justice meetings and legislative hearings on this project, and had they been actually "concerned," as they now claim, they had an obligation to file in a timely manner, rather than "sit on their hands, do nothing until the last minute, retain an attorney the day before the petition is due, and now be heard to claim that the rules, regulations and requirements should be waived in their favor."

Again, the petition was timely filed, and the manner in which it was filed did not prejudice the County or Department Staff. Though the petition was filed by fax, a method disallowed by the hearing notice, Mr. Abraham received my permission to file in this manner due to the particular circumstances of this case, which included his late retention and the fact that the petition itself would be short, incorporating the contents of a comment letter Mr. Abraham himself had previously written for another client. The costs of intervention in Department proceedings can be substantial, in time and especially money. Therefore, it is not unreasonable that SPECS would take the limited step of filing legislative comments, and another group, represented by the same counsel but with more resources, would take the next step of advancing those comments as potential issues for adjudication. Though I would have preferred it had Mr. Abraham contacted counsel for the County and Department Staff before he contacted me, it was not unreasonable for him to approach me on June 1 to see what could be done to accommodate his clients. Had he not contacted me and simply missed the filing deadline, he would still have had the option of filing late, offering the circumstances he has described as good cause.

In its July 26 submission, Department Staff states essentially the same arguments as those offered in the County's

July 22 papers. Therefore, a separate discussion of Staff's submission is not warranted.

All parties now having had a full opportunity to be heard on a written record with regard to the motion to strike Concerned Citizens' petition in its entirety, I hereby deny the motion. I am ruling now in the interests of efficiency, so the issues conference can move forward with a discussion focusing on the petition's contents rather than a repetition of arguments addressing the manner in which it came forward.

Motion to Preclude Concerned Citizens' Air Issues

The second of the two motions is to preclude consideration of air issues outlined in Mr. Abraham's letter to me dated July 15, 2005, and Mr. Shimada's letter to Mr. Abraham dated July 14, 2005. In the June 1 petition of Concerned Citizens, Mr. Shimada was identified as a witness who would testify in support of the group's proposed issues involving erroneous air emissions estimations. These issues formed the basis for the claims, discussed from pages 6 to 16 of the May 20 SPECS comment letter, that the landfill is a major source of VOC emissions and the Phase II expansion is subject to New Source Review (NSR).

In his July 14 letter, Mr. Shimada concludes that the landfill expansion is not subject to the regulatory requirements of non-attainment NSR or Prevention of Significant Deterioration (PSD), because emissions of criteria pollutants are estimated to be below the major source thresholds for these Clean Air Act programs. On the basis of Mr. Shimada's letter, Mr. Abraham's July 15 letter states that Concerned Citizens is abandoning these issues as set forth in a discussion headed "Applicability Determinations" on pages 13 and 14 of the SPECS comment letter. That discussion had included the following assertions:

- - The Phase II expansion triggers the requirements of NSR because, based on actual waste disposed, the difference between Phase I and Phase II VOC emissions would be more than 82 tons, exceeding the major source significance level of 40 tons per year.
- - The Phase II expansion triggers Prevention of Significant Deterioration (PSD) review because Phase I is a major source and Phase II would increase the landfill's non-methane organic compound (NMOC) emissions by 102.4 tons, beyond the applicable regulatory threshold of 50 tons per year.

Though Mr. Abraham wrote that these assertions were being withdrawn, he added that Mr. Shimada's letter showed that "other

issues raised in the SPECS comment letter are substantive and significant." His letter went on to include a summary of air issues discussed in Mr. Shimada's letter and what he described as "other outstanding issues."

As summarized in Mr. Abraham's letter, these issues include the following claims:

(1) The County's application fails to address Annual Guidance Concentrations (AGCs) for chronic exposure to VOC emissions, contrary to Department guidance.

(2) The existing landfill does not comply with federal Best Available Control Technology (BACT) standards, which, according to Mr. Shimada, apply because, in his view, expected emissions of 1,1,2,2-tetracholoroethane, acrylonitrile and bromodichloromethane exceed applicable AGCs.

(3) The County has not made a demonstration of reduced cancer risk required by BACT and Department guidance.

(4) The proposed expansion would exceed odor nuisance thresholds due to expected emissions of hydrogen sulfide calculated by Mr. Shimada.

(5) In light of alleged ongoing operating deficiencies at the landfill, it is unclear whether the County is complying with federal Maximum Achievable Control Technology (MACT) requirements for enhanced monitoring, record keeping and reporting.

During our July 18 conference call, I questioned whether these five issues were covered by the May 20 SPECS comment letter, which Concerned Citizens adopted as its statement of issues, or were instead being proposed now for the first time, after the June 1 deadline for filing petitions. The County then sought and received my permission to make a written motion that I strike (or disregard) new assertions in the July 14 and 15 letters, which has taken the form of the motion to preclude Concerned Citizens from raising these assertions at the issues conference. The County's motion to preclude is part of its papers dated July 22, 2005. The Department made the same motion in its papers dated July 26, and Concerned Citizens responded to the County's papers on that same date.

Having reviewed the parties' submissions, I hereby preclude consideration of the issues-related material in the July 14 letter of Mr. Shimada and the July 15 letter of Mr. Abraham.

These letters shall not be considered part of the Concerned Citizens petition, because they were filed after the deadline. As late filings, they might be considered if Concerned Citizens could show "good cause" for their untimeliness [see 6 NYCRR 624.5(c)(2)(i), addressing "good cause for the late filing" as one of several requirements that late-filed petitions must demonstrate in order for them to receive any consideration.] No "good cause" was offered when the July 14 and 15 letters were submitted, and none has been demonstrated by Concerned Citizens in response to the motion to preclude. The hearing notice was issued on March 23, 2005, and the prospective petitioners had more than two months after that to prepare and submit their filings. None of the five issues raised in Mr. Abraham's July 15 letter were raised in the SPECS comment letter that he incorporated as Concerned Citizens' statement of issues on June 1. While that letter addressed odor control, it did so only in relation to off-site odors documented by a Department inspector and called in to the County's hot-line, as part of a claim that the County is unfit to run the landfill. On air emissions, the letter's claim was that, if such emissions were properly calculated, the landfill would be considered a major source subject to NSR and PSD requirements.

The new material in the July 15 letter represents "something more" than what was in the SPECS comment letter, when Mr. Abraham previously had indicated that the issues in the SPECS comment letter - - "nothing more, nothing less" - - were being adopted by Concerned Citizens. On June 1, when Concerned Citizens submitted its petition, Mr. Shimada was offered as a witness to support the issues in the SPECS comment letter involving erroneous emission estimations. But those issues have been abandoned by Concerned Citizens, and the development of the new material in Mr. Shimada's July 14 letter is based on review of the application which he performed since June 1, according to Mr. Abraham's own concession during our most recent conference call and in his subsequent submission of July 26, which responds to the motion to preclude.

Considering this new material now would be unfair to and unreasonably prejudice the County and Department Staff, who were entitled to know, at the time of the filing deadline, the full range of issues proposed by prospective intervenors. Their ability to prepare for the issues conference, and to negotiate with project opponents, would be undermined if petitioners, after the filing deadline, were able to freely substitute new claims for old ones based on analyses performed after petitions were due. Allowing this would render the filing deadline meaningless, as the County has argued.

There is no indication that the application has changed, or that the applicant's own analyses have been changed or supplemented, since June 1, such that an intervenor might be entitled, in response, to alter its statement of issues. For that reason, there is no reason that the work performed by Mr. Shimada could not have been done in a timely manner, and his contentions made part of the petition in the first instance, rather than added to it, as a supplement, some six weeks later.

Mr. Abraham's revision or supplementation of his client's statement of issues was not solicited by me; during previous conference calls, I had sought to learn more about Concerned Citizens as a group, but not about its arguments. A petitioner's offer of proof should be adequately detailed in the petition itself, so that later submissions, made after the filing deadline, are not necessary. Mr. Abraham correctly notes that, pursuant to 6 NYCRR 624.5(b)(5), an ALJ shall allow for a petition's supplementation where the ALJ finds that a prospective party did not have adequate time for the petition's preparation. That is not the case here; even if some of Concerned Citizens' members did not have actual notice of the filing deadline, due to their seasonal residency at Mountain Lodge Estates, the hearing notice was broadly released and published well in advance of that deadline.

My granting the motion to preclude should not be construed as suggesting Department Staff disregard the arguments in the July 14 and 15 letters. Staff can and should evaluate the claims on their merits, and if it finds them to raise legitimate concerns, pursue them as issues of their own. Department Staff has not yet taken a position on the expansion application, and even when it does, that position remains tentative throughout the hearing process, as Staff, unlike prospective intervenors, is able to raise new issues at any time, to address matters it may have overlooked earlier. This allowance is given to Staff so the Commissioner does not approve a project that is not in fact permittable, or that may require further conditioning before a permit is issued.

Future Proceedings

The issues conference remains scheduled to begin at 1 p.m. on August 2, continuing throughout the afternoon and resuming from 10 a.m. to 5 p.m. on August 3. My expectations for how the conference shall proceed remain as written in my July 19, 2005, memorandum to the parties. As the County has confirmed, the conference will be held at the Sullivan County Courthouse in Monticello.

/s/
Albany, New York Edward Buhrmaster
July 29, 2005 Administrative Law Judge