

IN THE MATTER OF : *APPLICATION NO. 200001829*
CIRCLE OF LIFE, LLC. : *MAY 7, 2003*

FINAL DECISION

I
SUMMARY

This decision concerns an application filed by Circle of Life, LLC (applicant) with the Department of Environmental Protection (DEP) seeking permits to construct and operate a solid waste volume reduction plant (the proposed facility) at 158R Middletown Avenue in New Haven. The proposed facility consists of a circular shaped building, a tipping plaza, a scale plaza, paved roadways, a rail track and a rail bed and is designed to receive and consolidate up to 2378 tons per day of construction and demolition debris, utility poles, railroad ties and land-clearing debris. In addition to volume reduction, the proposed facility will allow the applicant to initiate transport of the waste out of state by rail cars to midwestern landfills. The parties to this proceeding are the applicant, the DEP Bureau of Waste Management (staff) and an intervenor comprised of a group of neighbors from the Fair Haven area of New Haven, the Downing Street Blockwatch (intervenor).

In her January 21, 2003 Proposed Final Decision, the hearing officer found that the applicant had submitted an application containing sufficient information for me to render a decision on its merits. She also found that the intervenor had failed to prove that the proposed facility is likely to unreasonably pollute the natural resources of the State in violation of General Statutes §22a-19. Based upon these and other determinations, the hearing officer concluded that

the proposed permits, with modifications, are consistent with and satisfy all applicable provisions of all relevant statutes and regulations, that a permit to construct and a temporary permit to operate should issue with permit conditions proposed by staff and, finally, should performance tests reveal that the proposed facility is operating in compliance with the temporary permit, that a permit to operate be issued.

The hearing officer concluded that if the applicant adheres to the terms and conditions of the draft permits, the proposed facility would be constructed and operated in accordance with all legal requirements. The hearing officer recommended that the permits be granted subject to two conditions to the permit to construct and one condition to the temporary permit to operate. These three proposed conditions are discussed in detail below.

Pursuant to the Regulations of Connecticut State Agencies (RCSA) §22a-3a-6(y)(D), a final decision may affirm, modify or reverse a proposed final decision. The scope of a final decision includes the findings of fact and conclusions of law necessary to the decision. In accordance with General Statutes §4-180(c), the findings of fact are based exclusively on the evidence in the record. I have reviewed the record, including the docket file, transcripts of the hearings, briefs, pleadings, rulings and other aspects of the evidentiary record and, as a result, affirm in part and modify in part the Proposed Final Decision. As more fully explained herein, I grant with conditions the permit to construct and temporary permit to operate the proposed facility and, based upon staff assessment of operations conducted during the period of temporary operation, including performance tests, grant a permit to operate the facility for a period of five years. With the consent of the applicant, such permit to operate may be more restrictive than the draft presented at hearing, such additional restrictions to be based upon staff evaluation of operations conducted during the period when the temporary permit to operate is in effect.

II

BACKGROUND

On June 7, 2000, the applicant submitted an application for permits to construct and operate the proposed facility. Staff reviewed the application, deemed it complete and prepared draft permits to construct and operate dated October 1, 2001. Staff subsequently revised the draft permits to construct and operate and prepared a draft temporary permit to operate to authorize operation of the facility for purposes of start-up, equipment shakedown and performance testing.

On October 1, 2001, the DEP issued a Notice of Tentative Determination to approve the application. A hearing was requested by a petition signed by more than twenty-five people and hearings were held on June 24 and July 2, 9, 16 and 23, 2002. The record closed on July 23, 2002 (with applicant's exhibit 85 added to the record on August 14, 2002) and the parties filed post-hearing and reply briefs by October 3, 2002. The Proposed Final Decision was issued on January 21, 2003. The intervenor filed a request for oral argument and all three parties filed exceptions to the Proposed Final Decision. Oral arguments were heard on March 12, 2003.

III

DECISION

A

The Proposed Final Decision

(1)

Conclusion

I affirm the findings of the hearing officer that the application contained sufficient information for me to render a decision on its merits, that the applicant's compliance history does not indicate a pattern or practice of willful noncompliance to justify denial of the permits, and that the applicant has successfully met its obligations under the DEP *Environmental Equity Policy*. I also affirm the hearing officer's conclusion that the intervenor has failed to meet its burden of proof that the proposed facility is reasonably likely to unreasonably pollute the natural resources of the State in violation of §22a-19 of the General Statutes.

(2)

Findings of Fact

I adopt in their entirety and without change the following findings of fact from the Proposed Final Decision: 3-7, 9-12, 14-16, 18-31, 33-44, 46-62, 64-66.

Based on the evidentiary record, and in light of briefs filed and exceptions submitted, I adopt the following findings of fact to replace proposed facts corresponding to the paragraphs enumerated in the Proposed Final Decision.

1. The applicant is a limited liability company owned and operated by Felix Andrew Anastasio, Sr. and Barbara Anastasio as equal partners. The Anastasios also own and operate other businesses including St. Joseph's Wood Products, LLC, a wood recycling facility, and

Nicesca, LLC, a real estate development company. (Ex. APP-1, Attachment D, *Background Information*, Attachment G, *Business Information*.)

2. In September 1998, the applicant entered into a commercial lease agreement with Nicesca, LLC to lease between 3 to 4.8 acres (site) at the 280-acre Cedar Hill Rail Yard (rail yard) located in the Towns of New Haven and North Haven. CSX Railroad, which leases a portion of the property to Nicesca, LLC, owns the active rail yard, which operates 24 hours per day seven days a week serving the New Haven-Boston and New Haven-Hartford corridors. (Exs. APP-1, Attachment G, *Business Information*, APP-6, 65; exs. DEP-22, 25; test. M. Holland, 07-02-02, pp. 37, 147-148; test. C. Atkins, 07-16-02, p. 462.)

8. To facilitate public participation in the application process, the applicant coordinated and worked with staff and prepared an environmental equity plan, which outlined community outreach activities the applicant had conducted and planned to undertake. On September 7, 2000, the applicant held an informational meeting with Alderwoman Shirley Ellis-West and on September 11, 2000, gave her a tour of the site. A community informational meeting was held in New Haven on February 22, 2001, and notices of the meeting were mailed to: members of the New Haven Environmental Justice Advisory Board; members of the New Haven Environmental Advisory Committee; the Executive Director and Deputy Director of the Livable City Initiative; Alderwoman Ellis-West and alderpersons for two adjacent wards; and three representatives from the DEP. (Exs. APP-2, 4, 4A, 35, 39-42, 64, 72; ex. DEP-25; test. C. Atkins, 07-16-02, pp. 464-465.)

13. The Quinnipiac River Watershed Association (QRWA) is an organization committed to preserving and restoring the Quinnipiac River. QRWA is familiar with the site by virtue of its osprey restoration activities in the area. QRWA believes that the site is appropriate

for the proposed facility but questions whether the facility is too big and seeks assurances that potential water quality impacts are satisfactorily addressed and that nesting osprey and other wildlife in the marsh are shielded from potential adverse impacts of the facility. (Test. M. Mushinsky, 06-24-02, pp. 108-112, 07-02-02, p. 172.)

17. Residents of Fair Haven who testified as sworn speakers at the hearing contend that the proposed facility will increase diesel air emissions from truck traffic and cause air pollution and adverse human health impacts on children and the elderly in the community. The Fair Haven neighborhood does not abut the site and is located approximately one-half to one mile to the northeast. (Exs. APP-1, Attachment C, *USGS Map*, APP-6, 64, 69; test. sworn speakers, 06-24-02.)

32. The applicant retained RECON Engineers, P.C. (RECON) to investigate and assess subsurface soil conditions at the site. RECON conducted field observations and performed five soil borings in staked areas where site excavation will take place and collected thirteen soil samples. Reported test results indicated that concentrations of volatile organic compounds (VOCs), semi-volatile organic compounds (SVOCs), and toxic metals detected were significantly below the Connecticut Remediation Standard Regulations (CRSRs). Petroleum hydrocarbons and polychlorinated biphenyls were undetected. (Ex. APP-81; test. J. Reczek, 07-16-02, pp. 379-388, 398-402.)

45. Trucks will be restricted to paved roads and at the end of each day the applicant will remove litter and mechanically sweep the pit, rail scale, tipping plaza, driveway ramps and scale plaza. The lessor, Nicesca, LLC, will be responsible for the maintenance of utilities, roadway lighting, waterline extensions, rail bed improvements, sweeping of roads and snow

removal. (Ex. APP-1, Attachment H, *Operation and Management Plan*; test. M. Holland, 07-02-02, pp. 59, 108-109.)

63. Because pollutants absorbed by the phragmite vegetation may remain in the plant tissue, OLISP recommended adding a condition in the permit that would require the applicant to harvest the phragmite vegetation at the end of each growing season and properly dispose of it. (Ex. APP-75; ex. DEP-22; test. D. Lowry, 07-09-02, pp. 329-330.)

(3)

Conclusion of Law

The intervenor takes exception to the hearing officer's conclusion that the application is complete. The thrust of the intervenor's argument is that certain documents, including the facility plan, were not *prepared* by an engineer licensed to practice in the State of Connecticut as prescribed by RCSA §22a-209-4(b)(2) but rather by an out-of-state firm. As a result, the intervenor concludes that the application is incomplete and should be denied on that basis. The intervenor does not question the accuracy or quality of the documents nor does the intervenor challenge the competency of the certifying engineer. Consistent with the assertions of the applicant and staff, the hearing officer found that the documents in question were signed and stamped by Robert Mansfield, a professional engineer licensed to practice in the State of Connecticut.

The Commissioner may issue or deny a permit under such conditions as he may prescribe and upon submission of such information as he may require for the construction and operation of a volume reduction facility. General Statutes §22a-208a (a). The information required in an application for permits to construct and operate a solid waste facility is set forth in RCSA §22a-209-4. The intervenor contends that because the applicant failed to include certain information

in the application it is incomplete and should be denied. “An application will not be deemed complete until all the information required by the statutes or regulations or otherwise requested by the Commissioner have been submitted in proper form. Regs., Conn. State Agencies §22a-209-4 (b).” *Newtown v. Keeney*, 234 Conn. 312, 322 (1995). The decision as to what information must be included in an application for a solid waste permit is ultimately within the discretion of the Commissioner and need only include those items necessary in order for the Commissioner to make a decision on the application. *Preston v. Department of Environmental Protection*, 218 Conn. 821, 829 (1991). In rejecting the plaintiff’s argument in *Preston* that every item of information set forth in the regulations must be included in an application, the court stated that that such reasoning would “elevate form over substance” in “cases where the Commissioner, in his discretion deems such information either unnecessary or superfluous.” *Id.* at 830-831.

I have reviewed the claim put forward by the intervenor, including the specific regulation and facts cited to support the contention that the application is incomplete. Based on my review, I decline to deny the application on a basis that would, in fact, place form over substance. Further, I conclude that the application is complete and in a form that allows for a decision to be reached on the merits.

IV
PERMIT CONDITIONS

A

Conditions Recommended by the Hearing Officer

In her proposed decision, the hearing officer recommends the inclusion of three additional permit conditions, two to be added to the permit to construct and the third to be included in the temporary permit to operate. The latter two recommendations concern proper management and disposal of wastes encountered during facility construction (recommended permit to construct paragraph 7a.) and greater opportunity for long-term public input into the management of the facility (recommended temporary permit to operate paragraph 5a.).

These conditions enhance environmental protection and are agreeable to staff and the applicant. Therefore, I accept the hearing officer's recommendations regarding these conditions and direct staff to add them to the respective permits. Staff is further directed to add recommended paragraph 5a. to the final permit to operate.

In addition, the hearing officer recommends the following three-part condition be added to the solid waste permit to construct.

5a.i. that the applicant post a \$255,000 closure surety bond with the DEP to cover third party costs for the handling, removal and proper disposal of the maximum amount of unprocessed/processed solid waste and residue capable of being stored at the site;

5a.ii. that the applicant obtain a stormwater discharge permit from the Bureau of Water Management, such permit to include a requirement that the applicant harvest and properly dispose of phragmite vegetation at the end of every growing season.

5a.iii. that the applicant obtain a written determination from the Bureau of Air Management as to whether a new source air permit is required for operation of the stationary prime loader exhaust stack emissions.

Regarding recommended permit condition 5a.i, I find such condition unnecessary during facility construction and decline to adopt it. Pursuant to this final decision, the applicant will be authorized to accept waste at the facility only after construction is completed and the Department issues a temporary permit to operate. Condition no. 17 of the temporary permit to operate requires the applicant to post a \$255,000 closure surety bond prior to accepting solid waste at the facility. An identical condition is included in the final permit to operate. Inclusion of the condition to post a bond for waste handling, removal and disposal in the temporary permit to operate and the final permit to operate is adequate to protect public health and the environment.

With respect to recommended permit condition 5a.ii, I agree with staff that a condition requiring the applicant to obtain a stormwater discharge permit should not be included as a condition in the proposed solid waste permit. While RCSA §22a-209-4(b)(5) specifically allows the Commissioner to impose any reasonable condition upon a solid waste permit to construct, embedding water or air permit requirements in the solid waste permit would, at the least, create administrative difficulties for the DEP without appreciable benefit. If necessary, permit coordination can be imposed as a condition of a final decision. In this case, as evidenced by its exceptions to the proposed decision, the applicant is fully aware of its obligation to obtain, as required by law, any other applicable individual or general permits prior to commencing operation of the proposed facility. I trust it will do so and therefore decline to adopt this recommended permit condition. As for the harvesting and disposal of the phragmites vegetation referenced in the recommended permit condition, I agree with staff that it can be added as a condition to the permit to operate. Therefore, the following shall be added as condition 8.k. in the final permit to operate: "At the end of each growing season, remove and dispose of phragmites vegetation that may be impacted by stormwater discharges from the site in the area of

the stormwater treatment swale." The applicant is advised to consult with OLISP well in advance of the first phragmites removal event. Unless phragmites cutting removal is accomplished by hand or specially designed mechanical equipment, the activity may be subject to a tidal wetlands or structures and dredging permit."

Regarding recommended permit condition 5a.iii, I agree with staff and the applicant that including in the solid waste permit a condition requiring the applicant to obtain a written determination from the Air Management Bureau concerning its permit obligations under that program is unnecessary here. As with the similar stormwater discharge permit issue addressed above, the applicant is clearly aware of its obligation to obtain all necessary permits prior to engaging in regulated activities at the site.

Additional changes to the subject permits shall be made as follows:

B

Permit to Construct

- (1) In condition no. 1, correct typographical errors related to the definition of "Day".
- (2) In condition no. 8, delete the first sentence and substitute the following: *"The Permittee shall: (a) notify the Department when the construction of the Facility is finalized; (b) submit a PE certified as-built Site Plan drawing along with a formal request for the issuance of the Temporary Permit to Operate; and (c) not start operation of the Facility before the Performance Test Protocol referenced in condition no. 10 below is approved in writing by the Commissioner, the qualifications of the third party engineer referenced in condition no. 11 below are approved in writing by the Commissioner, and the Temporary Permit to Operate is issued."*
- (3) The signature line should be changed to read "2003" rather than "2002".

C

Temporary Permit to Operate

Condition no. 2h is deleted and the following substituted in its place: "*Performance Test Protocol, approved by the Commissioner in accordance with condition no. 10 of the Permit to Construct No. 0930544-PC.*"

Condition no. 6 is deleted and the following substituted in its place: "*The Permittee shall notify the Commissioner at a minimum five days before the commencement of the performance test. The Permittee shall commence the performance test no later than forty (40) days after the date of initial acceptance of waste at the Facility.*"

Condition no. 20 is deleted and the following substituted in its place: "*This permit shall expire ninety (90) days from the date of issuance and may be revoked, suspended, modified, renewed, or transferred in accordance with applicable laws.*"

The signature line should be changed to read "2003" rather than "2002".

D

Permit to Operate

The purpose of the temporary permit to operate is to assess the applicant's ability to operate the facility at the proposed capacity in a manner that is safe and protective of the environment. Staff and applicant agree that it is possible that analysis of the performance test results and other facility operations engaged in under the temporary permit to operate may result in changes to the final permit to operate. As noted by staff in its exceptions to the Proposed Final Decision, "during the temporary permit to operate the Department may determine that additional restrictions might be needed to lower the maximum tonnage allowed at the facility or trucks per hour". The applicant states in its oral argument brief that it supports staff's exceptions and the reasons provided by staff as to the need for such exceptions.

Therefore, no later than fifteen days after submission of the report required pursuant to paragraph 7 of the temporary permit to operate, DEP staff shall notify the applicant and intervenor of a meeting to be held at DEP, 79 Elm Street, Hartford. The applicant will provide a copy of the performance test and the report to the intervenor contemporaneous with its submission to DEP staff. The purpose of the meeting will be to review the performance test results and consider operations during the period of operation under the temporary permit. Changes to the operating permit as a result of the temporary operations and performance testing will be considered. Staff will take into account comments that the applicant and the intervenor put forth during the meeting. The nature and extent to which the final permit to operate is adjusted (including any reduction in the maximum daily volume of solid waste to be received at the facility) shall be at the discretion of staff, such discretion to be exercised based on the results of the performance test, observations made during the period of temporary operation, and information exchanged at the meeting required pursuant to this paragraph.

To ensure that time is available to conduct the meeting and make whatever changes may be necessary to the final permit to operate without disrupting operations, I have, pursuant to §22a-209-4(c)(4), extended the duration of the temporary permit to operate from sixty to ninety days.

V
CONCLUSION

Based upon the record before me, I conclude that the proposed facility would serve the waste management needs of this State. I further conclude that if the applicant adheres to the terms and conditions of the permits specified herein, as modified, the proposed facility would be constructed and operated in accordance with all legal requirements and in a manner that ensures against the pollution of the State's air, water and other natural resources. I therefore grant the permits to construct and operate the proposed facility.

May 7, 2003
Date

Arthur J. Rocque, Jr.
Arthur J. Rocque, Jr.
Commissioner