

**COMMONWEALTH OF KENTUCKY
ENVIRONMENTAL AND PUBLIC PROTECTION CABINET
FILE NO. DOW-28817-039 AND DOW-28833-039**

FILED

OCT 10 2007

Office of Administrative Hearings

THE CITY OF CINCINNATI
and
DAVID W. SHAW

PETITIONERS

VS. **ORDER SCHEDULING FOLLOW-UP CONFERENCE**

ENVIRONMENTAL AND PUBLIC PROTECTION CABINET
and
SANITATION DISTRICT NO. 1 OF NORTHERN KENTUCKY

RESPONDENTS

* * * * *

This matter came before the undersigned Hearing Officer for an initial prehearing conference on October 5, 2007. The Hon. Laura D. Keller and the Hon. Blaine Early, III appeared on behalf of the Petitioner, The City of Cincinnati (Cincinnati). Petitioner, Mr. David Shaw appeared on his own behalf without counsel. The Hon. John C. Bender and the Hon. Amanda Waters appeared on behalf of the Respondent, Sanitation District No. One of Northern Kentucky (SD #1). The Hon. Brenda Gail Lowe and the Hon. Sharon R. Vriesenga appeared on behalf of the Environmental and Public Protection Cabinet (Cabinet).

Petitioners have challenged the Cabinet's August 16, 2007 determination to issue KPDES permit KY0105031 to SD # 1 for its Eastern Regional Wastewater Treatment Plant (ERWWTP).

There has been some significant discussion prior to this initial conference, at least between the parties represented by counsel.

Mr. Shaw was advised of his right to obtain an attorney to represent him in this matter but advised that he wished to proceed without counsel at this time.

Initially, there was some discussion regarding Cincinnati's pending challenge to the Cabinet's earlier KPDES permit determination for the ERWWTP. That action is designated by File No. DOW-26767-039 and is being held in abeyance by Order of the undersigned. That action was being held in abeyance because of SD #'s intent to modify its regional facility plan (RFP) to change the proposed discharge location for its ERWWTP. SD # 1 did, in fact, modify its RFP, as expected, and that required modification of the KPDES permit, which led ultimately to this new KPDES permit determination. (As the parties are aware the Cabinet's approval of the RFP modification was also challenged by Cincinnati and that action is currently pending before the Secretary after a report and recommendation by the undersigned).

There was some discussion about whether the two KPDES cases should be consolidated or whether the second determination in essence overrides the first determination and renders it moot. Counsel for Cincinnati was concerned about the second determination being considered a "revision" only and the need to preserve all of its challenges to the permit by keeping the first petition active. There did not seem to be any significant substantive disagreement between the parties on these issues but the Hearing Officer encouraged the parties to resolve this issue by formal agreement among themselves to avoid the undersigned mischaracterizing their agreement on this issue. The parties agreed to work to resolve this issue prior to the next conference.

The undersigned also brought up for consideration the hearing process deadline contained in KRS 224.10-449(3), as it applies to this petition. By the undersigned's calculation, without any waiver or extension, the 180 hearing process deadline will expire March 20, 2008.

Counsel report that prior to the conference the represented parties, through their respective counsel, have discussed that deadline issue and also how to propose to proceed in this matter, in general. Counsel report agreement as follows: i) waive the 180 day hearing process deadline; ii) refer this matter to mediation, with an independent mediator versed in the subject matter of the action, and to have this case mediated through the remainder of 2007 (assuming progress continues); and, iii) enter into a Scheduling Order to get dates certain on the calendar but to suspend formal discovery until the beginning of 2008, to give the mediation process a chance for success first. (After further discussion, counsel and Mr. Shaw agreed to setting aside three weeks in November of 2008 for the formal hearing of this matter, if needed, and the parties are to make an effort to come to an agreement with the remaining terms of a formal Scheduling Order, including other deadlines and whether use of pre-filed direct testimony will be utilized).

As to mediation, counsel are contemplating agreement on retaining an outside Mediator to be agreed to among all the parties, with also an agreement to be reached on payment of the Mediator's compensation. (The Office of Administrative Hearings does not have the budget to contribute to that process). After explanation, Mr. Shaw reported his agreement, in principal, with how counsel have proposed to proceed in this matter. Mr. Shaw also advised he is in agreement with waiving the hearing process deadline.

However, the Cabinet's agreement to mediate was contingent on obtaining approval from its client and budgetary concerns about its ability to contribute a share of the costs. As to the expected costs, all parties' agreement to mediate is contingent on working out the specifics of retaining a Mediator and cost contribution, if any, from the particular party.

There was also some discussion about the effect of an agreement between only certain of the parties. Any issue not resolved by agreement of all parties will not be considered finally resolved. The litigation on those issues will otherwise remain pending.

Given the above, it was agreed to schedule a short follow-up conference to give the parties additional time for discussion prior to entering into a formal scheduling and mediation referral order in this matter. A date and time were agreed to for this follow-up conference.

Based on the above and being otherwise sufficiently advised, **IT IS HEREBY ORDERED AS FOLLOWS:**

1. Counsel and/or parties shall appear for a status conference on **October 18, 2007**, at the hour of **10:00 AM, ET** in the auxiliary conference room of the Office of Administrative Hearings located at 35-36 Fountain Place, Frankfort, Kentucky 40601.

2. Counsel or parties may appear telephonically for this conference. The undersigned will initiate the call. Thus, if parties and/or counsel are not going to be present at their regular telephone members at the time designated for the conference, they should inform the Office prior to the date of the conference.

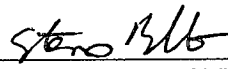
3. On, or prior to the conference scheduled above, all parties shall file a written waiver of the hearing process deadline, as was provided with the parties' copy of the administrative summons. The undersigned notes that Mr. Shaw has already executed and filed his waiver.

4. Counsel for the Cabinet shall come prepared to state whether it agrees to mediation in this matter, in general.

5. Counsel and/or parties shall attempt to work out the details of a scheduling order and mediation referral order (if mediation is accepted by the Cabinet) prior to this next conference.

6. Counsel and/or parties shall also attempt to work out the language needed to properly address the status of the earlier KPDES challenge prior to this next conference.

So ORDERED this the 10th day of October, 2007.



STEVE BLANTON, HEARING OFFICER
OFFICE OF ADMINISTRATIVE HEARINGS
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Frankfort, Kentucky 40601
Telephone: (502) 564-7312
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing ORDER was, on this 10th
day of October, 2007, mailed by first-class mail, postage prepaid, to:

MR DAVID W SHAW
8377 STONEHOUSE ROAD
CALIFORNIA KY 41007

HON W BLAINE EARLY III
HON LAURA D KELLER
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250 WEST MAIN ST STE 2300
LEXINGTON KY 40507

HON JOHN C BENDER
HON KELLY BARTLEY
GREENEBAUM DOLL & MCDONALD
300 WEST VINE STREET STE 1100
LEXINGTON KY 40507

HON AMANDA WATERS
SANITATION DISTRICT NO 1
OF NORTHERN KENTUCKY
1045 EATON DRIVE
FORT WRIGHT KY 41017

and a courtesy copy to:

HON JANICE M THIERIOT
PEDLEY ZIELKE & GORDINGER PLLC
2000 MEDINGER TOWER
462 SOUTH FOURTH AVE
LOUISVILLE KY 40202

and hand-delivered to:

HON. BRENDA GAIL LOWE
HON. SHARON R VRIESENKA
Environmental and Public Protection Cabinet
Office of Legal Services
Fifth Floor, Capital Plaza Tower
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