STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Applications of **ONTARIO COUNTY** for Modification of the Part 360 and Title V Permits, and for a Part 663 Freshwater Wetlands Permit for its Municipal Solid Waste Landfill on Route 5 & 20 in the Town of Seneca, Ontario County, New York.

DEC Permit Application Nos. 8-3244-00004/00007, 00001, and 00021

RULING ON ISSUES AND PARTY STATUS

Ontario County ("County" or "applicant") has submitted applications relating to a proposed expansion of the Ontario County landfill, a mixed solid waste landfill accepting non-hazardous solid waste located on Route 5 & 20 in the Town of Seneca, Ontario County, New York. The proposed landfill expansion will consist of two stages including a "wrap-around," which will cover approximately 16 acres around the northern and western boundaries of the existing operational landfill, and an "eastern expansion" which will cover approximately 27.5 acres to the east, including what is currently the soil borrow area. The final elevation of the landfill would be 28 feet higher than the height for which the existing landfill is currently permitted. A proposed new soil borrow area, covering approximately 15.5 acres, would be constructed to the south of the existing landfill in an area to be owned by the Town of Seneca and to be leased to the County. Additional site modifications include the modification, construction and relocation of stormwater ponds, relocation of the maintenance building and utilities, and construction of two new leachate storage lagoons, a new landfill gas flare, and site access roads. A new stormwater pond and a proposed expansion perimeter berm will be located in the adjacent area of a State-regulated freshwater wetland.

Applicant seeks a freshwater wetlands permit pursuant to New York State Environmental Conservation Law ("ECL") Article 24 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") Part 663; a modification of its existing solid waste management facility permit pursuant to ECL Article 27 and 6 NYCRR Part 360; and modification of an existing Title V permit pursuant to ECL Article 19 and 6 NYCRR Part 200 et seq. A 5-acre waiver approval under the SPDES Multi-Sector General Permit is also required.

I. PROCEDURAL BACKGROUND

A. State Environmental Quality Review Act ("SEQRA")

The Ontario County Board of Supervisors was the lead agency under SEQRA. The proposed landfill expansion was identified as a Type I action, and a positive declaration was issued. Following the preparation of a Draft Environmental Impact Statement in December 2011, a public hearing was held, a period for public comment was provided, and a Final Environmental Impact Statement was accepted by Ontario County Board of Supervisors ("Board") on August 23, 2012. The Board adopted a Statement of Findings in May 2013.

B. This Proceeding

The County's applications were submitted to the Region 8 office of the New York State Department of Environmental Conservation ("Department" or "DEC") in October 2013 by Barton & Loguidice, an engineering firm retained by the County and Casella Waste Services of Ontario, LLC ("Casella Ontario"), the private entity that operates the landfill pursuant to an Operation, Management and Lease Agreement executed in 2003.

On January 13, 2015, Region 8 staff referred this matter to the Department's Office of Hearings and Mediation Services ("OHMS") for scheduling a legislative hearing and issues conference pursuant to 6 NYCRR Part 624. See Issues Conference Exhibit ("IC Ex.") 1. As reflected in his January 15, 2015 letter to the parties, Chief Administrative Law Judge ("ALJ") James T. McClymonds thereafter assigned the matter to me.

A joint notice of complete application and notice of a legislative/public comment hearing was published in the January 28, 2015 edition of the Department's electronic Environmental Notice Bulletin ("ENB"). See IC Ex. 2. The notice was also published in the February 1, 2015 editions of *The Daily Messenger* and the *Finger Lakes Times*. See IC Exs. 3A and 3B (affidavits of publication). The notice required that petitions for party status be filed by February 25, 2015, and that the public comment period would close on March 3, 2015.

As announced in the notice, the legislative/public comment hearing was held on March 3, 2015 at the Canandaigua Middle School Auditorium located at 215 Chapel St., Canandaigua, New York. The hearing, over which I presided, was held to provide members of the public an opportunity to offer their comments concerning the application. Seven members of the public spoke at the public comment hearing. At the close of that hearing, I extended the public comment period to March 6, 2015. Seventy-five written comments were submitted by members of the public by the close of the comment period.

C. Filing of Petitions for Party Status and Motions to Preclude

By email dated February 6, 2015, counsel for proposed party Finger Lakes Zero Waste Coalition ("FLZWC") requested a 90-day extension of the February 25, 2015 deadline by which to file petitions for party status. In separate correspondence, each dated February 10, 2015, counsel for Department staff, applicant Ontario County, and landfill operator Casella Ontario all objected to the FLZWC request for an extension of time. By email dated February 12, 2015, FLZWC replied to the objections of staff, applicant and Casella Ontario.

FLZWC stated that it did not learn until February 2, 2015 that its long-term noise expert would be unable to work on this proceeding "owing to extraordinary family obligations." FLZWC had retained a new noise expert, but that expert could not begin work on this matter until February 17, 2015. By memorandum dated February 13, 2015, I granted in part FLZWC's motion for an extension of time and set the deadline of March 10, 2015 for filing a petition for party status with respect to the noise issue only. With respect to any other issue for which FLZWC might seek party status, its petition for party status remained due on February 25, 2015.

On February 25, 2015, FLZWC filed a petition for full party status ("Initial Petition"). See IC Ex. 6. On February 27, 2015, applicant filed a notice of motion, memorandum of law, and an attorney's affirmation with exhibits in support of a motion to preclude FLZWC's petition ("Appl. Motion I"). See IC Exs. 7A-7C, respectively. On March 5, 2015, FLZWC filed a memorandum of law and response to applicant's motion to preclude ("FLZWC Resp. Mem. I"). See IC Ex. 8. On March 9, 2015, FLZWC filed a Supplemental Petition on Noise Issues ("Supplemental Petition"). See IC Ex. 9. On March 10, 2015, FLZWC filed an Amended Supplemental Petition on Noise Issues ("Amended Supplemental Petition"). See IC Ex. 10A. On March 11, 2015, FLZWC filed a list of errata with respect to the Amended Supplemental Petition. See IC Ex. 10B. On March 17, 2015, applicant filed a notice of motion, memorandum of law, and an attorney's affirmation in support of a second motion to preclude ("Appl. Motion II"). See IC Exs. 11A-11C, respectively. On March 20, 2015, FLZWC filed a memorandum of law and response to applicant's second motion to preclude ("FLZWC Resp. Mem. II"). See IC Ex. 12. I granted staff's request to address the petitions, the motions to preclude and the responses to those motions orally at the issues conference rather than through the filing of papers.

D. Issues Conference

The issues conference in this matter was initially scheduled for March 11, 2015. With prior public notice, the issues conference was rescheduled and held on April 15, 2015 in Conference Rooms 2 and 3 of the Ontario County Safety Training facility, 2914 County Road 48, Canandaigua, New York. Thomas S. West, Esq. of The West Firm and Kristen J. Thorsness, Esq., Assistant County Attorney for Ontario County represented applicant.[1] Lisa Schwartz, Esq., Assistant Regional Attorney, Region 8, represented Department staff. Gary A. Abraham, Esq. represented FLZWC.

At the issues conference, argument was heard regarding proposed issues for adjudication and additional matters discussed in FLZWC's petitions, applicant's two motions to preclude, and FLZWC's responses thereto. I reserved on the motions and the FLZWC petitions. The parties represented at the issues conference that they were negotiating a stipulation regarding noise-related issues to be adjudicated. On May 4, 2015, counsel for applicant submitted a proposed stipulation regarding noise, executed by counsel for applicant only.

II. DISCUSSION

A. FLZWC's Petitions and Identification of Proposed Issues for Adjudication

An entity seeking full party status must file a written petition which: (i) identifies the proposed party, its environmental interest in the proceeding, any interest relating to relevant statutes administered by the Department, and the precise grounds for its opposition or support; and (ii) identifies an issue for adjudication that is "substantive" and "significant," see 6 NYCRR § 624.4(c)(2)-(3), and "present[s] an offer of proof specifying the witness(es), the nature of the

[1] Mr. West also represents Casella Ontario.

evidence the person expects to present and the grounds upon which the assertion is made with respect to that issue." 6 NYCRR § 624.5(b)(2)(ii).

Petitions may be supplemented "[w]here the ALJ finds that a prospective party did not have adequate time to prepare its petition for party status…." 6 NYCRR § 624.5(b)(5). Late-filed petitions are not allowed except when (i) the late petition satisfies all requirements for a timely petition; and (ii) the proposed party demonstrates that there is good cause for the late filing, that participation by the petitioner will not significantly delay the proceeding or unreasonably prejudice the other parties, and that participation will materially assist in the determination of the issues raised in the proceeding. See 6 NYCRR § 624.5(c). Finally, where a prospective party fails to file a petition in the required form, an ALJ may deny party status or may require the prospective party to provide additional information. See 6 NYCRR § 624.5(b)(4).

As set forth above, FLZWC has submitted three documents relating to issues it has proposed for adjudication: (i) the Initial Petition; (ii) the Supplemental Petition; and (iii) the Amended Supplemental Petition. Each is discussed below.

1. The Initial Petition

The Initial Petition was comprised of three sections: (1) Introduction (pp. 1-8); (2) Issues Proposed for Adjudication (pp. 9-40); and (3) Conclusion (p. 41). Under the heading "**ISSUES PROPOSED FOR ADJUDICATION**," FLZWC specifically identified two proposed issues. The first proposed issue was set forth exactly as follows:

> **1. The County's Part 360 Application is deficient in that it lacks a mandated comprehensive recycling analysis, and the development of such an analysis would likely affect the size of the landfill expansion and the term of the draft modified Part 360 permit.**

Initial Petition, at 9 (numbering and bold font in original). The second proposed issue was set forth exactly as follows:

> **2. The County has failed to overcome the presumption, applicable when two facilities are sited on one site, that the landfill and its onsite gas-to-energy plant are operating under common control, with the result that new emissions estimations must be provided before a Title V permit modification can be approved.**

Id. at 26 (numbering and bold font in original). Neither Department staff nor applicant disputes that FLZWC has proposed these two issues for adjudication.[2] The Initial Petition contained no other numbered and specifically identified issues proposed for adjudication.

[2] As discussed herein, applicant has moved to "preclude" FLZWC from raising these two issues. Applicant does not, however, dispute that FLZWC has identified these as two proposed issues for adjudication.

2. The Supplemental Petition

By email dated March 3, 2015, counsel for FLZWC requested that he be allowed to present his proposed noise expert witness beginning at 2:00 p.m. on the date of the issues conference, to accommodate the witness' travel from Boston. Although applicant initially opposed FLZWC's request, applicant withdrew its opposition to the request upon the agreement by FLZWC to file its petition for party status with respect to noise issues on March 9, 2015, rather than on the March 10, 2015 date set forth in my February 13, 2015 Memorandum.

In accordance with the agreement between applicant and FLZWC, FLZWC filed its Supplemental Petition on March 9, 2015. See IC Ex. 9. Following a conference call with Chief Judge McClymonds regarding the cancellation of the March 11, 2015 issues conference, counsel for FLZWC emailed the parties on the morning of March 10, stating that, because the issues conference was not going forward on March 11, "the predicate for our agreement has crumbled," and that FLZWC would file an amended supplemental petition on noise on March 10, in accordance with the deadline set forth in my February 13, 2015 Memorandum. As set forth above, FLZWC thereafter filed the Amended Supplemental Petition on March 10, 2015.

Applicant argues that FLZWC's filing of the Amended Supplemental Petition violates the agreement between applicant and FLZWC, and that I should on that ground reject the Amended Supplemental Petition.

Although applicant's frustration with FLZWC's apparent failure to honor its agreement is understandable, the agreement between applicant and FLZWC was not "so ordered" by the undersigned, and FLZWC filed the Amended Supplemental Petition by the March 10, 2015 deadline in my scheduling order. I therefore deny applicant's request to reject the filing of the Amended Supplemental Petition. In addition, I will consider the Amended Supplemental Petition to have superseded the Supplemental Petition in all respects.

3. The Amended Supplemental Petition

In the Amended Supplemental Petition, FLZWC utilized an almost-identical text format in identifying noise issues proposed for adjudication. As in the Initial Petition, FLZWC included a bold font all caps heading "**ISSUES FOR ADJUDICATION**," followed by numbered proposed issues and sub-issues in bold italics, as follows:

> ***1. A nighttime noise assessment is required in the instant case but has not been performed.***

Amended Supplemental Petition, at 12 (numbering and bold italics in original).

> ***2. The Applicant's noise assessment utilizes a faulty measure of background sound levels.***

Id. at 14 (numbering and bold italics in original).

3. The Applicant's noise assessment fails to assess a worst-case hour of landfilling operations.

Id. at 18 (numbering and bold italics in original).

4. The County should not be allowed to rely on proposed post-permit mitigations.

Id. at 20 (numbering and bold italics in original).

5. Reliance on "noise easements" is misplaced in this case.

a. The County as Applicant has obtained no "noise easements".
b. "Noise easements" on which the County relies do not extend to post-closure operations.
c. Casella's noise easements at issue are not "appurtenant" to the County's landfill site.

Id. at 22-25 (numbering and bold italics in original).

6. The County cannot be granted a variance from Part 360-1.14(p)(4) (80dBA limit on equipment noise) unless and until it demonstrates it can comply with the applicable sound level limit under Part 360-1.14(p).

Id. at 26 (numbering and bold italics in original). The Amended Supplemental Petition contained no other numbered and specifically identified issues proposed for adjudication.

B. Applicant's Two Motions to Preclude

Applicant has moved to preclude both numbered issues in the Initial Petition. See Appl. Motion I. Applicant has also moved to preclude proposed issue No. 6 set forth in the Amended Supplemental Petition, as well as other topics discussed by FLZWC in its response to applicant's first motion to preclude, relating to odor, compliance with Clean Air Act ("CAA") New Source Performance Standards ("NSPS"), capacity of flares at the landfill, methane emissions, and noise modeling. See Appl. Motion II. I address each of these below.

1. Comprehensive Recycling Analysis

Citing, among other provisions, 6 NYCRR § 360-19(f)[3] and various provisions of 6 NYCRR Subpart 360-15 (entitled "Comprehensive Solid Waste Management Planning,"

[3] Section 360-1.9(f) provides, in relevant part, as follows:

> *Comprehensive recycling analysis.* In the case of applications that are submitted by or on behalf of a municipality *for initial permits to construct and operate or to renew a permit* … for a landfill … the applicant must submit as part of a complete application a comprehensive recycling analysis,

FLZWC argues that the County's Part 360 application is deficient because it lacks a comprehensive recycling analysis ("CRA"), and that the development of a CRA would likely affect the size of the landfill expansion and the term of the draft permit. See Initial Petition, at 9; see also id. at 8.[4] FLZWC argues that the agreement between applicant and operator Casella Ontario "creates dramatic disincentives to undertake recyclables recovery programs," and that such disincentives "are embodied in the applicant's local solid waste management plan, which lacks any meaningful comprehensive recycling analysis." Id. at 9-10. FLZWC argues that the Department cannot permit the expansion of the landfill absent the creation of a CRA. Id.

In addition, citing Matter of Foster Wheeler-Broome County, Interim Decision of the Commissioner, September 19, 1990, FLZWC argues that, were the County to comply with its obligation to create a CRA, the expansion proposal would result in an oversized facility, "a result that is not permitted under the mandated planning requirements." Id. at 10.[5]

FLZWC also describes the history of the development and approval of the County's Local Solid Waste Management Plan ("LSWMP"), and provides extensive criticism of the LSWMP's treatment and discussion of recycling. See id. at 16-19, 22-26. FLZWC recounts its own participation in the LSWMP proceeding, stating that it "commented extensively to the County and, subsequently to the Department" on what it viewed as many inadequacies of the LSWMP with respect to recycling. Id. at 25-26.

In its first motion to preclude, applicant argues that (i) section 360-1.9(f) does not apply here because this matter involves the modification of an existing permit, not an application for an initial permit to construct or operate, see Appl. Mem. I, at 5-6; (ii) FLZWC's assertion that the Part 360 application is deficient is in reality an attack on the Department's determination that the application is complete, see id. at 6-9; and (iii) FLZWC's proposed issue relating to the adequacy of the CRA is really a challenge to the LSWMP. Applicant asserts that FLZWC participated fully in the LSWMP proceeding, that it did not initiate a court challenge to the County's or the Department's approval of the LSWMP, that any such challenge is now time-barred, and that FLZWC cannot collaterally attack in this proceeding the LSWMP and related decision-making. See id. at 9-16.

Staff stated at the issues conference that (i) because this is not an application for an initial permit, section 360-1.9(f) does not apply, see Issues Conference Hearing Transcript ("IC Tr.") at 50:17-51:4; (ii) even though section 360-1.9(f) does not directly apply in this case, the

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> unless … such an analysis had been previously submitted and approved by the department; or a local solid waste management plan is in effect that addresses all components of such an analysis.

(italics added).

[4] To satisfy the requirement, set forth at 6 NYCRR § 624.5(b)(1)(v), that a potential party "identify the precise grounds for opposition or support," FLZWC stated that "the County cannot comply with … [t]he requirement to submit a comprehensive recycling analysis and plan of action to achieve recycling goals identified in the County's approved plan …." Initial Petition at 8.

[5] At the issues conference, FLZWC counsel stated that a CRA would be part of the sizing analysis and that "sizing analysis is the central issue." Issues Conference Transcript at 47:3-12.

requirements set forth in that provision are incorporated into the solid waste management plan regulation at 6 NYCRR § 360-15.9;[6] (iii) the CRA is part of the County's LSWMP that was approved in 2014, see id. at 64:7-14; and (iv) staff's determination that the County's application is complete implies that staff determined there was a satisfactory recycling plan in the LSWMP. See id. at 60:12-61:4.

In its response to applicant's first motion to preclude, FLZWC argues that a completeness determination does not foreclose challenges to alleged deficiencies in an application, see, e.g., FLZWC Resp. Mem. I, at 7-10, and that FLZWC "does not seek to attack Department staff's completeness determination." Id. at 12; see also IC Tr. at 61:22-24 (FLZWC counsel stating that FLZWC is not attacking the completeness determination). In addition, FLZWC expends much of its memorandum discussing whether the County's LSWMP is consistent with FLZWC's view of Departmental policy and applicable laws and regulations governing municipal solid waste management. See FLZWC Resp. Mem. I, at 15-19.[7] At the issues conference, counsel for FLZWC continued to argue that the CRA was missing, and that Department "guidance" required the submission of a CRA even if this were not an initial application, if no CRA has been submitted before. See IC Tr. at 48:5-49:8.

FLZWC has not raised an adjudicable issue regarding the CRA. The record reflects that the CRA is part of the County's LSWMP, and that staff's determination of completeness of the current application includes a determination that the LSWMP contains a proper CRA. Thus, contrary to the assertions of FLZWC, there is in fact a CRA, and therefore it is not "lacking."

Moreover, FLZWC's primary complaint relates to what it views as the inadequacies of the CRA in the County's LSWMP, and therefore the inadequacy of the LSWMP. See, e.g., IC Tr. at 64:22-66:19. FLZWC participated fully in the LSWMP process, however, and did not bring a court challenge to the County's approval of the LSWMP, see IC Ex. 14B (Ontario County Board of Supervisors Resolution No. 297-2014), or to the Department's approval of the LSWMP. See IC Ex. 7c, Affirmation of Thomas S. West dated February 27, 2015 ("West Aff. I"), at Ex. C; see also IC Tr. at 67:8-13 (FLZWC counsel conceding that FLZWC could have brought an Article 78 proceeding to challenge the Department's approval of the LSWMP). This proceeding is not the proper forum in which to challenge the adequacy of the LSWMP, and the time during which FLZWC could have initiated such a challenge has expired.

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[6] Section 360-15.9(f) provides, in relevant part, as follows:

> The [solid waste management] plan must include, at a minimum … (f) a comprehensive recycling analysis for the planning unit, to include those items identified in subdivision 360-1.9(f) of this Part ….

[7] Although not entirely clear, it appears that FLZWC may also have been attempting to add one or more new proposed issues in its response to applicant's first motion to preclude, claiming that "precisely one branch of FLZWC's proposed LSWMP issue" is that Ontario County "fails to exhibit all the conditions for an appropriate landfill site under 6 NYCRR § 360-2.12(a)(1)," that the County has not performed a site selection study, and that the County has not applied, and could not meet the standards, for a variance under 6 NYCRR § 360-1.7(c)(2). None of these provisions or topics, however, was cited in FLZWC's Initial Petition. See § II.A.1 above; see also Initial Petition at 8 (identifying issue as relating to CRA and plan of action). To the extent FLZWC's discussion of these matters may relate to FLZWC's claim that the landfill is "oversized" based upon the Foster Wheeler Interim Decision, that Interim Decision is neither controlling nor relevant in this circumstance, as discussed herein.

Finally, I reject FLZWC's claim that the Foster Wheeler Interim Decision is controlling, or even relevant, here. As did the proposed intervenor in Matter of Sullivan County Division of Solid Waste, Rulings of the Administrative Law Judge on Issues and Party Status, January 18, 2007, at 47, FLZWC essentially claims here that the expansion of the landfill is oversized and will impede efforts to encourage waste reduction and recycling. The incinerator cases, such as Foster Wheeler, are inapposite here. The sizing of incinerators relates to their efficiency; they are sized thermodynamically. The Foster Wheeler decision does not state that it is applicable to landfills, and its analysis is simply not applicable in this proceeding regarding the proposed expansion of the landfill.

RULING: FLZWC has not raised an adjudicable issue regarding the comprehensive recycling analysis. Because FLZWC has failed to satisfy its burden to raise this as an adjudicable issue, applicant's motion to preclude with respect to this issue is denied as moot.

2. Common Control

Gas generated by the County's landfill is burned by an onsite gas-to-energy plant ("GTE Plant") independently owned by Seneca Energy II, LLC ("SE"). The second proposed issue for adjudication specifically identified in the Initial Petition relates to FLZWC's claim that the landfill and the GTE Plant are under "common control" so that the emissions from the facilities should be aggregated for purposes of determining the proper level of air pollution controls to be imposed in the landfill's Title V permit. See Initial Petition at 26-40.

Both the federal Environmental Protection Agency ("EPA") and the Department have provided extensive discussion regarding how to determine whether two nominally separate facilities are under "common control" so that the facilities should be considered a single source of emissions under the CAA. See, e.g., September 18, 1995 Letter from William A. Spratlin, Director, EPA Air, RCRA, and Toxics Division to Peter R. Hamlin, Chief, Air Quality Bureau, Iowa Department of Natural Resources ("Spratlin Letter"); see also DEC Declaratory Ruling 19-19 (Seneca Meadows, Inc.) (September 9, 2011) (citing the Spratlin Letter, several other sources of analysis and providing case summaries).

Between 2009 and 2012, Department staff reviewed the relationship of the landfill and the GTE Plant, and found that the two are separate facilities not under "common control." See IC Ex. 5, Application Documents Item 1 (January 5, 2012 letter from Thomas Marriott, P.E. to Emily Zambuto of Seneca Energy II, LLC); see also West Aff. I, Ex. D.

SE thereafter submitted an application to renew and modify the Title V permit for the GTE Plant. Notice of the completed application was published in the July 18, 2012 ENB. The notice stated that comments on the application could be submitted through August 17, 2012, and that the Department would evaluate the application and comments to determine whether to hold a public hearing. See West Aff. I, Ex. E.

By letter dated August 17, 2012, FLZWC submitted an eight page letter commenting on Seneca Energy's application, objecting to staff's determination that the GTE Plant and the landfill were not under "common control." See West Aff. I, Ex. F. FLZWC's letter included an extensive discussion of the questions and factors identified in the EPA Spratlin Letter, and FLZWC's views regarding its applicability to the GTE Plant and the landfill. See id.

The Department thereafter issued a Responsiveness Summary regarding SE's application, specifically addressing every point raised in FLZWC's August 17, 2012 letter. See West Aff. I, Ex. G. Staff thereafter submitted to EPA a proposed Title V permit for the GTE Plant. See West Aff. I, Ex. H. Staff's cover letter specifically noted that staff had received comments from FLZWC and had provided a responsiveness summary, and that no changes were made to the proposed permit based upon the comments. EPA had 45 days after receipt of a copy of the permit to object to the issuance of the permit. See 42 U.S.C. § 7661d(b); see also 40 C.F.R. § 70.8(c); 6 NYCRR § 621.10(a)(5). EPA did not issue an objection to the proposed permit, and the Department thereafter issued the Title V permit to SE. See West Aff. I, ¶ 40.

FLZWC thereafter filed a petition with EPA, requesting that EPA object to the Department's issuance of the Title V permit. See West Aff. I, Ex. I; see also 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). FLZWC argued that the GTE Plant and the landfill are under common control and should therefore be considered a single source for purposes of preconstruction review under the CAA's New Source Review/Prevention of Significant Deterioration programs. See West Aff. I, Ex. I. After EPA failed to respond to FLZWC's petition, FLZWC commenced an action against EPA in federal court, seeking to compel EPA to grant or deny FLZWC's petition. See West Aff. I, Ex. J. The federal court later issued an order granting the joint application of FLZWC and EPA to stay the federal litigation pending EPA's response to the FLZWC petition, which response is apparently due by June 30, 2015. See Initial Petition at 5, and n. 6; see also id., Ex. A (federal court order staying proceedings). Thus, EPA has to date not responded to FLZWC's petition seeking an EPA objection to the Department's issuance of the Title V permit, and the federal litigation remains pending.

Following the Department's issuance of the Title V permit to SE, FLZWC did not avail itself of its right under Article 78 of the Civil Practice Law and Rules ("CPLR") to challenge in New York State courts that final determination of the agency, and the four month period in which to initiate such a special proceeding long ago expired. See CPLR 217(1).

Although FLZWC did not commence a special proceeding to challenge the Department's "common control" determination in the SE permit proceeding, FLZWC seeks to adjudicate that issue in this proceeding. FLZWC has stated, however, that common control is "principally" a legal issue, and that FLZWC "does not dispute any fact asserted by Department staff and acknowledged by the applicant regarding the actual relationship" between the landfill and the GTE Plant. FLZWC Resp. Mem. I, at 20. FLZWC has also stated that it "finds nothing to dispute in the movants' fact assertions, which are fairly and adequately supported by [West. Aff. I] Exhibits D through M." Id. at 3. Among those exhibits are letters to Department staff from the County, Casella Ontario and Seneca Energy II, dated in January and February 2015, stating that there have been no factual changes in the relationship between the GTE Plant and the landfill, with regard to the issue of common control, since the Department's 2012 determination

that the GTE Plant and the landfill are not under "common control." See West. Aff. I, Exs. K-M; IC Exs. 13A-13C.

In its first motion to preclude, Applicant argues that FLZWC is collaterally estopped from raising common control as an issue for adjudication in this proceeding. See Appl. Motion I, at 16-20. FLZWC did not in its written response to the motion directly address the issue of collateral estoppel. Counsel for FLZWC took the position at the issues conference that collateral estoppel did not apply because "[t]his is a different matter. This is not the same matter as the [Seneca Energy] matter" IC Tr. at 24:18-21, and that FLZWC "preserved the issue by petitioning EPA." Id. at 26:15-19. FLZWC counsel stated that, although FLZWC could have appealed the issuance of the permit to the DEC Commissioner, and then filed an Article 78 proceeding, it chose the less expensive route of administratively petitioning the EPA, and believes it has through that process preserved the issue. See id. at 26:23-27:6.

There is no need to address applicant's collateral estoppel argument. FLZWC has conceded that no facts have changed since the Department's 2012 common control determination, and that there are thus no factual issues to adjudicate in this proceeding. Moreover, FLZWC has not provided a compelling legal argument to support a holding that is contrary to the Department's 2012 determination in the SE proceeding. Finally, to the extent, if any, EPA's ultimate determination differs from staff's 2012 determination in the Seneca Energy proceeding, staff and the applicant may address at that time any potential changes in the draft Title V permit necessitated thereby.[8]

RULING: FLZWC has not raised an adjudicable issue regarding common control. Because FLZWC has failed to satisfy its burden to raise this as an adjudicable issue, applicant's motion to preclude with respect to this issue is denied as moot.

3. Noise Variance

In the sixth proposed issue for adjudication set forth in the Amended Supplemental Petition, FLZWC asserted that the County cannot be granted a variance from 6 NYCRR § 360-1.14(p)(4) unless and until it demonstrates it can comply with the applicable sound level limit under section 360-1.14(p). See Amended Supplemental Petition, at 26.

The record reflects that a variance was requested, and granted, as part of a permit modification proceeding in 2012. See Affirmation of Thomas S. West, Esq., dated March 17, 2015 ("West Aff. II"), at 29-31; see also id. at Ex. E. FLZWC provided comments on the proposed permit modification granting a noise variance. See id. Ex. G. Staff thereafter issued the modified permit on or about August 21, 2012, and sent a copy to citizens who provided

[8] At the issues conference, all parties agreed that the impact of an EPA decision that the facilities are under common control is purely speculative. See, e.g., IC Tr. at 27:11-31:12. Counsel for applicant took the position that, even aggregating emissions from the landfill and the GTE Plant would not result in the imposition of greater controls than those already implemented. See id. at 31:19-35:20. Although FLZWC counsel apparently disagrees, FLZWC has proffered no witness with respect to whether the controls currently in place would be considered insufficient if the emissions of the landfill and the GTE Plant were aggregated.

comments, including FLZWC. See id. Ex. I. FLZWC did not challenge the issuance of the modified permit through an Article 78 proceeding.

Applicant is not seeking this variance in this proceeding; rather, the variance was already granted in the permit modification proceeding in 2012, and FLZWC's claim that applicant should not obtain a variance that it is not seeking in this proceeding is not appropriate.[9]

RULING: FLZWC has not raised an adjudicable issue regarding the noise variance. Because FLZWC has failed to satisfy its burden to raise this as an adjudicable issue, applicant's motion to preclude with respect to this issue is denied as moot.

C. FLZWC's Claims Regarding Additional Proposed Issues for Adjudication

FLZWC argues that, through its responses to applicant's two motions to preclude, it has proposed timely, properly and adequately other issues for adjudication in addition to those proposed issues clearly identified in the Initial Petition and the Amended Supplemental Petition, as quoted above. See, e.g., IC Tr. at 123:4-6 (FLZWC counsel statement that FLZWC's written responses to applicant's motions to preclude were "supplementing our petition"); see also id. 126:15-19 (same). Both applicant and Department staff oppose FLZWC's efforts to add these as proposed issues for adjudication. See generally Appl. Motion I; Appl. Motion II; see also IC Tr. at 120:16-121:10 (staff position that FLZWC's attempt to raise these issues is untimely).

1. FLZWC Has Not Raised Adjudicable Issues Regarding Odor, NSPS Compliance, Flare Capacity or Methane Emissions

FLZWC has failed, both procedurally and substantively, to raise timely, properly, or adequately any adjudicable issues regarding odor, NSPS compliance, flare capacity, or methane emissions.

In the "Introduction" section of the Initial Petition, citing the landfill's current Title V air permit regarding landfill gas emissions controls, FLZWC included the following sentence: "The landfill's odor problems suggest it is not well-designed and well-operated." Initial Petition, at 2. This sentence is apparently an oblique reference to certain requirements of the federal New Source Performance Standards ("NSPS") applicable to air emissions from municipal solid waste landfills. See generally 40 C.F.R. § 60.752. The Initial Petition does not cite the NSPS regulation with respect to odor. Nor does the Initial Petition identify a proposed issue regarding odor, whether the landfill is "well-designed and well-operated," or any other NSPS-related issue. See Initial Petition, at 1-41. Indeed, FLZWC mentions NSPS only once in its Initial Petition, within its discussion of proposed issue No. 2 relating to common control. See id. at 27.

[9] Moreover, at the issues conference, counsel for FLZWC stated that, if applicant otherwise meets the noise requirements applicable to the landfill operation, the noise variance will not be an issue. See IC Tr. at 98:15-19. Thus, determination of whether applicant meets the requirements of 6 NYCRR § 360-1.14(p) is already part of the noise issues that the parties have agreed to adjudicate.

In the "Statement of Facts" section of its response to applicant's first motion to preclude, FLZWC refers again to the design and operation of the landfill's gas collection and control system, and attaches a report evaluating the collection system. FLZWC states that "[t]he landfill's odor problems, *which FLZWC does not seek to raise in this proceeding* … is [sic] linked to deficiencies in the design and operation of the landfill's gas collection and control system…." FLZWC Resp. Mem. I, at 4, n. 6 (italics added). Although conceding that it is not raising odor as an issue for adjudication, FLZWC also states that "the landfill's flares have insufficient capacity to control the volume of gas" at the landfill, and stated that "the landfill is not 'well-designed and well-operated' as evidenced by chronic and serious offsite odor problems." Id. at 4.

In the "Argument" section of its memorandum of law in response to applicant's first motion to preclude, FLZWC states that "Title V issues are not exhausted by the common control/single source question," and that applicant "is also obligated to comply with the 'well-designed and well operated' performance standard required under" NSPS. Id. at 22. FLZWC thereafter discusses its view of some NSPS requirements regarding landfills. See id. at 23-25. FLZWC then asserts that the County's landfill "exceeded the methane concentration limit at several gas wells in early 2014," and that "FLZWC has no indication that remediation efforts have [been] successful to date." Id. at 25. FLZWC states that it "is authorized to develop as an issue for adjudication whether the landfill can be [well] designed and operated, and under what permit conditions the County can provide a reasonable assurance of future compliance." Id. Finally, FLZWC states that, with respect to "whether the landfill's gas flares have sufficient capacity," FLZWC "look[s] forward to developing that issue in the issues conference." Id.

In its response to applicant's second motion to preclude, FLZWC expressly claims that "the issue of compliance with the NSPS program … *was identified in FLZWC's initial petition*." FLZWC Resp. Mem. II, at 5 (italics added). FLZWC also argues that a written comment submitted by a member of the public (Ms. Katherine Bennett Roll, who lives near the landfill), is sufficient to raise NSPS compliance as an adjudicable issue in this proceeding. See id. at 9. FLZWC attaches Ms. Roll's written public comment to its response to applicant's second motion. See FLZWC Resp. Mem. II, Ex. A. Throughout its brief, FLZWC relies heavily on comments by Ms. Roll regarding these issues, see id. at 9-12, but provides no information regarding her qualifications, and does not state that Ms. Roll would testify on these issues at a hearing.

Generally, an issue is adjudicable if: (i) it relates to a dispute between Department staff and an applicant regarding a substantial permit term or condition; (ii) it relates to a matter cited by staff as a basis to deny the permit, and is contested by the applicant; or (iii) it is proposed by a potential party and is both "substantive" and "significant," as those terms are defined in the regulations. See 6 NYCRR § 624.4(c)(1)-(3).

Essentially, FLZWC has taken one sentence from the Introduction section of the Initial Petition, and claims that such sentence has, over time, and through FLZWC's discussion of NSPS requirements in various sections of its responses to applicant's motions, the submission of a report by a consultant retained by the County, one public comment by a citizen who is not an expert, and its claims in briefing and at the issues conference that these have always been issues

identified for adjudication, metamorphosed into timely, properly raised and supported substantive and significant issues under 6 NYCRR Part 624.

FLZWC is incorrect. First, FLZWC's attempt to add these new issues is procedurally defective. See 6 NYCRR § 624.5(b) (person desiring party status must file petition "[b]y the date set in the notice of hearing"); see also Matter of Sullivan County Division of Solid Waste, Interim Decision of Commissioner, March 28, 2008, at 12. FLZWC clearly identified only two specific issues for adjudication in the timely filed Initial Petition: (1) comprehensive recycling analysis; and (2) common control. See Initial Petition, at 9-40. FLZWC did not in its Initial Petition identify odors, NSPS compliance, flare capacity, or methane emissions as issues for adjudication, and expressly stated in its response to applicant's first motion that it was not raising odors as an issue for adjudication. See IC Tr. at 122:20-123:10 (FLZWC counsel conceding that FLZWC did not identify either flare capacity or methane emissions in the Initial Petition); see also FLZWC Resp. Mem. I, at 4, n. 6 (stating that FLZWC was not raising odor as an issue in this proceeding).

Moreover, FLZWC did not seek leave to file an amended, revised petition to expressly raise such issues. Nor did it attempt to demonstrate that (i) it had good cause for not raising these issues in the Initial Petition, (ii) adding the new issues would not significantly delay the proceeding or not prejudice the other parties, or (iii) its participation would materially assist in the determination of issues raised in the proceeding. See 6 NYCRR § 624.5(c)(2). Given the clarity with which FLZWC identified the two issues set forth in the Initial Petition, I do not find credible FLZWC's subsequent and repeated claims that these other topics were properly identified as proposed issues in the Initial Petition.

FLZWC's attempt to add these new issues is also substantively defective. FLZWC has the burden of persuasion at the issues conference to provide an appropriate offer of proof that supports its proposed issues. See 6 NYCRR § 624.4(c)(4). Such offer of proof must "specify[] the witness(es), the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect to that issue." 6 NYCRR § 624.5(b)(2)(ii). "Offers of proof may take the form of proposed testimony, usually that of an expert, or the identification of some defect or omission in the application." Matter of Buffalo Crushed Stone, Inc., Decision of the Commissioner, November 17, 2008, at 6; see also Matter of Halfmoon Water Improvement Area No. 1, Decision of the Commissioner, March 3, 1982, at 2. Conclusory statements are not sufficient to raise an adjudicable issue, and a potential party's assertions "should arise from the opinions of the expert or other qualified witnesses." Halfmoon, at 2. Conducting an adjudicatory hearing where offers of proof, at best, raise potential uncertainties, is not the intent of the Department's hearing process. See Buffalo Crushed Stone, at 6 (citations and internal quotations omitted). The "introduction of a question does not raise an issue for adjudication." Matter of Waste Management of New York, LLC, Decision of the Commissioner, October 20, 2006, at 7 (quoting from and affirming Matter of Waste Management of New York, LLC, ALJ Ruling on Issues and Party Status, March 7, 2006, at 13).

FLZWC has not proffered any qualified witness, expert or otherwise, to appear at an adjudicatory hearing to support and defend its generalized allegations regarding whether the landfill is "well-designed and operated," or that the landfill lacks sufficient flare capacity, or that

methane emissions continue to exceed limits, or that the draft permit is insufficient in any respect to ensure compliance. FLZWC has not stated that it intends to offer Ms. Roll, or anyone else, as a witness, and in any event has not supplied any information to support a claim that Ms. Roll is qualified to offer testimony on these technical issues.[10] Nor has FLZWC specified the nature of any evidence it expects to present at the hearing on these issues. Rather, counsel simply asserted at the issues conference that "we did the math … and it doesn't add up. And that's the offer of proof." IC Tr. at 44:15-17. This is inadequate.

RULING: FLZWC has not raised timely or properly an adjudicable issue regarding odor, NSPS compliance, flare capacity or methane emissions. Because FLZWC has failed to satisfy its burden to raise timely or properly these as adjudicable issues, applicant's motion to preclude with respect to these issues is denied as moot.

2. FLZWC Has Not Raised An Adjudicable Issue Regarding "Straight-Line Propagation" or Cadna/A Type Noise Modeling

As set forth above at § II.A.3, FLZWC identifies, in the Amended Supplemental Petition, in bold italicized font, several proposed issues for adjudication relating to noise. Notwithstanding the clarity with which FLZWC has identified these proposed issues, FLZWC states in the "Conclusion" section of the Amended Supplemental Petition that applicant's modeling approach of "measuring offsite sound impacts at selected points, has not been tolerated" under two prior administrative decisions. Amended Supplemental Petition, at 27. FLZWC further states that, "either straight line propagation or Cadna/A-type sophisticated modeling" is preferred, and that "a new model must be prepared and made available for comment and criticism by the petitioner and the Department." Id. Moreover, FLZWC states that "[u]ntil the Applicant complies with the methodology for a noise assessment under Part 360-1.14(p) acceptable under the Department's precedents, there is no basis to adjudicate the issue…." Id. at 28.

Clearly, FLZWC is not seeking to adjudicate noise modeling; indeed, it states that there is no basis to adjudicate modeling until applicant performs modeling that FLZWC claims is "acceptable" under the Department's precedents. Applicant, however, has apparently interpreted FLZWC's statements in the "Conclusion" section of the Amended Supplemental Petition as an attempt by FLZWC to propose an additional issue for adjudication, see Appl. Motion II, at 13-14, and, perhaps in an overabundance of caution, argues that such purported proposal is both untimely and not supported by an offer of proof.

Although FLZWC had not specified in the Amended Supplemental Petition that its preference for different modeling is a proposed issue for adjudication, it responded to applicant's motion to preclude by apparently crediting applicant's belief that FLZWC is indeed proposing the issue for adjudication. FLZWC argues that: (i) the modeling issue was a "legal issue" requiring no special offer of proof; (ii) "the Department has, based on affirmed ALJ Rulings, a *policy*" that modeling is superior for demonstrating compliance with 6 NYCRR § 360-1.14(p);

[10] Ms. Roll is not an engineer, see IC Tr. at 43:23-24, and FLZWC has not provided any other information to support offering her as a witness.

and (iii) ALJ rulings on the superiority of modeling "are examples of a Department 'statement … of general applicability that implements or applies law' amounting to a 'rule' under [the State Administrative Procedure Act]." FLZWC Resp. Mem. II, at 13 (italics added).

At the issues conference, counsel for FLZWC initially stated that counsel for applicant "opened the door" on the issue, and that FLZWC is indeed proposing noise modeling as an adjudicable issue. See IC Tr. at 99:20-101:3. Upon further discussion, however, FLZWC counsel stated that: (i) it is not taking the position that two affirmed ALJ rulings have become a "rule" under SAPA, see 106:15-21;[11] (ii) the Department's actual noise policy, DEP-001, "Assessing and Mitigating Noise Impacts," does not require modeling, id. at 105:16-106:5; and (iii) FLZWC's expert will not testify that CadnaA-type computer modeling is required in all cases. Id. at 113:2-5. Finally, FLZWC counsel stated flatly: "I'm not arguing that modeling is required, so that's not an issue." Id. at 119:2-3.[12]

RULING: FLZWC has not raised an adjudicable issue regarding whether certain modeling is required. Because FLZWC has failed to satisfy its burden to raise this as an adjudicable issue, applicant's motion to preclude with respect to this issue is denied as moot.

III. RULING ON PARTY STATUS

FLZWC seeks full party status with respect to all of the issues it has proposed for adjudication. Securing full party status requires: (i) the filing of an acceptable petition pursuant to 6 NYCRR § 624.5(b)(1) and (2); (ii) raising a substantive and significant issue or demonstrating that the petitioner can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party; and (iii) demonstration of an adequate environmental interest. See 6 NYCRR § 624.5(d)(1).

Based on the record, I find that FLZWC has an environmental interest, which was not challenged by the applicant or staff. In addition, the parties have stipulated to adjudicate substantive and significant issues relating to noise.

RULING: FLZWC's petition for full party status is granted.

IV. APPEALS

A ruling of an ALJ (i) to include or exclude any issue for adjudication; (ii) on the merits of any legal issue made as part of an issues ruling; or (iii) affecting party status, may be appealed to the Commissioner on an expedited basis. See 6 NYCRR § 624.8(d)(2)(i)-(iii). Expedited appeals must be filed in writing within five days of the disputed ruling. See 6 NYCRR

[11] The issues conference transcript incorrectly refers to "SEQRA" during the discussion of FLZWC's claim that the superiority of modeling is now a rule under the State Administrative Procedure Act (for which the correct acronym is "SAPA"). See IC Tr. at 106:13-17. The transcript is hereby corrected, replacing "SEQRA" with the correct acronym, "SAPA."

[12] Counsel for staff stated that "CadnaA modeling is not a required policy of the Department," and is "not even consistent and routine practice insofar as Part 360 noise analysis is concerned." Id. at 117:13-18.

§ 624.6(e)(1). This period may be extended. See 6 NYCRR § 624.6(g). Notice of any appeal and a copy of all briefs must be filed with the undersigned ALJ and served on all parties. See 6 NYCRR § 624.6(e)(3).

Appeals of this Ruling on Issues and Party Status must be received by 4:00 PM on Thursday, **May 28, 2015**. Replies are authorized, and must be received by 4:00 PM on Thursday, **June 4, 2015**.

The original and two copies of each appeal and reply thereto must be filed with Commissioner Joseph Martens (Attention: Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services), at the New York State Department of Environmental Conservation, 625 Broadway (14th Floor), Albany, New York 12233-1010. The copies received will be forwarded to Chief ALJ James T. McClymonds and me. In addition, one copy of each submittal must be sent to all others on the service list at the same time and in the same manner as the submittals are sent to the Commissioner. Service of papers by facsimile transmission (fax) or by electronic mail is not permitted, and any such service will not be accepted.

A hearing regarding noise issues as to which the parties have stipulated to adjudication has been scheduled to commence on May 11, 2015. The specific scope of that adjudicatory hearing will be determined if and when the parties submit a fully executed proposed stipulation for my review, and at the adjudicatory hearing. The adjudicatory hearing will not be stayed or adjourned pending any appeal of this Ruling. See 6 NYCRR § 624.8(d)(7).

/s/

_____

D. Scott Bassinson
Administrative Law Judge

Dated: May 6, 2015
Albany, New York

Attachments: Issues Conference Exhibit List
Service List

Matter of Ontario County Landfill Expansion Application
NYSDEC Application Nos. 8-3244-00004/00007,
8-3244-00004/00021, 8-3244-00004/00001

ISSUES CONFERENCE EXHIBIT LIST

1. Referral Memorandum to Office of Hearings and Mediation Services, with attachments

2. ENB Notice, January 26, 2015

3. Affidavit of Publication

    a. The Daily Messenger
    b. Finger Lakes Times

4. February 5, 2015 Cover Letter attaching DVD containing updated Document List, and the Documents Identified Therein

5. Document List @ January 28, 2015

6. Petition for Full Party Status, Finger Lakes Zero Waste Coalition ("FLZWC"), dated February 25, 2015, with exhibits

7. County Motion to Preclude, dated February 27, 2015
    a. Notice of Motion
    b. Memorandum of Law in Support of Motion to Preclude
    c. Affirmation of Thomas S. West, Esq. in Support of Motion to Preclude, with exhibits
    d. Ontario County Final Solid Waste Management Plan, March 2014

8. FLZWC Memorandum of Law and Response to Motion to Preclude, dated March 5, 2015, with exhibits

9. FLZWC Supplemental Petition on Noise Issues, dated March 9, 2015, with exhibits

10. FLZWC Amended Supplemental Petition

    a. Amended Supplemental Petition on Noise Issues, FLZWC, dated March 10, 2015, with exhibits
    b. March 11, 2015 Letter from FLZWC counsel with errata relating to IC Ex. 10.a

11. County Second Motion to Preclude, dated February 27, 2015
    a. Notice of Motion
    b. Memorandum of Law in Support of Second Motion to Preclude
    c. Affirmation of Thomas S. West, Esq. in Support of Motion to Preclude, with exhibits

d. Affidavit of Service

12. FLZWC Memorandum of Law and Response to Second Motion to Preclude, dated March 20, 2015, with exhibit

13. A. January 22, 2015 letter from counsel for Casella Ontario to counsel for staff
    B. February 24, 2015 letter from counsel for County to counsel for staff
    C. February 27, 2015 letter from counsel for Seneca Energy II, LLC to counsel for staff

14. A. Ontario County Board of Supervisors Resolution No. 296-2014
    B. Ontario County Board of Supervisors Resolution No. 297-2014