STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Application for a Solid Waste Management Facility Permit Pursuant to Article 27 of the Environmental Conservation Law (ECL) for Construction and Operation of a Yard Waste Composting Facility in Spring Creek Park, Brooklyn, New York,

- by the -

DEPARTMENT OF SANITATION OF THE CITY OF NEW YORK,

Applicant.

DEC Application No. 2-6105-00666/00001

DECISION OF THE COMMISSIONER

July 2, 2012

DECISION OF THE COMMISSIONER

Applicant Department of Sanitation of the City of New York (DOS) filed an application with the New York State Department of Environmental Conservation (Department) seeking a solid waste management facility permit for the construction and operation of a yard waste composting facility located within Spring Creek Park, in southeastern Kings County (Brooklyn).

After an administrative adjudicatory hearing, Administrative Law Judge (ALJ) Susan J. DuBois prepared a hearing report, which was released as a recommended decision for comment by the parties. For the reasons that follow, the recommended decision is adopted in part, the permit is granted as modified in this decision, and the variance applications are granted to the extent discussed below.

I. PROCEDURAL BACKGROUND

In fall 2001, DOS filed an application with the Department seeking a permit pursuant to Environmental Conservation Law (ECL) article 27 and part 360 (Part 360) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) to construct and operate a yard waste composting facility at 12720-B Flatlands Avenue, Brooklyn, New York (referred to as the Spring Creek Yard Waste Composting Facility). The application includes requests for three variances from setback requirements specified in Part 360.

The composting facility would consist of a pad of recycled asphalt millings, surrounded by a raised berm planted with screening trees and shrubs, and fencing. The facility would also include storm water management basins.

If permitted, the facility would be authorized to accept only leaves, grass clippings, discarded Christmas trees, brush, logs, trees, stumps, horse manure, and unadulterated wood chips (hereinafter "yard waste"). The facility would receive no more than 15,000 tons of yard waste in any one calendar year. The maximum amount of yard waste allowed on-site at any one time would be limited to no more than 83,900 cubic yards.

Construction of the facility was largely completed in 2001-2002, with additional construction in 2003. The New York City Parks Department has composted yard waste on the site since 2001. To undertake composting at the facility at levels above the regulatory exemption threshold of 3,000 cubic yards per year (see 6 NYCRR 360-5.3[a][2]), DOS must obtain the Part 360 solid waste management facility permit that is the subject of this proceeding.

Much of the construction on the facility occurred before DOS filed its application for a Part 360 permit and was completed before its application was processed by the Department. Nevertheless, Department staff exercised its prosecutorial discretion and decided to encourage DOS to complete the present permit application process rather than commence enforcement proceedings.

The Spring Creek facility, if approved, would be a component of the City of New York's solid waste management plan (SWMP) (see ECL 27-0107; ECL 27-0707[2][b]). Under the SWMP, which was approved by the Department, the City is obligated to continue collecting and composting leaves from 37 City districts, and improve and expand its yard waste composting program to another 34 districts (see Lange Testimony, Transcript [Tr] [5-15-07], at 16-17).

A. Issues Rulings and Interim Appeals

Department staff issued a notice of complete application in December 2002.[1] Staff reviewed the permit application, determined that the project could be approved, and prepared a draft permit. The matter was then referred to the Department's Office of Hearings and Mediation Services (OHMS) for permit hearing proceedings pursuant to 6 NYCRR part 624 (Part 624).

After conducting a legislative hearing and issues conference, ALJ DuBois issued an issues ruling dated August 30, 2004, and a supplemental issues ruling dated February 8, 2005.

[1] DOS is the lead agency for the project under the State Environmental Quality Review Act (ECL article 8 [SEQRA]) (see Hearing Report and Recommended Decision [11-23-09] [Rec Dec], at 2). In December 2002, DOS issued a negative declaration finding that the project would not have a significant environmental impact (see id.). Accordingly, SEQRA review of the project is completed.

Both the August 2004 issues ruling and the February 2005 supplemental issues ruling were appealed to the Commissioner.

On the appeals, the Executive Deputy Commissioner issued an interim decision dated June 14, 2006, that modified in part and otherwise affirmed the ALJ's issues rulings. The Executive Deputy Commissioner held that issues concerning odor, litter, dust, and vector control, and DOS's noise impact analysis required adjudication (see Matter of Department of Sanitation of the City of NY [Spring Creek], Interim Decision of the Executive Deputy Commissioner, June 14, 2006, at 13-16, 18-19). With respect to the requirements for the requested variances, the Executive Deputy also held that adjudicable issues were raised concerning the variances' potential impacts under 6 NYCRR 360-1.7(c)(2)(iii). The Executive Deputy Commissioner further held that the project's consistency with the City's local waterfront revitalization program (LWRP) required further administrative review (see id. at 19-26).

The Executive Deputy Commissioner concluded that the remaining issues raised on the appeals did not require adjudication, including issues concerning the applicability of the Department's hazardous waste regulations to the project, State Environmental Quality Review Act (SEQRA) review, compliance with local zoning, alienation of parkland, and DOS's record of compliance. With respect to the requested variances, the Executive Deputy Commissioner affirmed the ALJ's ruling that no issues were raised regarding DOS's showing under 6 NYCRR 360-1.7(c)(2)(ii) (see id. at 27). The Executive Deputy Commissioner also affirmed the ALJ's supplemental ruling that the Part 360 setback requirements in effect immediately prior to March 10, 2003 applied to DOS's application (see id.).

Accordingly, the Executive Deputy Commissioner remanded the matter to the ALJ for further proceedings consistent with the interim decision. Parties to the proceedings were DOS, Department staff, and intervenors New York/New Jersey Baykeeper (Baykeeper), and the Concerned Homeowners Association and Mr. Ronald J. Dillon (collectively CHA).

B. Coastal Consistency Review

As directed by the interim decision, Department staff submitted a State coastal assessment form (CAF) and revised coastal consistency certification for review by the ALJ and the parties. In a ruling dated February 6, 2007, the ALJ held that further review was required and remanded the CAF and revised certification to Department staff for further revision.

In May 2007, Department staff submitted a further revised certification to the ALJ, and in October 2007, staff submitted a revised permit condition designed to implement the certification. In a ruling dated February 19, 2008, the ALJ again held that the revised certification was irrational and affected by an error of law, and remanded the certification to staff for further revision (see ALJ Ruling, Feb. 19, 2008, at 23-24).

In March 2008, Department staff advised the ALJ that it would not further revise the CAF and coastal consistency determination and, instead, would submit its May 2007 certification to the Commissioner for consideration.

C. Adjudicatory Proceedings and Second Interim Appeal

Adjudicatory hearings commenced in May 2007. In June 2007, DOS notified the Department that it was transferring management of its composting facilities from Organic Recycling, Inc. (ORI) to WeCare Organics LLC (WeCare). Baykeeper proposed to add the transfer of management companies as an issue for adjudication. CHA supported Baykeeper's proposal, and further asserted that the identity of the site owner and facility operator be adjudicated.

In a ruling dated November 20, 2007, the ALJ held that the issues raised by Baykeeper and CHA did not present adjudicable issues (see ALJ Ruling on Additional Proposed Issue, Nov. 20, 2007). CHA appealed from the ALJ's ruling. That appeal is addressed below.

Hearings concluded in March 2009. After the filing of post-hearing briefs and other submissions, the ALJ closed the record on August 31, 2009.

D. Recommended Decision; Post-Recommended Decision Motions

The ALJ prepared a hearing report, which was released to the parties for comment pursuant to 6 NYCRR 624.13(a)(2)(ii) on November 23, 2009. In the hearing report, the ALJ recommended denying DOS's application. The ALJ also recommended that the Commissioner conclude that the coastal consistency certification required by 19 NYCRR 600.4(c) cannot be made. In the alternative, in the event the Commissioner disagreed with the recommendation to deny the application, the ALJ recommended certain additional permit conditions to mitigate potential adverse impacts from the project.

Timely comments in support of the ALJ's recommended decision were filed by Baykeeper and CHA, respectively, on February 4, 2010. Comments in opposition to the recommended decision were timely filed by DOS and Department staff also on February 4, 2010. Attached to Department staff's comments was a proposed draft permit with modified permit conditions included.

On February 8, 2010, Baykeeper moved to strike the revised draft permit, and all references to it, from Department staff's comments. On February 11, 2010, CHA moved to strike Department staff's revised draft permit and DOS's entire February 4, 2010 submissions.

Department staff filed a response to Baykeeper's and CHA's motions dated February 25, 2010. DOS filed a response to the motions dated February 26, 2010. CHA filed a response to Baykeeper's motion dated February 25, 2010.

II. DISCUSSION

A. CHA's Second Interim Appeal

In its second interim appeal, CHA challenges the ALJ's November 20, 2007 issues ruling declining to join issues concerning the change in operations contractors, the ownership of the site, or the operator of the facility for adjudication. With respect to the change of operations contractors from ORI to WeCare, the ALJ held that intervenors failed to raise a substantive or significant issue concerning WeCare's record of

environmental compliance or experience (see ALJ Ruling, Nov. 20, 2007, at 6-8). In addition, the ALJ noted that as the permittee, DOS would be responsible for complying with the permit and, thus, would be responsible for ensuring that its subcontractors carry out the work necessary to comply with the permit (see id. at 8).

On its appeal, CHA argues that the change in operations contractors did not comply with Department policy governing the transfer of permits and pending permit applications (see Transfer of Permits and Pending Application, DEC Program Policy DEP 01-1, Dec. 19, 2001 [DEP 01-1]). In addition, CHA seeks to raise a variety of issues concerning the procurement process used by DOS in contracting with WeCare. None of the issues raised by CHA are adjudicable.

To be adjudicable, an issue proposed by an intervenor must be both substantive and significant (see 6 NYCRR 624.4[c][1][iii]). An issue is substantive if sufficient doubt is raised concerning the applicant's ability to meet statutory or regulatory criteria applicable to the project such that a reasonable person would inquire further (see 6 NYCRR 624.4[c][2]). An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project, or the imposition of significant permit conditions (see 6 NYCRR 624.4[c][3]).

Where, as here, Department staff has reviewed the permit application and concluded that the project is approvable, the intervenor has the burden of persuasion to demonstrate its proposed issue is substantive and significant (see 6 NYCRR 624.4[c][4]). Proposed fact issues must be supported by a sufficient offer of proof.

Here, the ALJ correctly applied the substantive and significant standard when she rejected CHA's proposed issues. Under Part 360, the appropriate applicant and, thus, potential permittee, is the owner or operator of the solid waste management facility at issue (see 6 NYCRR 360-1.2[b][7], [113], [114], [117]). DOS has been and remains the owner and operator of the proposed composting facility and, therefore, would bear the ultimate legal responsibility for ensuring compliance with any approved Part 360 permit. Thus, DOS is appropriately identified as the permittee in the draft permit.

On the other hand, ORI, as an operations contractor, was not proposed as the legal owner or operator of the facility and, therefore, its removal from the draft permit is appropriate. Similarly, WeCare is not proposed as owner, operator, or other party legally responsible for the facility. Thus, DEP 01-1, which governs the transfer of applications from an applicant to another legally responsible party, does not apply. Moreover, the ALJ correctly held that CHA failed to provide a sufficient offer of proof supporting a conclusion that WeCare's operation of the facility as DOS's subcontractor will result in DOS's inability to ensure compliance with any permit.

Finally, issues concerning the City of New York's procurement process and DOS's adherence to its requirements are not relevant to any statutory or regulatory standards administered by the Department. Thus, CHA fails to raise any substantive and significant issues, and the ALJ's November 20, 2007 issues ruling is affirmed.

B. Intervenors' Motions To Strike

Baykeeper moves to strike attachment A to Department staff's February 4, 2010 comments on the ALJ's recommended decision. Attachment A consists of the February 10, 2004 draft permit for the Spring Creek composting facility with modified permit conditions recommended by staff and agreed to by DOS (2010 Draft Permit).

Baykeeper argues that the 2010 Draft Permit constitutes "new, untested evidence" that has not been subject to the adjudicatory hearing process and, therefore, was improperly submitted as comments on the recommended decision (Email from Prof. Daniel Eric Estrin to Louis Alexander, Assistant Commissioner [2/8/10]). Baykeeper's objection is overstated.

The Department's Part 624 permit hearing procedures contemplate an iterative process in which proposed project modifications are litigated in an effort to mitigate or eliminate significant environmental impacts identified through adjudicatory hearings. Throughout that process, draft permit conditions are regularly modified to address environmental concerns raised during the hearing, and to implement the permit decision maker's directives arrived at on the basis of the

evidentiary record. Proposed permit conditions are not themselves "evidence" that require evidentiary hearings prior to their imposition. Provided that the parties are afforded the opportunity to comment on and litigate the underlying legal and factual bases of an issue, no legitimate purpose would be served by requiring additional adjudication of any specific permit condition, whether proposed by a party or imposed by the ALJ or Commissioner on their own, that implements the ALJ's or Commissioner's resolution of an issue already adjudicated. So long as a party has had the opportunity to be heard on the substance of an issue, that party is not prejudiced if the ALJ or Commissioner modifies proposed permit conditions to implement his or her decision, and without further comment from the parties.

In this case, Baykeeper is not prejudiced by the modified permit conditions proposed by Department staff in the 2010 Draft Permit. Review of the proposed modifications reveals that the modifications were previously proposed prior to the close of the record, or are proposed to implement the permit modifications recommended by the ALJ in her recommended decision. Baykeeper has had ample opportunity to be heard on the underlying substance of the modifications, including the ALJ's recommended permit modifications. Accordingly, no prejudice would occur if the permit modifications proposed by staff, with or without further modification by the Commissioner, are imposed without further hearing. Thus, Baykeeper's motion to strike the 2010 Draft Permit is denied.

CHA moves to strike Department staff's 2010 Draft Permit, and DOS's entire February 4, 2010 brief in response to the recommended decision. CHA argues that the challenged submissions are not "comments" as authorized by 6 NYCRR 624.13(a)(3), and fail to comply with the Assistant Commissioner's directives establishing page limits and typographical requirements for the comments (see Letter from Louis A. Alexander, Assistant Commissioner, to Adjudicatory Hearing Participants [11-23-09]). CHA's objections elevate form over substance and are rejected. Notwithstanding DOS's denomination of its comments as a "brief," its submissions were clearly authorized by the Assistant Commissioner. In addition, DOS's inclusion of a table of contents that caused its brief to exceed the 50-page limit does not provide a basis for excluding its entire submission. Similarly, Department staff's failure to double-space its proposed 2010 Draft Permit does not provide a

legitimate basis for excluding staff's submissions, particularly because staff's comments on the merits, which are double-spaced, fall well within the 50-page limit.

CHA also moves for sanctions for what it alleges are improper ex parte communications between Department staff and DOS concerning the permit modifications proposed in the 2010 Draft Permit. Communications between Department staff and an applicant do not fall within the statutory and regulatory prohibition against ex parte communications with the ALJ or Commissioner and, thus, are not subject to exclusion on that basis (see State Administrative Procedure Act § 307[2]; 6 NYCRR 624.10). Thus, CHA's motion to strike and for sanctions is denied.

C. Comments on the November 23, 2009, Hearing Report and Recommended Decision

As noted above, issues concerning the proposed project's compliance with the Part 360 requirements governing potential odor, litter, dust, vector control, and noise impacts were adjudicated (see Interim Decision, at 13-16, 18-19). In addition, DOS's showing under 6 NYCRR 360-1.7(c)(2)(iii) in support of its application for variances was also adjudicated.

At the adjudicatory hearing, the applicant has the burden of proof to demonstrate that its proposed project will be in compliance with all applicable laws and regulations administered by the Department (see 6 NYCRR 624.9[b][1]). Whenever factual matters are involved, the applicant must sustain its burden of proof by a preponderance of the evidence (see 6 NYCRR 624.9[c]).

Where, as here, an ALJ's hearing report prepared after an evidentiary hearing is released as a recommended decision pursuant to 6 NYCRR 624.13(a)(2),[2] the Commissioner's review of

[2] In its comments on the recommended decision, CHA raises several objections to the post-hearing procedures followed in this proceeding, including the issuance of the ALJ's hearing report as a recommended decision for comment by the parties. The procedure is authorized by the regulations, however, and provides the parties an additional opportunity to provide legal argument on the merits before a final decision is issued. Moreover, the time frames provided for are directory and, therefore, no particular outcome is required if they are not met. Accordingly, CHA's objections are overruled.

the recommended decision is de novo, with application of the preponderance of evidence standard for resolving fact issues (see Matter of Universal Waste, Inc., Decision of the Commissioner, Oct. 15, 2011, at 16; Matter of Karta Corp., Decision of Executive Deputy Commissioner, April 20, 2006, at 6; Matter of Athens Generating Co., LP, Interim Decision of the Commissioner, June 2, 2000, at 12; see also Matter of Sil-Tone Collision, Inc., 63 NY2d 406, 411 [1984]; Matter of Simpson v Wolansky, 38 NY2d 391, 394 [1975]). A Commissioner is not bound by the ALJ's findings of fact (see Simpson, 38 NY2d at 394; Matter of Jackson's Marina, Inc. v Jorling, 193 AD2d 863, 866 [3d Dept 1993]). A Commissioner may overrule an ALJ's findings of fact and make his or her own findings, provided they are supported by record evidence (see id.).

DOS's application is governed by the general provisions governing solid waste management facilities at 6 NYCRR part 360-1. It is also governed by the operational requirements of subpart 360-5, which is applicable to composting and other class A organic waste processing facilities in general, and the operational requirements of section 360-5.7, which is specifically applicable to yard waste composting facilities (see Interim Decision, at 4).

Based upon my review of the record, I conclude that DOS has met its burden of demonstrating that its project, as conditioned by the 2010 Draft Permit as modified in this decision, will be in compliance with all applicable laws and regulations administered by the Department. Accordingly, for the following reasons, the ALJ's recommendation that the permit application be denied should be rejected, and the 2010 Draft Permit should be approved, with modifications as discussed following.

1. Noise Impacts

DOS argues that contrary to the ALJ's conclusions, the record demonstrates that the facility will comply with the Part 360 noise standards, and DOS agrees to additional permit conditions that address the ALJ's concerns. Department staff also argues that the project, as conditioned by the revised draft permit, will meet noise standards. I agree.

Section 360-1.14(p) of 6 NYCRR provides that the noise levels resulting from equipment or operations at a solid waste management facility located in an urban area must be controlled to prevent transmission of sound levels beyond the property line at locations zoned or otherwise authorized for residential purposes in excess of 67 decibels (A) (dBA) during the hours from 7 A.M. to 10 P.M., and 57 dBA during the hours from 10 P.M. to 7 A.M.

In this case, DOS submitted a final noise analysis report (Exhibit [Exh] 40) and a supplemental noise analysis (Exh 53). Those analyses showed slight exceedances (less than 1 dBA) of the applicable standards under limited circumstances (see Rec Dec, at 31-32). Modeling further demonstrated that the implementation of various mitigation measures would bring the projected dBA levels down to below the applicable standards (see id. at 32-33).

As an initial matter, I reject the ALJ's conclusion and the intervenors' assertions that the noise analyses should be given little or no weight (see Finding of Fact 26, Rec Dec, at 30). When reviewing technical evidence, such as DOS's noise analyses, a standard of reasonableness is applied (see Matter of Oneida-Herkimer Solid Waste Management Authority, Decision of the Commissioner, March 19, 2004, at 7-8; Matter of Hyland Facilities Assocs., Decision of the Commissioner, April 13, 1995, at 2). "While scientific or engineering 'certainty' is a laudable goal, it is an unrealistic expectation in complex environmental matters" (Hyland, at 2). Instead, a reasonable standard of judgment is applied to determine the sufficiency of the technical record (see Oneida-Herkimer, at 8; Hyland, at 2). Where the technical evidence is reasonably reliable, that evidence together with other mitigation measures incorporated into permit conditions can provide a reasonably assurance that applicable statutory and regulatory criteria can be met and maintained (see Oneida-Herkimer, at 11).

Here, review of the record reveals that the noise studies are reasonably reliable. They were professionally and competently conducted by a qualified analyst, Henningson, Durham & Richardson Architecture and Engineering, P.C. Moreover, Department staff's expert engineer independently and impartially reviewed the studies and agreed with their conclusions (see Tr [9-19-07], at 103). Furthermore, intervenors offered no studies against which to weigh DOS's studies. Thus, DOS's noise

analyses provide a sufficient basis upon which to conclude that the Part 360 noise standards will be met.

In addition, Department staff has proposed, and DOS has accepted additional mitigation measures that provide a reasonable assurance that the Part 360 measures will be met. The measures, which were presented during the hearing and recommended by the ALJ, include maintaining the western berm at a height of three meters or greater; prohibiting the use of mechanical equipment within 35 feet of the western berm between 10 P.M. and 7 A.M.; prohibiting grinding, windrow turning, debagging or screening between 4 P.M. and 7 A.M.; and prohibiting any use of the tub grinder in the northwest corner of Active Mulching Pad 3.

Additionally, in response to the ALJ's concerns about the numbers of vehicles assumed in the modeling, Department staff proposes to limit the number of DOS delivery trucks delivering yard waste to the facility at any one time during the three busiest months of the year. No more than 20 DOS trucks would be allowed at the facility at any one time during the months of November and December, and no more than 10 DOS trucks at any one time during January (see 2010 Draft Permit, Condition 28[b]). These conditions limit truck traffic during the peak yard waste delivery season to no more than the worst case scenario levels modeled in the noise studies.

Although this was not raised by the ALJ, I conclude that the draft permit should be further modified to address truck traffic during the off-peak season (February through October). The supplemental noise modeling predicted that operations at the facility during February through October would not exceed the applicable noise standards, provided that the tub grinder was moved out of the northwest corner of Active Mulching Pad 3 (see Supplemental Spring Creek Noise Analysis, Exh 53, at fifth unnumbered page; see also Findings of Fact 29-31, Rec Dec, at 31-32). The supplemental modeling was based upon the presence of no more than 10 landscaper trucks and two outgoing finished product trucks on-site at the same time (see Exh 53, at first unnumbered page).[3] To bring the draft permit into

[3] The ALJ concluded that the supplemental noise analysis only added landscaper trucks to the modeling (see Finding of Fact 29, Rec Dec, at 31). Review of the supplemental modeling indicates that two outgoing finished product trucks were also added to the modeling scenarios. Accordingly, Finding of Fact 29 is modified to provide:

conformity with the off-peak season noise modeling, draft permit condition 28 should be modified to provide that during the months of February to October, no more than 10 landscaper trucks and two outgoing finished product trucks shall be at the facility at any one time.

Finally, during closing briefing before the ALJ, DOS proposed to undertake noise monitoring to allow it to take corrective action in the event actual facility operations exceeded the noise standards. The ALJ agreed that if a permit was issued for this facility, the requirements for the noise monitoring plan should be expanded and made more specific. In response to DOS's proposal and the ALJ's recommendations, Department staff proposes to require DOS to submit and implement a noise monitoring protocol within 45 days of the effective date of the permit. This requirement is included as Condition 26(b) of the 2010 Draft Permit. The development and implementation of a noise monitoring and abatement plan will provide further assurance that in the event actual operations result in exceedances of the applicable noise standards, those conditions will be effectively corrected.

To bring the noise monitoring plan into conformity with DOS's engineering report for the facility (see Exh 4, at 6-6), however, and remove any issue concerning the location of the receptors in the noise modeling (see Rec Dec, at 40), the 2010 Draft Permit should be revised in one respect. The revised permit should provide that under the monitoring plan, noise levels will be measured at the property line of the facility, not beyond the property line as proposed (see 2010 Draft Permit, ¶ 26[b]).

Accordingly, based on the record, I conclude that DOS has carried its burden of establishing that the project as

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"The supplemental noise analysis (Ex. 53) expanded on the modeling of scenarios C through E (February through October scenarios) by addition two outgoing finished product trucks, and between 5 and 10 landscaper trucks as noise sources in additional runs of the model. This analysis predicted that the noise levels at receptor 6 in scenario D (daytime operations, March to May) would be 67.2 dBA (five landscaper trucks) or 67.3 dBA (ten landscaper trucks). This analysis also predicted that the addition of two outgoing finished product trucks, and between 5 and 10 landscaper trucks would not cause exceedances of the relevant noise limits in scenarios C (February operations) or E (June through October operations)."

proposed, and as conditioned by the 2010 Draft Permit as modified here, will comply with the Part 360 noise standards.[4]

2. Odor, Dust, Litter and Vector Impacts

DOS argues that the record demonstrates that the facility will comply with the Part 360 regulations governing odor, dust, litter, and vector control, and agrees to additional permit conditions to address concerns raised by the ALJ in her recommended decision. Department staff also argues that the project, as conditioned by the 2010 Draft Permit, will meet Part 360 standards governing odor, dust, litter, and vector control. I agree.

With respect to dust and odors, sections 360-1.14(k) and (m) require that dust and odors from a facility be effectively controlled so that they do not constitute nuisances or hazards to health, safety or property. The regulations specific to yard waste composting facilities require that the "facility must be operated in a manner to control the generation and migration of odors to a level that is to be expected from a well operated facility, as determined by the department" (6 NYCRR 360-5.7[b][11]). As Department staff correctly notes, the Part 360 regulations do not require that all dust and odors be eliminated from yard waste composting facilities. The regulations contemplate that some amount of odor and dust will be generated, even by a well operated facility. However, nuisance or hazardous conditions are prohibited by the regulations.

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[4] Accordingly, finding of fact 25 (Rec Dec, at 30) is revised to read as follows:

> "25. Based on the record as a whole, it is likelier than not that the facility's operation will not exceed the noise standards of 6 NYCRR part 360 at any time during the year, both with respect to the daytime noise limit and the nighttime noise limit. Although the noise analyses submitted by the Applicant showed small exceedances of both these limits under certain operating scenarios, the Applicant has identified and accepted additional permit conditions that its noise witness stated would bring the noise levels below the applicable noise limits."

In addition, the ALJ's conclusion in finding of fact 26 that the noise analyses can be given very little weight is rejected as against the weight of the credible evidence.

With respect to litter, section 360-1.14(j) requires that blowing litter be confined to operating areas by fencing or other suitable means, so that it can be effectively controlled.

As to vectors, section 360-1.14(l) requires that a facility be maintained to prevent or control on-site populations of vectors using techniques appropriate for protection of human health and the environment, and prevent the facility from being a vector breeding area. Vectors are defined as a "carrier that is capable of transmitting a pathogen from one organism to another, including but not limited to flies and other insects, rodents, birds and vermin" (6 NYCRR 360-1.2[b][181]).

Contrary to the ALJ's conclusions, I find that the weight of the credible record evidence indicates that the facility has been operated and is likely to be operated in compliance with the Part 360 regulations governing odor, dust, litter, and vector control. In particular, the Department's experts, Dr. Sally Rowland and Kenneth Brezner, P.E., convincingly testified that a properly maintained and operated yard waste composting facility will not be the source of significant odor, dust, or vector problems. Although some odors and dust can be expected, particularly during windrow turning operations or on occasions when conditions are not optimal for composting, such conditions are short term and can be effectively corrected if they persist. Dr. Rowland in particular testified at length concerning best management practices for the control of odors and dust at yard waste composting facilities, and noted that those practices are incorporated into the facility's engineering plan (see, e.g., Engineering Report, Exh 4, B-27 to B-29; see also Findings of Fact 52-54, Rec Dec, at 47-48). Dr. Rowland further testified that based upon the facility's design and engineering, operations at the facility should not have a negative impact on the neighborhood (see, e.g., Tr [5-16-07], at 74).

Nothing in the yard waste stream DOS proposes to process at the facility is so unusual that one would expect an outcome different from what is typical for a well-operated yard waste composting facility. To the contrary, because the facility would primarily be used to compost leaves, and due to other engineering features, such as the use of a compacted pad and an active windrow monitoring and turning program, odor and dust are less likely to occur (see, e.g., id. at 41, 57, 70).

Moreover, nothing in the record suggests that operation of the facility consistent with the engineering plan and the 2010 Draft Permit will result in nuisance conditions. To constitute a nuisance under the regulations, a facility must generate dust or odors of such quantity, characteristics, or duration so as to unreasonably interfere with the comfortable enjoyment of life or property (see, e.g., Matter of Mohawk Valley Organics, LLC, Order of the Commissioner, July 21, 2003, at 2; see also 6 NYCRR 211.1 [prohibition against air pollution, including nuisance levels of particulates or odors]). Occasional or transitory emissions of dust or odors generally do not constitute a nuisance.

Intervenors, who oppose the facility, base their arguments that the facility cannot be operated in compliance with Part 360 requirements upon problems with the facility that allegedly occurred during its initial operation in 2001 and 2002. The ALJ, who accepted the intervenors' arguments, also based her conclusion that the facility should not be permitted almost entirely on the conditions that allegedly occurred during that same time period. It is unclear, however, whether the ALJ applied the correct standard when concluding that based on those conditions, DOS was unlikely to comply with the odor and dust regulations in the future. Although the ALJ referred to "unreasonable nuisance conditions" in her findings concerning the variances (see Finding of Fact 90, Rec Dec, at 69), her specific findings with respect to odors and dust do not explicitly make a nuisance finding. Instead, the ALJ cites "problems" during operations at the facility.

Moreover, the credible record evidence does not support a finding that dust or odors generated during operations at the facility in 2001 and 2002 were of such a nature or duration so as to constitute an unreasonable interference with life or property. Although some of the project opponents' lay witnesses testified concerning odors from the facility, their testimony indicates that odors occurred when windrows were being turned, an operation that would normally be expected to generate some odors, even at a well run facility (see Finding of Fact 56, Rec Dec, at 49). The testimony does not support a finding that odors were so persistent or of such a quality as to constitute a nuisance during times when odors would not be expected.

In addition, the record does not clearly establish that the odor "problems" were solely the result of composting

activities. Given the other sources of odors in the vicinity of the facility, including the scavenger waste pit used by septic haulers to discharge raw sewage, the City's combined sewer overflow (CSO) tanks, and the nearby creek and marshes, it is more likely than not that many of the odors identified by the opponents' lay witnesses were from sources other than the composting facility. In fact, Department inspectors detected odors from those other sources during an inspection conducted in 2007 (see Exh 76).

Similarly, the dust identified by intervenors' lay witnesses at most only occurred during windrow turning operations. The record does not support a finding of nuisance dust conditions at times other than during those operations. Moreover, the lay witnesses' testimony was inconclusive concerning whether any dust from operations at the facility left the site or not (compare Tr [5-30-07], at 67, with id. at 182-183). As with odor, dust conditions were more likely than not the result of other activities in the area, including construction activities, and bus and truck traffic, and not composting activities. With respect to the "black dust" identified by lay witnesses for the intervenors, black dust was more likely the result of soot from idling diesel engines at the neighboring bus depot than the composting of yard waste at the facility.[5]

With respect to any potential health effects from any potential dust from the facility, the ALJ herself concluded that those effects are inconclusive. Thus, no basis exists for concluding that any dust from the facility constituted a hazard to health, safety or property (see 6 NYCRR 360-1.14[k]).

As to the lay witnesses' testimony concerning flies and gnats at the facility, their testimony was inconsistent, inconclusive, and uncorroborated. Moreover, the lay witnesses' testimony was contradicted by intervenors' own expert, who testified that she was unaware of fly or gnat problems associated with yard waste composting (see Tr [5-31-07], at 130-131, 154). The ALJ herself indicated that the record is unclear concerning whether the insects allegedly observed are capable of transmitting a pathogen from one organism to another, an element

[5] The first sentence of Finding of Fact 76 (Rec Dec, at 60) is modified to strike the word "black." The record does not support the conclusion that the facility was the source of "black" dust.

which is necessary for an organism to be considered a vector under the regulations (see 6 NYCRR 360-1.2[b][181]).

Even assuming DOS's operation of the yard waste composting facility in 2001 and 2002 resulted in "problems," the weight of the record evidence supports the conclusion that any problems were corrected. For example, throughout 2003 to 2007, Department staff conducted numerous inspections of the facility and another composting facility operated by DOS, the Southview Park Composting Facility located in Bronx County.[6] Those inspections found no odor, dust, litter, or vector problems at either of the facilities (see, e.g., Exhs 61-62, 64, 69, 72, 76, 82, 83, 86). The ALJ's conclusion that the inspections were conducted when the facilities were not operating or operating only at a low level is belied by the record and incorrect. A majority of inspections at the Spring Creek facility were conducted when the New York City Parks Department was actively composting leaves at the facility at levels under the regulatory exemption level, even if de-bagging, windrow turning, or screening operations were not occurring at the time of the inspections (see, e.g., id.; Tr [9-19-07], at 36, 39, 43, 116-117; Tr [5-15-07], at 22-23). Several of the inspection reports for the Soundview facility reveal that DOS was operating that facility pursuant to its permit at the time of the inspections.

In addition, the record contains no evidence of complaints about the Spring Creek facility during the 2003 to 2007 period. None of intervenors' witnesses testified concerning problems during 2003 to 2007. In fact, one of intervenors' witnesses testified that he observed no odor, dust, or vector problems during a visit to the Spring Creek facility in 2005 (see Tr [5-30-07], at 243-245). Thus, the weight of evidence supports the conclusion that DOS has and can continue to operate composting facilities without creating nuisance levels of odors, dust, litter, or vectors.[7] The "problems" the

[6] In the 2006 interim decision, the Executive Deputy Commissioner held that evidence of the effectiveness of environmental control measures at other composting facilities operated by DOS was admissible on the issue of the potential effectiveness of similar measures at the Spring Creek facility (see Int Dec, at 15).

[7] Baykeeper's single photograph taken in 2006 (see Exh 73) does not undermine the conclusion that dust has been effectively controlled at the facility. To the contrary, the photograph reveals that the berms effectively contain any dust to the facility site. In any event, the photograph does not reveal wide-spread nuisance conditions, and the lack of any persistent nuisance

Spring Creek facility might have experienced in 2001 to 2002 do not support the conclusion that the facility cannot be run in compliance with the Part 360 requirements, provided the best management practices and permit conditions are met. Thus, the problems in 2001 and 2002 do not support denial of the permit.[8]

With respect to litter, the ALJ held that the greatest source of litter problems at the facility resulted from the de-bagging of yard waste from plastic bags. This problem has been effectively addressed by a City ordinance adopted in 2006, which requires City residents to place yard waste in either paper bags or rigid containers for collection by DOS. To the extent the ALJ remained concerned about businesses exempt from the paper bag requirement, Department staff proposes, and DOS accepts, a permit condition requiring that all yard waste received at the facility be either loose or contained in a paper bag (see 2010 Draft Permit, ¶ 26[f]).

Other concerns of the ALJ have been and may be addressed by additional permit conditions. The ALJ expressed the concern that yard waste in paper bags might still be susceptible to anaerobic decomposition if left in the bags too long. The ALJ also expressed the concern that leaving yard waste in paper bags might result in food waste making its way into the yard waste stream, and thereby become a food source for vectors. The ALJ appears to recommend that the permit condition requiring that leaves be de-bagged within 60 days following their delivery to the facility be maintained, notwithstanding DOS's testimony indicating that the use of paper bags makes de-bagging unnecessary (see 2010 Draft Permit, ¶ 30).

I agree with the ALJ's recommendation to maintain the de-bagging requirement. Moreover, the maximum period for de-bagging should be shortened from 60 days to 30 days. This would bring the de-bagging requirement for the Spring Creek facility into conformity with other composting facility permits, such as the permit for the Fresh Kills composting facility permit issued in 2008 (see Fresh Kills Composting Facility, DEC Permit No. 2-6499-00029/00097, effective June 26, 2008, condition 23), and comports with the requirement in the Spring Creek engineering

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conditions in the neighborhood is established by other credible record evidence, including the Department's inspection reports.

[8] Accordingly, Finding of Fact 68 is struck in its entirety as against the weight of the credible evidence (see Rec Dec, at 53).

report (Exh 4, at 6-2) and the original draft permit condition 31, which required that leaves be de-bagged "as soon as possible" after arrival at the facility. Thus, 2010 Draft Permit condition 30 should be modified to provide, "Leaves must be de-bagged as soon as possible following their delivery to the subject facility, and before they cause a nuisance odor. Such leaves must be de-bagged within 30 days following their delivery to the subject facility. Such 30-day deadline shall be extended only for the duration of any declared snow emergency that occurs during the 30-day period."

The ALJ's concerns about grass and horse manure are addressed by a permit condition that prohibits the acceptance of those materials until certain conditions are met and written Departmental approval given (see 2010 Draft Permit, ¶ 33). The ALJ's concerns about the potential size of the windrows being a source of odors is addressed by a permit condition setting an upper limit for active composting windrows to no more than 12 feet in height and 22 feet in width (see id. ¶ 26[g]).

As to dust, and to some extent odor, concerns, Department staff proposes, and DOS accepts, a permit condition prohibiting windrow turning or final screening of compost if sustained wind speed is at or above 25 miles per hour (mph) (see id. ¶ 26[d]). Based upon the record, however, I conclude that this condition should be modified. The record reveals that the best management practice for windrow turning or final screening is tied less to wind speed than it is to wind direction. Generally, active windrow operations should be avoided when sustained winds are blowing toward residences and other sensitive neighboring land uses (see Rowland Testimony, Tr [5-16-07], at 61; Harrison Testimony, Tr [5-31-07], at 97-98; see also Finding of Fact No. 54, Rec Dec, at 48).[9]

[9] This best management practice is further supported by the planning guide developed by the Department in conjunction with Cornell Cooperative Extension and the New York State Energy Research and Development Agency, "Yard Waste Management: A Planning Guide for New York State" (1990). That guide provides that windrows should be turned only when wind conditions are favorable, that is, when the site is downwind of residences and other sensitive neighboring land uses (see id. at 79). The guide also notes that higher wind speeds are actually preferable, because they dilute any released odors faster than do calm conditions (see id.).

The 1990 guide was not made a part of the record. To the extent it is necessary, I take official notice of the policy statements contained in the guide (see 6 NYCRR 624.9[a][6]).

Here, the record reveals that wind speeds of under 10 mph should not result in off-site impacts (see Simmons Testimony, Tr [7-11-07], at 118-119).[10] Moreover, weather data from John F. Kennedy International Airport during the period from June 1996 to June 2001 reveal that on an average yearly percentage basis, peak wind gusts of 10 mph or greater from the south of the site and towards the residences and businesses across Flatlands Boulevard to the north of the site occurred approximate 12 percent of the time (see Exh 4, Table 2-1, at 2-33). Thus, operations at the facility may reasonably be modified to avoid active windrow turning or final screening when sustained winds of 10 mph or greater are predicted to be from the south. Accordingly, 2010 Draft Permit condition 26(d) should be modified to provide, "No windrow turning or final screening of compost shall occur if sustained winds are predicted to be from the south at speeds of 10 miles per hour or greater."

In sum, the permit conditions sought to be included by Department staff, the conditions added or modified by this decision, and the engineering and operational best management practices identified in the engineering plan for the facility (see Exh 4), provide a reasonable assurance that the facility will be operated in compliance with Part 360 requirements governing odors, dust, litter, and vectors, and will not constitute a nuisance in the area.

3. Variances

In her recommended decision, the ALJ recommends that two variances sought by DOS -- a variance from the 50-foot setback between the property line and the perimeter of the site (Variance 1) and a variance from the 200-foot setback between the perimeter of the site and residences or places of business (Variance 2) -- be denied (see Rec Dec, at 79-80).[11] The ALJ

[10] The ALJ discounted this testimony on the ground that the evidence showed that wind speeds under 10 miles per hour can be measured (see Rec Dec, at 54). I do not find that this is a proper basis for discounting the testimony. The circumstance that winds under 10 miles per hour may be measured does not undermine the proposition that winds under that speed do not result in off-site impacts.

[11] As affirmed in the 2006 interim decision, the setback requirements in effect immediately prior to the March 10, 2003 amendments to Part 360 apply

based her recommendation on the conclusion that operating the facility as close to residences and places of business as proposed will cause problems with odor, dust, noise, and possibly vectors that are inconsistent with Part 360 requirements (see id.). The ALJ also held that requiring compliance with the setbacks involved would not impose an unreasonable economic, technological, or safety burden on DOS or the public (see id.).

With respect to the third variance sought by DOS -- a variance from the 200-foot setback between surface waters and the perimeter of the site (Variance 3) -- the ALJ concludes that the variance may be granted (see Rec Dec, at 80). The ALJ concluded that allowing this variance would have no adverse impacts due to the berms that separate the facility from the water bodies and the drainage system that would prevent site runoff from entering those water bodies (see id.).

For the reasons stated by the ALJ, I agree that Variance 3 should be granted. With respect to the remaining variances, I disagree with the ALJ and conclude that DOS has made a sufficient showing justifying the granting of Variance 1 in its entirety, and Variance 2 in part.

Under 6 NYCRR 360-1.7(c)(2), to obtain a variance from one or more specific requirements under Part 360, the applicant must:

(i) identify the specific provisions of Part 360 from which a variance is sought;

(ii) demonstrate that compliance with the identified provisions would, on the basis of conditions unique to the applicant's particular situation, impose an unreasonable economic, technological, or safety burden on the person or the public; and

(iii) demonstrate that the proposed activity will have no significant adverse impact on the public health, safety or welfare, the environment, or natural resources, and will be consistent with the provisions of the ECL and the performance expected from application of Part 360.

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in this case (see Int Dec, at 27). Those requirements were provided for in 6 NYCRR former 360-4.4(d) and former 360-5.5(g).

Under subdivision (iii), the potential impacts of the activity for which the variance is sought is examined, not the project as a whole (see, e.g., Matter of Waste Management of New York, LLC [Towpath], Rulings of the ALJ on Party Status and Issues, Dec. 31, 1999, at 34-35).

Here, DOS has clearly identified the two specific setbacks from which it seeks variances. Furthermore, contrary to the ALJ's conclusion, DOS has made a sufficient showing of the unreasonable economic burden compliance with the setback requirements would impose on DOS and the City (see Matter of Saratoga County Landfill, Second Interim Decision of the Deputy Commissioner, Oct. 3, 1995, at 4 [proof of economic burden need not be highly detailed or complex]). In its variance application, DOS explained that operating the yard waste composting facility in compliance with the setback requirements would reduce the operational size of the facility to such an extent that efficient composting operations could not be performed (see Exh 15, Attachment to Variance 1, at 3; id., Attachment to Variance 2, at 3). This would require the City to locate a compost facility at another site that might require purchase or condemnation, in an area potentially less suitable for operations,[12] and thereby substantially increase capital and operating costs (see id.). This demonstration is sufficiently detailed and rational to support the conclusion that compliance with the setback requirements would impose an unreasonable economic burden on DOS and the City.

As to Variance 1, contrary to the ALJ's conclusion, the weight of the credible evidence supports the conclusion that allowing the variances from the 50-foot setback requirement will not result in any significant adverse environmental impacts, and will be consistent with the ECL and the performance expected from the application of Part 360. The Department's experts explained that the purpose of the 50-foot setback between the property line and the perimeter of a site is to provide a visual buffer for aesthetic reasons, and a physical buffer to prevent the encroachment of a facility on a neighboring property (see,

[12] I disagree with the ALJ's assertion that operational suitability of the facility's location and the generally compatible surrounding land uses are unrelated to the economic analysis (see Rec Dec, at 70 n 46). These factors are relevant to the analysis of the economic considerations supporting the project's location over an alternative location. Accordingly, footnote 46 on page 70 of the recommended decision is modified by striking the second sentence of the footnote.

e.g., Rowland Testimony, Tr [5-16-07], at 37-39). In this case, the presence of the 32-foot wide berm effectively addresses both visual screening and any potential encroachment on neighboring property. In addition, neither construction of the berm in its present location, specifically, nor operation of the facility within the remaining 18 feet of the setback should result in any significant adverse environment impacts that are inconsistent with the impacts expected from a yard waste composting facility operating in compliance with Part 360, as concluded above.[13] Accordingly, DOS has made a sufficient demonstration under section 360-1.7(c)(2) for the grant of Variance 1.

With respect to Variance 2, in addition to aesthetics, the purpose of the 200-foot separation between the perimeter of the site and residences or places of business is to mitigate odor and dust (see, e.g., Rowland Testimony, Tr [5-16-07], at 40-41). To measure compliance with the requirement, the relevant separation is the distance between the facility perimeter and any building on the adjacent property, not to the adjacent property line.

Although I conclude that operation of the facility should not result in odor and dust impacts inconsistent with the regulations, I nonetheless conclude that the setback should be maintained as a precaution, at least where actual residences and places of business are located within 200 feet of the facility's active composting operations. In this case, the buildings within 200 feet of the facility perimeter include the residences located on Flatlands Avenue between Fountain Avenue and Crescent Street. Those residences are within 200 feet of the northwestern corner of Active Composting Pad 1 (located south of Flatlands Avenue between Fountain Avenue and the NYC DEP scavenger waste facility) (see Site Plan, Exh 120). Maintaining the 200-foot setback from residences in this area (or 100 feet from Pad 1's northern perimeter) would result in the loss of less than 0.5 acres of operational area, or less than 2,500 cubic yards of capacity, while providing an appropriate buffer for those residences. Thus, the variance request should be denied as to that portion of Pad 1 (see Attachment A).

Residential buildings are also located approximately 100 feet north of the northeastern half of the Active Mulching

[13] Consistent with my findings above, and based upon the weight of the credible evidence, the ALJ's Fact Finding No. 90 (Rec Dec, at 69) is modified by deleting the first and third sentences.

Pad (Pad 3) (see Site Plan, Exh 120). Review of the operational report shows that Pad 3 will be used for both the active composting and storage of mulched wood waste (see Exh 4, at 4-24; A-32; see also id. Table A-3, at A-21). Because odors and dust are potentially associated with active composting operations, and not the storage of mulched product, the variance may be granted for the storage of mulched wood chips on Pad 3, provided no active composting occurs within 200 feet of the adjacent residences (see Attachment A).

With respect to the remainder of the facility's perimeter, the variance is either unnecessary or may be granted. To the west of the facility, although residentially-zoned property is located within 200 feet of the facility perimeter, the actual residences of the Brooklyn Development Center are located greater than 200 feet from the perimeter (see Finding of Fact 89, Rec Dec, at 69). Similarly, although the parking lot of the MTA bus depot is located within 200 feet of the northern perimeter of the finished product screening and storage area located to the east of Active Compost Pad 1, the actual depot building is located more than 200 feet from the site perimeter (see Site Plan, Exh 120). Thus, a variance from the 200-foot separation requirement is not necessary for the western side of the facility, or for the northern perimeter of finished product screening and storage area.

Also to the north of the facility, the United States Postal Service station building and its parking lot are located within 200 feet of the northern perimeter of Active Compost Pad 2. However, the building is located more than 200 feet north of the southern edge of the berm and, thus, more than 200 feet from the operational area of the pad (see id.). Thus, the variance may be granted for the northern perimeter of Pad 2.

Finally, the buildings of the 26th Ward Auxillary Water Pollution Control Plant are located within 200 feet of the facility's eastern and southern perimeter. However, 6 NYCRR former 360-5.5(g) provided that the 200-foot requirement did not apply to composting facilities located at existing publicly-owned municipal sewage treatment works (POTW).[14] Granting the variance to allow one City agency (DOS) to operate the

[14] As noted above in footnote 11, the exception from the 200-foot setback requirement for composting facilities located at previously-existing POTWs is applicable to this application under the transition provisions of Part 360 (see 6 NYCRR 360-1.7[a][3][vi]; Int Dec, at 27).

composting facility adjacent to a POTW operated by another City agency (NYC DEP) is consistent with that provision of subdivision g.

Accordingly, Variance 2 may be granted in part and otherwise denied. The draft permit should be modified to provide that composting operations may not occur within 100 feet of the northern perimeter of Active Composting Pad 1. The permit should also provide that active composting may not occur on Active Mulching Pad 3 within 200 feet of the residences located on Flatlands Avenue between Grant Avenue and Eldert Lane. The permit should further provide that mulch may be stored on Pad 3 within 200 feet of the residences, provided the mulch is monitored and removed if it begins to actively compost (see Attachment A).

4. Coastal Consistency Review

As explained in the 2006 interim decision in this matter, where, as here, a proposed project is located within the coastal area, and a local waterfront revitalization program (LWRP) has been approved by the New York State Secretary of State, the Department is required to review the project's consistency with the purposes and polices of the approved LWRP.

Under the Department of State's regulations, where the SEQRA lead agency issues a determination that an action will not have a significant effect on the environment, and where the action is within the boundaries of an approved LWRP and is identified pursuant to Executive Law § 916(1)(a) as an action requiring consistency review, a State agency such as the Department must file a certification with the Secretary that the action will not substantially hinder the achievement of any of the policies and purposes of the applicable approved LWRP and, whenever practicable, will advance one or more of such policies (see 19 NYCRR 600.4[c]). If the action will substantially hinder the achievement of any policy or purpose of the applicable approved LWRP, the State agency must instead certify that (1) no reasonable alternatives exist that would permit the action to be taken in a manner that would not substantially hinder the achievement of the policy or purpose, (2) the action taken will minimize all adverse effects on the local policy and purpose to the maximum extent practicable, and (3) the action will result in an overriding regional or Statewide public benefit (see id.).

The certification filed with the Secretary of State must include, among other things, a brief statement of the reasons supporting certification (see 19 NYCRR 600.2[g][3]), and is in addition to, and separate from, any consistency review conducted by any other local or State agency, including the lead agency.

In this case, the approved LWRP is New York City's New Waterfront Revitalization Program (NWRP). As was determined in the interim decision, solid waste facilities are designated in Appendix B to the NWRP as actions requiring consistency review. Thus, the Department is required to file a consistency certification in this case, notwithstanding DOS's negative declaration as SEQRA lead agency.

As further explained in the interim decision, coastal consistency review is an administrative determination by Department staff not otherwise subject to adjudication. As with negative declarations under SEQRA (see 6 NYCRR 624.4[c][6][i][a]), review of staff's coastal consistency determination by the ALJ and the Commissioner in a Part 624 permit hearing proceeding is limited (see Int Dec, at 23-24). The standard is whether the determination is irrational or otherwise affected by an error of law (see id. at 24). If it is concluded that the determination is rational and not affected by an error of law, staff's determination is left undisturbed (see id.).

As directed by the interim decision in this proceeding, Department staff submitted a State coastal assessment form (CAF) and a consistency determination in September 2006. The determination concluded that the project would not substantially hinder any policy or purpose of the NWRP. The determination did conclude that the project would have some adverse effects on natural resources, but that those effects would be offset by DOS's remediation of 20 acres of upland parkland, 15 acres of which would be immediately adjacent to Spring Creek Park.

In February 2007, the ALJ rejected the CAF and consistency determination on the ground that because neither the location of the remedial project nor the work to be undertaken had been identified, determination was irrational and affected

by errors of law. Accordingly, the ALJ remanded the coastal consistency determination for further review.

In May 2007, Department staff submitted a revised determination and, in October 2007, a revised permit condition, that clearly identified the locations for the remedial work and the nature of the work to be undertaken. In its determination, Department staff concluded that the facility would not substantially hinder the achievement of any of the NWRP policies and purposes, and would advance two policies: (1) the protection and restoration of the quality and function of ecological systems within the New York City coastal area (Policy 4), and (2) the protection of scenic resources that contribute to the visual quality of the New York City coastal areas (Policy 9).

In a February 19, 2008, ruling, however, the ALJ again rejected Department staff's CAF and certification. The ALJ concluded that the revised permit condition was still insufficiently precise about the location of the remediation area, and details of the remedial plan. The ALJ also concluded that even with the remediation identified in the revised permit condition, issuance of a Part 360 permit for the facility would substantially hinder several of the policies of the NWRP. Holding that portions of the revised consistency determination were not rational, the ALJ again remanded the matter to Department staff for further review.

In its closing brief and in its comments on the recommended decision, Department staff argues that the ALJ erred in rejecting the 2007 revised CAF and coastal consistency determination. For reasons stated by Department staff, I agree. Contrary to the ALJ's conclusion, and the arguments of intervenors in support of those conclusions, a fair consideration of the policies cited by the ALJ reveals that the facility will not substantially hinder those policies.

For example, Policy 7 of the NWRP seeks to minimize environmental degradation from the illegal disposal of solid waste in coastal areas. Policy 7 expressly provides that projects involving the handling and management of solid waste must comply with applicable State and local laws. Policy 7.3(B) provides that solid waste facilities should be sited and designed so that they will not adversely affect protected natural areas, such as significant coastal fish and wildlife habitats. Thus, contrary to the intervenors' assertions and the

ALJ's conclusion, DOS's facility does not substantially hinder these policies. Rather, the facility is entirely consistent with Policy 7 and its goals.

Policy 8 seeks to provide public access to and along New York City's coastal waters. However, access under the Policy is governed by the City's waterfront zoning regulations, and access is not required when it would be incompatible with the principal use of the site. Here, the City Parks Commissioner determined that the appropriate use of the site is as a yard waste composting facility, a determination that is not subject to review in this proceeding (see Int Dec, at 8-11).[15] It is rational to conclude that providing access to Spring Creek through the site is incompatible with its use as a yard waste composting facility. Moreover, the improvement of 20 acres of upland parkland as proposed in DOS's mitigation plan will likely provide increased waterfront access to the public and, therefore, advance Policy 8 and many of its sub-policies cited by intervenors (see Policy 8.2, 8.3, 8.4). Thus, it is rational to conclude that the project does not substantially hinder Policy 8.

Policy 9 seeks to protect scenic resources that contribute to the visual quality of the coastal area. As noted in Department staff's May 2007 supplemental statement, prior to the construction of the facility, the site was nominal, unimproved parkland that was dominated by invasive plant species and subject to illegal dumping. Thus, the site was a limited scenic resource at best. Whether the development of the site, with its berms and native-species plantings, can be considered an aesthetic improvement or not, the improvement of 20 acres of upland parkland, 15 acres of which are in close proximity to the facility, is rationally viewed as an improvement of the aesthetic qualities of the area. Accordingly, Department staff rationally concluded that the project does not substantially hinder Policy 9 but, instead, advances the policy.

In addition, any perceived imprecision in the location and details of the proposal to remediate 20 acres does not render staff's determination irrational. Revised permit condition 34 provides sufficient detail concerning the parameters of the required soil and habitat improvement plan to allow staff to evaluate any proposals by DOS and assure that the

[15] Policy 8.5(B) provides that transfers of interest in public trust lands be limited to the minimum necessary; it does not prohibit those transfers.

required remediation is effective. Moreover, the plan must be submitted and approved by the Department prior to the first receipt of yard waste at the facility. Accordingly, any concerns the ALJ and intervenors have regarding DOS's ability to develop an appropriate plan have been addressed.

In addition to the policies cited by the ALJ, intervenors also contend that the facility substantially hinders Policy 4.1(E). That policy protects designated "Significant Coastal Fish and Wildlife Habitats" (SCFWH). Review of the maps attached to the NWRP and the additional maps obtained by Department staff, however, shows that the facility is not located in a designated SCFWH (see Letter from John Nehila, Assistant Regional Attorney, to ALJ DuBois [10-6-06], Attachments). Accordingly, the project does not substantially hinder Policy 4.1(E). Instead, the proposed remediation, which is proposed to take place in part in a SCFWH-designated area to the east of the facility, will advance Policy 4.

In sum, Department staff's May 2007 coastal consistency determination is rational and should be affirmed.

5. Other Issues

In their comments on the recommended decision, DOS and Department staff argue that the ALJ erred in concluding that a question remained concerning the ownership of one of the parcels comprising the project site, namely block 4580, lot 2. I agree. Record evidence, including the 1993 record map for Spring Creek Park (Exh 112), reveals that the lot in question was acquired by the City through condemnation on May 12, 1938. In any event, the issue of site ownership is not relevant to the Part 360 solid waste management facility permit sought by DOS. As noted above, Part 360 permits are issued to facility owners and operators, which in this case is DOS.

In its comments on the recommended decision, CHA also raises several issues not already addressed above. CHA challenges the ALJ's resolution of intervenors' claim of witness tampering during the proceeding. In a May 25, 2007, ruling, the ALJ ruled that although an investigation of the alleged tampering with intervenors' proposed witness, Christopher Boyd,

was on-going,[16] Mr. Boyd's testimony was unnecessary for the record (see Ruling, May 25, 2007, at 6). The ALJ concluded that intervenors had other means available to present the evidence Mr. Boyd would have presented. For the reasons stated by the ALJ, the May 25, 2007 ruling is affirmed, and CHA's challenge to the ruling is rejected.

In addition, CHA argues that its representative, Ronald Dillon, was subjected to intimidation that hampered his participation in this proceeding. However, review of the record reveals that Mr. Dillon was afforded and took the full opportunity to participate.

CHA argues that the permit should be denied based on environmental justice considerations. In her 2004 issues ruling, however, the ALJ rejected environmental justice as a separate adjudicable issue (see Ruling, at 39). The ALJ noted that the Department's then-recently adopted Commissioner's Policy 29, Environmental Justice and Permitting (March 19, 1993 [CP-29]), which became effective after the application in this case was received, did not apply to the application. However, the ALJ concluded that supplemental notice and the extension of petition deadlines occurred in this proceeding and were consistent with CP-29 (see id. at 38). The ALJ also concluded that CHA's substantive arguments concerning the project's impacts on the community were otherwise being addressed on the merits. The Executive Deputy Commissioner affirmed the ALJ's ruling on administrative appeal (see Int Dec, at 27). Thus, CHA's issue is not reviewable. In any event, given the significant record development in this case and the resolution of the issues above, CHA's arguments concerning the facility's impacts on the community have been fully addressed on the merits.

The remaining issues raised by CHA in its comments, including the alleged alienation of parkland, noncompliance with local zoning, and DOS's history of compliance, were previously rejected on the merits or otherwise determined not to be adjudicable in the 2006 interim decision. Accordingly, those issues are also not reviewable at this stage of the proceeding.

[16] In January 2009, Assistant Commissioner Louis A. Alexander informed the parties to this proceeding that the Department's Division of Law Enforcement had investigated intervenors' allegations of witness tampering and had referred the matter to the Public Integrity Bureau of the New York State Office of the Attorney General.

III. CONCLUSION

In conclusion, based upon the weight of the credible record evidence, DOS has carried its burden of establishing that the proposed yard waste composting facility, as conditioned by the draft permit as modified by this decision, will comply with all applicable laws and regulations administered by the Department. In addition, DOS has satisfied the regulatory requirements for two of the variances requested and for a portion of the third. Finally, Department staff's May 2007 coastal consistency determination is rational and unaffected by any errors of law. Accordingly, I remand the matter to Department staff for issuance of a permit consistent with the 2010 Draft Permit, as modified by this decision.

Department staff is also directed to file its 2007 coastal consistency determination with the New York State Department of State, as required by 19 NYCRR 600.4(c).

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

/s/

by: _____
Joseph J. Martens
Commissioner

Dated: July 2, 2012
Albany, New York

Attachment A: Setbacks as required by Commissioner's decision

TO: Attached Service List

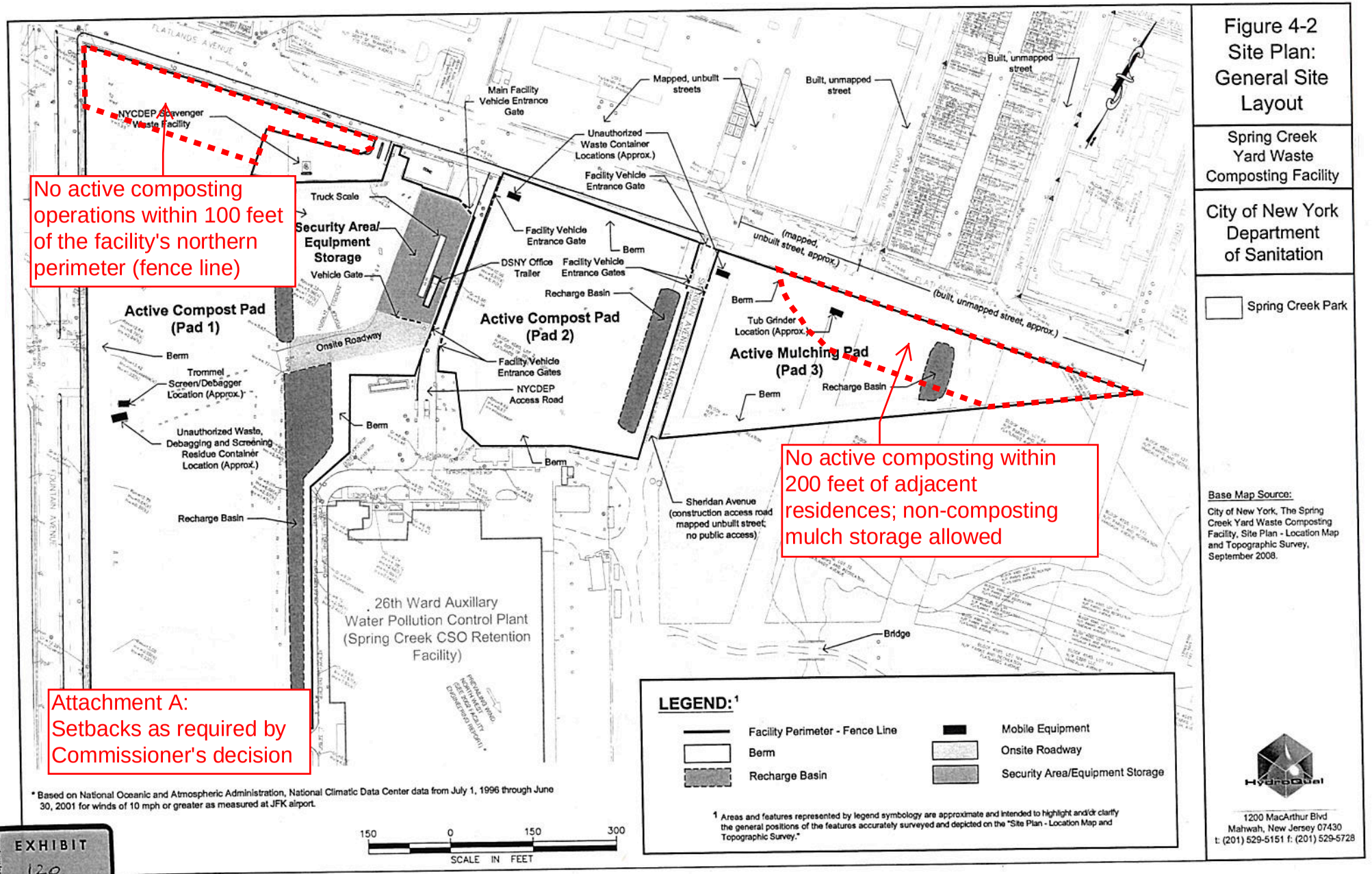

Figure 4-2 Site Plan: General Site Layout

Spring Creek Yard Waste Composting Facility

City of New York Department of Sanitation

Spring Creek Park

Base Map Source:

City of New York, The Spring Creek Yard Waste Composting Facility, Site Plan - Location Map and Topographic Survey, September 2008.

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EXHIBIT 120

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of the -

Application of the NEW YORK CITY DEPARTMENT OF SANITATION for a Permit pursuant to Environmental Conservation Law article 27 and part 360 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York to Construct and Operate the SPRING CREEK YARD WASTE COMPOSTING FACILITY

DEC Application No. 2-6105-00666/00001

Hearing Report and Recommended Decision

- by -

_____/s/_____
Susan J. DuBois
Administrative Law Judge

November 23, 2009

PROCEEDINGS

Introduction

The City of New York Department of Sanitation (the "Applicant") applied to the New York State Department of Environmental Conservation (the "Department" or "DEC") for a permit pursuant to Environmental Conservation Law ("ECL") article 27 and part 360 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR part 360") for a yard waste composting facility at 12720-B Flatlands Avenue, Brooklyn. The application includes requests for three variances from setback requirements specified in part 360. The hearing took place pursuant to 6 NYCRR part 624, the DEC permit hearing procedures. The application was received by the DEC Region 2 Office in the fall of 2001.

The Applicant proposes to operate a composting facility on a 19.6 acre site southeast of the intersection of Flatlands Avenue and Fountain Avenue, Brooklyn. The site is located within the Brooklyn portion of Spring Creek Park, an undeveloped city park. The park includes land in both Brooklyn and Queens, and the compost facility site occupies a substantial portion of the Brooklyn section of the park.

The facility is already in existence and the facility has already operated, although it does not have a DEC permit. The majority of facility construction was completed in or before November 2002. The staff of the DEC ("DEC Staff") stated it exercised its discretion in deciding to encourage the Applicant to pursue a permit application rather than taking enforcement action (Exhibit ["Ex."] 3, section 3.F, at 1 [February 18, 2004 response to comments]).

In its first two years of operation under a permit, the facility would receive approximately 61,900 cubic yards per year (approximately 12,300 tons per year) of material consisting of leaves, Christmas trees and brush delivered by the Applicant and other city agencies. During year three and later years, the facility would receive approximately 64,900 cubic yards per year (approximately 15,000 tons per year) consisting of those materials plus grass, brush, virgin wood chips, logs, trees and stumps delivered by landscapers, and horse manure delivered by stable owners (Ex. 4, at 4-2).

The facility would accept material from all portions of the City of New York, but the overwhelming majority of the material would be produced by the residential areas of Brooklyn and Queens (Ex. 4, at 3-1 to 3-5). Composting would take place in outdoor windrows. The compost would be made available to the New York

City Department of Parks and Recreation ("Parks") for use in parks, and would be distributed to residents and public greening projects.

The Applicant is lead agency for review of the project under the State Environmental Quality Review Act (ECL article 8 ["SEQRA"]). In its July 31, 2002 notice of incomplete application,[1] DEC Staff had requested that DEC be the lead agency for the SEQRA review of the project. The Applicant notified DEC Region 2 on December 3, 2002 that the Applicant intended to serve as lead agency, and on December 5, 2002 DEC Staff acknowledged this lead agency designation.

On December 17, 2002, the Applicant issued a negative declaration finding that the project would not have a significant environmental impact. DEC Staff issued a notice of complete application on December 20, 2002. The notice of complete application was published in the Department's Environmental Notice Bulletin on December 25, 2002 and in the Daily News on December 27, 2002.

Notices, comments and issues conference

The DEC Region 2 Office referred the application to the DEC Office of Hearings and Mediation Services ("OHMS") on January 7, 2004 to schedule a hearing. The notice of hearing was published in the Department's Environmental Notice Bulletin on February 18, 2004 and in the Daily News on February 17, 2004. Due to a reference in the original notice of hearing to a prior version of part 360, a supplemental notice was published in the Daily News on April 20, 2004 and in the Environmental Notice Bulletin on April 21, 2004. The events and schedule of the hearing in 2004 are described in more detail in the August 30, 2004 ruling on issues and party status ("issues ruling").

A legislative hearing for public comments took place on the evening of March 30, 2004 at the Brooklyn Sports Club, 1540 Van Siclen Avenue, Brooklyn, New York before Susan J. DuBois, Administrative Law Judge ("ALJ"). An issues conference took place at the same location on March 31, 2004, followed by a site visit. Written comments were submitted in addition to the statements made at the legislative hearing. The project had also

[1] DEC Staff issued two notices of incomplete application, dated June 19, 2002 and July 31, 2002, concerning this application (Ex. 3, sections 1.E and 1.F).

been the subject of extensive written comments submitted in 2003 in response to the notice of complete application.

The deadline for petitions for party status to participate in the adjudicatory hearing was March 26, 2004. Correspondence concerning the proposed issues and the requests for party status took place in the spring and early summer of 2004, as described in the issues ruling.

Parties' representatives

The Applicant was represented by Ramin Pejan, Esq., Christopher G. King, Esq., Bridget Eichinger, Esq., and Michael Burger, Esq.[2] DEC Staff was represented by John Nehila, Esq., Assistant Regional Attorney, DEC Region 2. Raritan Baykeeper, Inc. doing business as New York/New Jersey Baykeeper ("Baykeeper") was represented by Daniel E. Estrin, Esq., Pace Environmental Litigation Clinic, with assistance from student interns. A consolidated party consisting of Concerned Homeowners Association and Ronald J. Dillon ("CHA") was represented by Ronald J. Dillon, President of Concerned Homeowners Association. A consolidated party consisting of the Municipal Art Society of New York and New Yorkers for Parks ("Amici") was represented at the issues conference by Christopher Rizzo, Esq., and later by Michael Gerrard, Esq. and Amanda Hiller, Esq.[3]

Rulings on issues and party status

The Applicant and DEC Staff are parties to a DEC permit hearing, pursuant to 6 NYCRR section 624.5(a). The August 30, 2004 issues ruling granted full party status to the following parties: Baykeeper and CHA as full parties, and the Amici as an amicus party.

The petition for party status that was submitted by Brooklyn Community Board No. 5 was denied. The issues ruling also noted that State Senator John L. Sampson had submitted a petition for party status but later withdrew it, and that the Brooklyn Solid

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[2] Mr. Burger represented the Applicant until June 25, 2007 when he left the New York City Department of Law for other employment. Mr. Pejan replaced Mr. Burger in representing the Applicant on that date.

[3] As noted below, the Amici are no longer a party in this hearing because the issues on which they proposed to participate are not being adjudicated.

Waste Advisory Board had expressed interest in submitting a late petition but had not done so.

The issues ruling identified issues to be adjudicated, that may be summarized as follows: alienation of parkland; control of odor, litter, dust and vector impacts; variances from three setback requirements in part 360; and consistency with New York City's Waterfront Revitalization Program. The issues ruling also required the Applicant to submit additional information concerning proposed issues of noise impacts and allegations of waste dumping by the Applicant's trucks.

Additional proposed issues were excluded from adjudication by the issues ruling: compliance with zoning, environmental justice, traffic, inactive hazardous waste sites, and various issues related to the review procedure and the site's history.

Following receipt of the additional information that the issues ruling required or allowed parties to submit, I made a supplemental issues ruling on February 8, 2005 ("supplemental issues ruling"). The supplemental issues ruling concluded that an issue for adjudication existed concerning compliance with the noise standards in part 360, and that although the allegations about dumping did not raise an additional issue, certain facts alleged by CHA were relevant to the issue of odor, litter, dust and vector impacts. The supplemental issues ruling also discussed additional information the Applicant had submitted concerning its coastal consistency assessment form and concluded that an issue still existed on this subject, and the ruling clarified which version of the setback distances applied to the project.

Appeals and interim decision

In October, 2004, the Applicant, DEC Staff and CHA each filed an appeal of the issues ruling. CHA, Baykeeper and the Amici each submitted replies to the appeals filed by the Applicant and DEC Staff. The Applicant submitted a reply to the appeal filed by CHA.

With regard to the supplemental issues ruling, the only appeal was filed by CHA on March 2, 2005 and no party submitted a reply to that appeal.

On June 14, 2006, Executive Deputy Commissioner Lynette M. Stark issued an interim decision concerning the appeals, pursuant to a February 8, 2005 delegation of the Commissioner's decision making authority in this matter. The interim decision upheld the

issues rulings in part, but reversed the issues rulings on several subjects.

The interim decision stated that alienation of parkland was not an issue for adjudication. The interim decision also disagreed with the issues ruling with regard to the City's "311" line as a recourse in the event of nuisance conditions and stated that this subject was not relevant to whether the permit should be issued. The interim decision limited the scope of the issue concerning odor, litter, dust and vector impacts, by stating that evidence about alleged waste dumping by the Applicant's trucks was not relevant to this issue. The interim decision stated that adjudication was not necessary concerning the coastal consistency review, but set forth a process by which this review should be completed, similar to the process for reviewing the adequacy of a SEQRA negative declaration when one is challenged in a DEC permit hearing.

The interim decision upheld the supplemental issues ruling's determinations that the project is subject to the urban noise standard in part 360 and to the setback requirements that were in effect immediately prior to March 10, 2003.

Thus, following the interim decision, the issues for adjudication were control of odor, litter, dust and vector impacts; variances from three setback requirements in part 360; and compliance with the noise standards in part 360. The setback requirements from which variances were sought are: (a) the 50 foot setback between the property line and the perimeter of the site, (b) the 200 foot setback between the perimeter of the site and residences or places of business, and (c) the 200 foot setback between surface waters and the perimeter of the site.

Further proceedings, June 2006 to October 2006

CHA submitted a request on July 24, 2006 seeking clarification of the portion of the interim decision that concerned the Applicant's record of compliance. On September 12, 2006, Executive Deputy Commissioner Stark determined that no clarification was necessary.

On July 17, 2006, the Amici requested a formal ruling on the party status of the Amici, in view of the fact that neither issue proposed in their petition for party status remained for adjudication in the hearing. On September 1, 2006, I issued a ruling stating that the Amici were no longer an amicus party in this hearing.

In an e-mail sent on October 5, 2006, Baykeeper stated it was considering filing a proceeding under article 78 of the Civil Practice Law and Rules ("CPLR") challenging the Executive Deputy Commissioner's decision that alienation of parkland would not be an issue for adjudication in the hearing. On October 20, 2006, Baykeeper notified the ALJ and the parties that it filed this article 78/declaratory judgment petition on October 13, 2006. This action did not lead to a stay of the DEC permit hearing.

During the period from late July 2006 to October 2006, the parties engaged in discovery, with numerous objections to discovery requests and to the adequacy of responses.

Allegations concerning witness tampering

The adjudicatory hearing was scheduled to begin on October 16, 2006. On the morning of October 10, 2006, Baykeeper transmitted by e-mail a motion to adjourn the adjudicatory hearing on the basis that Christopher Boyd, who Baykeeper and CHA both proposed to call as an expert witness, had unexpectedly withdrawn from participating in the hearing due to communications from one or more individuals at the New York City Department of Law (counsel for the Applicant). The motion was accompanied by an affirmation of Mr. Estrin. CHA transmitted a letter by e-mail later on October 10, 2006 concerning Mr. Boyd's withdrawal from the hearing. The letter noted that the intervenors intended to call other government employees as witnesses, and it expressed concern that threats might be made against them. A conference phone call took place among the ALJ and representatives of the parties on October 10, 2006, during which no parties objected to Baykeeper's request for an adjournment. On October 10, 2006, I adjourned the hearing without date and stated a new hearing date would be established after more schedule-related information was known, particularly concerning how long it would take for Baykeeper to locate a new expert witness and for that witness to prepare for the hearing.

On October 17, 2006, the Applicant submitted an affirmation by Mr. Burger in response to Baykeeper's October 10, 2006 motion, stating among other things that certain allegations in Mr. Estrin's affirmation were false. Later on October 17, 2006, Mr. Estrin submitted a reply affirmation stating, upon information and belief, that the allegations in Baykeeper's motion for adjournment were true when they were made and remained true. Mr. Estrin's affirmation disputed various statements in Mr. Burger's affirmation and also asserted that Baykeeper "stands by its allegations, including the use of the term 'witness tampering,' and believes that the plain language of the New York Penal Code

quite clearly supports such terminology." (October 17, 2006 Estrin affirmation, at 3).

On November 6, 2006, I sent a memorandum to the parties in which I stated that the three affirmations included very serious allegations. The memorandum notified the parties that the DEC Office of Hearings and Mediation Services had referred the situation to the DEC Acting General Counsel and the DEC Assistant Commissioner for Public Protection, for appropriate action.

On January 12, 2007, Chief ALJ James T. McClymonds transmitted to me a memorandum from Acting General Counsel Alison H. Crocker that provided an update on the status of an investigation into the allegations. Ms. Crocker's memorandum stated her office had reviewed the allegations and had referred the matter to the DEC Division of Law Enforcement for investigation and preparation of a report of their findings. On January 22, 2007, I sent to the parties copies of Chief ALJ McClymonds's memorandum and the attached memorandum from Acting General Counsel Crocker.

Baykeeper notified the parties and the ALJ on April 16, 2007 that it would present Brian Ketcham, P.E. as an expert witness concerning assumptions used by the Applicant in its noise analysis, and was still working to retain an expert witness to testify on other adjudicable issues. On May 1, 2007, Baykeeper sent an e-mail stating that it was negotiating with Ellen Z. Harrison to testify as an expert witness. Both Mr. Ketcham and Ms. Harrison were included in the witness list Baykeeper provided on May 8, 2007. On May 16, 2007, Baykeeper stated it would not call Mr. Ketcham as a witness (May 15, 2007 transcript ["5/16/07 Tr."], at 5-6).

During the first day of the adjudicatory hearing (May 15, 2007), in cross-examining one of the Applicant's witnesses, Baykeeper attempted to ask about Mr. Boyd's withdrawal from the hearing, with respect to negative inferences that might be drawn against the Applicant. The Applicant and DEC Staff objected to the question. I sustained the objection to questions about the circumstances of Mr. Boyd's withdrawal from the hearing, in view of the ongoing investigation and my concern about overlap between the hearing and the investigation, but allowed Baykeeper and CHA to present offers of proof regarding what inferences should be drawn if Mr. Boyd did indeed withdraw due to witness tampering. (5/15/07 Tr. 89-104; 132-136; see also, November 21, 2006 ruling, at 5.)

Baykeeper submitted an offer of proof on May 18, 2007. Following receipt of responses from the other parties, I made a ruling on May 25, 2007. The ruling concluded that the information Mr. Boyd would have provided, in contesting information and assumptions in the Applicant's case, consisted of conclusions one could evaluate by looking at the documents Mr. Boyd would have used or at totals calculated from those documents. I stated that the documents themselves were, or probably would be, in evidence or could be put in evidence by stipulation or by testimony of a fact witness. Consequently, it was not necessary to determine, for purposes of this hearing, why Mr. Boyd withdrew from testifying because the information he would have provided could be put in the record by other means.

On January 8, 2009, Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services, wrote to the parties to notify them that the DEC Division of Law Enforcement had conducted an investigation of the allegations and referred the matter to the Public Integrity Bureau of the New York State Office of Attorney General for further review and investigation. Assistant Commissioner Alexander's letter provided contact information for the Assistant Attorney General to whom inquiries might be made. The record of the hearing does not contain information from later than January 8, 2009 concerning the investigation, or about the outcome of the investigation.

Further proceedings, October 2006 to May 2007

On October 24, 2006, I sent a memorandum to the parties that, among other subjects, discussed discovery disputes that the parties had identified in a conference call on October 10, 2006 and set a schedule for motions to compel disclosure and responses to such motions.

CHA submitted a motion on November 1, 2006, moving for "a directed ruling for denial of the permits sought by the applicant." CHA cited 13 reasons in support of its motion. DEC Staff and the Applicant submitted responses opposing the motion. On November 21, 2006, I made a ruling that denied the motion.

On November 2, 2006, CHA submitted two motions to compel discovery, with respect to its discovery requests addressed to the Applicant and to DEC Staff, respectively. On November 20, 2006, each of these parties replied in opposition. On February 6, 2007, I made a ruling on the motions to compel, which was one of two rulings I made in this hearing on the same date. The other ruling remanded the coastal consistency review to DEC Staff

for further review and revision, a subject discussed below in a separate section of this hearing report.

The February 6, 2007 ruling on the motions to compel described events involved in the discovery disputes and the relation between the subjects of the disputes and the issues identified for adjudication. The ruling directed the Applicant to provide numerous sets of information but denied CHA's motion to compel disclosure by DEC Staff.

The February 6, 2007 discovery ruling also contained a section regarding an ongoing disagreement between the Applicant and DEC Staff, on one side, and the intervenors, on the other, concerning whether the interim decision precluded the intervenors from calling an expert witness. I noted that, on September 27, 2006, I had told the parties my initial reaction was that the interim decision did not preclude such testimony, and that if the Applicant or DEC Staff wished to have such testimony precluded, a motion concerning this should be submitted. My February 6, 2007 discovery ruling further noted that neither the Applicant nor DEC Staff submitted a motion on this question, but notwithstanding this, in subsequent correspondence these parties took positions based in part on their interpretations that such testimony was precluded. The interim decision's discussion of expert and lay testimony was in the context of the issue of odors, litter, dust and vector impacts. The February 6, 2007 ruling stated that the interim decision does not prohibit one or both intervenors from presenting an expert witness or expert witnesses on this issue.

On February 9, 2007, CHA moved for leave to appeal the February 6, 2007 ruling on its motions to compel. The Applicant opposed the motion for leave to appeal. On March 1, 2007, Assistant Commissioner Alexander, pursuant to a delegation of decision-making authority in this hearing, denied the motion for leave to appeal. The Applicant's responses, or lack of responses, to CHA's discovery request and the February 6, 2007 discovery ruling were also the subject of disputes later in the hearing process.

CHA made two motions in April, 2007, both of which I ruled on in a May 8, 2007 ruling. On April 11, 2007, CHA moved to exclude from the hearing all data concerning delivery and removal of materials from the Spring Creek yard waste composting facility and the Applicant's other composting facilities, on the basis that this data was not accurate. On April 13, 2007, CHA moved that the Applicant be held in contempt for failure to provide materials CHA sought in discovery and for which CHA's motion to compel had been granted. After additional correspondence from

the Applicant, CHA and Baykeeper about these motions, I issued a ruling on May 8, 2007. The ruling denied both motions, for reasons discussed in the ruling, but directed the Applicant to provide information and stated that deficiencies in the Applicant's data and any failures to comply with discovery rulings could be considered in weighing the evidence and drawing inferences about the hearing record.

During the winter of 2006-2007, the Applicant, Baykeeper and CHA submitted correspondence about a dispute over the length of time Baykeeper was taking to locate a witness or witnesses in place of Mr. Boyd, and about the Applicant's requests that the adjudicatory hearing be scheduled. As noted above, Baykeeper identified two expert witnesses in mid-April and early May 2007 and the adjudicatory hearing began on May 15, 2007.

On May 17, 2007, Baykeeper transmitted a copy of an order in Raritan Baykeeper v Stark (Sup Ct, Kings County, May 10, 2007, Schneier, J., index No. 31145/06). Baykeeper commenced this court proceeding to restore alienation of parkland as an issue in the permit hearing, and also to obtain a declaratory judgment that the New York City Department of Sanitation's operation of the facility constitutes an alienation of parkland. The Court dismissed the first cause of action as unripe but denied the municipal defendants' motion to dismiss the second cause of action (see, May 10, 2007 order attached with Mr. Estrin's May 17, 2007 e-mail). The record of this hearing does not include later decisions or orders, if any were made, in Raritan Baykeeper v Stark, or any other outcome of this court case.

Adjudicatory hearing and witnesses

The adjudicatory hearing began on May 15, 2007 and continued on May 16, 30 and 31, June 28, July 11 and 12, September 19 and 20, October 10, 11 and 25, 2007. Two additional adjudicatory hearing dates took place on March 5 and 12, 2009, after an adjournment during which the Applicant prepared and revised certain maps. Most of the adjudicatory hearing took place at the DEC Region 2 Office or Region 2 Annex in Long Island City. The May 30, 2007 and October 25, 2007 hearing dates took place at the Brooklyn Sports Club, 1540 Van Siclen Avenue, Brooklyn. An additional site visit took place following the hearing on October 25, 2007.

The Applicant called the following witnesses: Robert Lange, Director of the Bureau of Waste Prevention, Reuse and Recycling; Philip W. Simmons, Senior Project Scientist, HydroQual, Inc.; G. Noemi Santiago, P.E., Henningson, Durham & Richardson

Architecture and Engineering, P.C.; Barry J. Cheney, P.E., HydroQual, Inc.; and Paul J. Emilius, Jr., P.L.S., GEOD Corporation and Greater Hudson Valley Engineering and Land Surveying, P.C.

DEC Staff called the following witnesses: Sally Rowland, Ph. D., P.E., Supervisor of DEC's Bio-Waste and Waste Transporter Section; Armand DeAngelis, Environmental Program Specialist 2, DEC Region 3 (formerly with the DEC Division of Solid and Hazardous Materials in Region 2); Kenneth Brezner, P.E., Regional Solid Materials Engineer, DEC Region 2; and Merkurios Redis, Environmental Engineer 1, Division of Solid and Hazardous Materials, DEC Region 2.

Baykeeper called the following witnesses: James Watt, Senior Sewage Treatment Worker, New York City Department of Environmental Protection;[4] Sebastian DeJesus, a resident of Crescent Street, Brooklyn; Craig Swanburg, Facility Director, MTA Bus (formerly Command Bus); Geoffrey Croft, founder of NYC Park Advocates; Ellen Z. Harrison, Senior Extension Associate and Director of the Cornell Waste Management Institute; and Cuyler Young, a resident of Crescent Street, Brooklyn.

CHA called as a witness Peter A. Uschakow, Director of the Brooklyn Developmental Center, New York State Office of Mental Retardation and Developmental Disabilities. Mr. Watt, Mr. DeJesus, Mr. Swanburg, Mr. Croft and Mr. Young were witnesses for CHA in addition to being witnesses for Baykeeper.

Additional proposed issue

On June 22, 2007, Mr. Nehila notified me by e-mail that he had just learned that the Applicant had notified DEC Staff that the Applicant would transfer management of its composting sites from Organic Recycling, Inc. ("ORI") to WeCare Organics LLC ("WeCare"), effective July 1, 2007. Mr. Nehila's e-mail transmitted a copy of a June 21, 2007 letter to this effect that had been sent by Mr. Lange to Mr. Brezner. On June 25, 2007, CHA moved to adjourn the hearing in view of this change. In additional e-mail correspondence on the same date, Baykeeper joined in the motion; DEC Staff and the Applicant opposed the

[4] Mr. Watt, Mr. Swanburg, Ms. Harrison, and Mr. Uschakow are identified in this report by their employment affiliations but they testified as individuals, not on behalf of their employers. Mr. Watt, Mr. Swanburg and Mr. Uschakow testified pursuant to subpoenae.

motion. Also on June 25, 2007, I posed two questions to the Applicant about whether the proposed operation of the Spring Creek compost facility by WeCare would differ from that described in the application and whether the Applicant had applied to DEC Staff for transfer of the permit application. The Applicant responded on June 26, 2007. Later on that date, I notified the parties that the June 28, 2007 hearing date would proceed and I reserved decision on whether to adjourn the July 11 and 12 hearing dates. The hearing did go forward on July 11 and 12, 2007 as well.

On June 29, 2007, DEC Staff sent letters to officials of the New York City Department of Sanitation, approving WeCare as the operations contractor for the Fresh Kills and Soundview compost facilities, and noting that WeCare is the proposed operations contractor of the Spring Creek compost facility. Copies of these letters were attached with Mr. Nehila's July 2, 2007 letter to me. The change in operations contractors led to further discussion and correspondence about the identity of the permittee in the draft permit for the Spring Creek facility, and the identity of the owner, site owner and operator of this proposed facility, as discussed in a later section of this hearing report.

On September 27, 2007, Baykeeper made an offer of proof concerning an additional proposed issue for adjudication, asserting that WeCare lacks experience in operating facilities similar to this one and that WeCare submitted an "absurdly low bid" to operate the Applicant's compost facilities. Baykeeper argued that these circumstances raise an issue about whether WeCare would be able to operate the compost facility in compliance with the applicable statutory and regulatory criteria. Baykeeper also argued that, in the event that WeCare's level of experience and low bid do not give rise to an independent issue for adjudication, they are relevant to existing adjudicable issues.

The other parties replied to Baykeeper's offer of proof on October 5, 2007, with the Applicant and DEC Staff opposing addition of a new issue and arguing that the change in operations contractors is not relevant to the existing issues. CHA's reply supported adjudicating the proposed issue but also stated that the issue should be expanded to include the identity of the site owner and the operator of the facility. CHA also moved that four documents or groups of documents concerning the change in operations contractor be marked as exhibits for identification.

I made a ruling on the proposed additional issue on November 20, 2007, concluding that no additional issue for adjudication

was raised by Baykeeper's offer of proof and that no additional testimony was necessary regarding the matters Baykeeper asserted in it. I granted CHA's motions with respect to including two of the documents as exhibits for identification but denied the motions regarding the other documents. I stated that the application form and a June 28, 2007 statement by counsel for the applicant were inconsistent concerning the identity of the site owner, and that this did not raise an issue for adjudication but would need to be clarified by the Applicant. I also requested information from DEC Staff about how DEC Staff identifies permittees for solid waste management facilities. Because the November 20, 2007 ruling was an issues ruling, it was appealable to the Commissioner; I set December 11, 2007 as the deadline for appeals.

On December 10, 2007, CHA appealed the November 20, 2007 ruling. The Applicant and DEC Staff each opposed the appeal. Baykeeper, the party that had proposed the additional issue, did not appeal the ruling. As of the date of this report, the appeal remains pending.

Further proceedings, June 2007 to close of record

On July 3, 2007, Mr. Dillon notified me that the Applicant had commenced legal proceedings against him, that he regarded as an effort to intimidate him so that he would remove himself from the hearing. In an August 25, 2007 letter about this situation, Mr. Dillon stated that the Applicant had begun legal action against him for an alleged infraction of the City of New York Administrative Code, title 16, section 16-118(2)(a). In subsequent correspondence, counsel for the Applicant described this legal action as a notice of violation for maintaining a "dirty area" at Mr. Dillon's residence (September 13, 2007 e-mail from Ms. Eichinger).

On September 9, 2007, Mr. Dillon notified me that dealing with this situation would preclude his participation in the September 19 and 20, 2007 hearing dates. In a separate letter dated September 9, 2007, Dolly Pratt, the Secretary of Concerned Homeowners Association ("Association"), asked that the hearing be adjourned so that the Association could seek pro bono legal counsel. Ms. Pratt's letter also stated that, according to the Association's Vice-President, the conditions the Applicant alleged existed at Mr. Dillon's house did not exist.

Following additional correspondence from the parties, I sent a memorandum on September 14, 2007 that denied the request for adjournment but stated I would consider whether to allow CHA to

recall witnesses who testified on the September dates, in the event that the Association found an attorney prior to the close of the hearing record. In an e-mail dated September 16, 2007, Mr. Dillon suggested that the Applicant was making false allegations against him but was failing to enforce against littering and other solid waste violations in the area of the compost facility.

No representative of CHA participated in the September 19 or 20, 2007 hearing sessions. On October 3, 2007, the Association stated it was not yet represented by an attorney and moved to recall witnesses who testified on September 19 and 20, 2007, to question a witness about an affidavit received in evidence, and to review the exhibits marked on September 19 and 20. The Applicant and DEC Staff opposed recalling the witnesses, and Baykeeper did not take a position on this question. On October 5, 2007, I denied the motions to recall the witnesses and for testimony about the affidavit, but granted the motion for review of the exhibits.

The hearing continued on October 10 and 11, 2007 and Mr. Dillon again participated as the representative of the Concerned Homeowners Association. On October 17, 2007, the Association moved for leave to appeal my October 5, 2007 ruling. On November 13, 2007, Assistant Commissioner Alexander sent a letter advising that Commissioner Alexander B. Grannis denied the Association's motion for leave to appeal.

At the hearing on September 19, 2007, I asked Mr. Brezner about whether the maps in the application depict property boundaries, the site perimeter and certain other information that is required under 6 NYCRR 360-1.9 and former section 360-5.4,[5] and that is or may be relevant to issues in this hearing. Based upon Mr. Brezner's testimony, it was apparent that omissions and inconsistencies existed in the application and that the Applicant would need to rectify these (9/19/07 Tr., at 150-169). On

[5] As stated in my September 25, 2007 memorandum to the parties, the section of 6 NYCRR subpart 360-5 that listed required contents of applications for permits for yard waste composting facilities was amended while this application was pending. The version that was in effect on December 20, 2002 (the date DEC Staff determined that this application was complete) would apply to this project (see, September 25, 2007 memorandum, at 1-2, citing the February 8, 2005 supplemental issues ruling at 3-5 with respect to a similar question about amendment of the setback requirements).

September 25, 2007, I sent a memorandum to the parties that discussed this, among other subjects, and that directed the Applicant to provide the information required to be in a site plan map and in a vicinity map for a yard waste composting facility. I did not set a deadline, because I did not know how much time would be reasonable for preparation of this information, but I asked that the Applicant propose a date for providing the information.

At the hearing on October 10, 2007, I inquired about preparation of the maps and counsel for the Applicant stated it might take between six weeks and a few months to prepare the maps (10/10/07 Tr. 170-173). In a February 14, 2008 memorandum to the parties, I noted that the Applicant had not identified a date by which the maps would be available, nor had it provided the maps. I set a deadline of March 14, 2008 for the Applicant to submit the maps. I later extended this deadline, at the request of the Applicant, to April 15, 2008. The Applicant submitted maps and GIS figures on April 14, 2008, although due to a missing page the submission was not entirely provided until on or after May 9, 2008.

Following an opportunity for comments by the other parties and a response from the Applicant, I made a ruling on July 11, 2008 that stated, among other things, that the April maps provided some of the information that was missing from the maps in the application but still lacked required information and contained numerous internal inconsistencies between maps. The ruling stated that some of Baykeeper's and CHA's criticisms of the maps concerned discrepancies that were not material or relevant to issues in the hearing, but that others were material and relevant. I required the Applicant to provide additional information and corrections as outlined in the ruling. I also requested certain items of information from CHA, if it wished to pursue assertions about several aspects of the maps. Among the omissions, the maps did not contain a line labeled as the perimeter of the site and/or the horizontal limits of the compost facility.

On July 16, 2008, CHA moved for leave to appeal the July 11, 2008 ruling about the maps. On July 29, 2008, Assistant Commissioner Alexander notified the parties that Commissioner Grannis denied CHA's motion for leave to appeal. While CHA's motion was pending and after it was denied, the parties submitted arguments and requests related to the July 11, 2008 ruling. On August 11, 2008, I sent a memorandum to the parties concerning this correspondence. Among other matters, the memorandum required the Applicant to provide certain items that CHA had

sought in discovery about the maps and denied certain other items of discovery sought by CHA.

The Applicant submitted revised maps and GIS figures, with related affidavits and an affirmation, on September 26, 2008. The other parties were given an opportunity to comment on the revised maps, with comments due November 12, 2008. On October 16, 2008, CHA made a discovery request concerning information used in preparing the revised maps. After a response from the Applicant, I sent a letter-ruling on this motion on October 24, 2008.

Following review of the revised maps and the correspondence concerning them, I sent a memorandum to the parties on December 31, 2008 that required the Applicant to identify which of its additional submissions it was proposing for receipt in evidence. The memorandum also stated that the hearing would be reconvened for voir dire and cross-examination if the Applicant proposed that the September 2008 maps and any of the related submissions be received in evidence. The memorandum stated that I had required the revised maps due to deficiencies in the maps contained in the December 2002 engineering report, and that the site plan map and vicinity map are necessary parts of the permit application. The Applicant identified its additional proposed exhibits on January 13, 2009.

During January and February 2009, disputes among the parties concerning discovery, cross-examination and witnesses to be called at the reconvened hearing led to two letter-rulings, dated February 13, 2009 and February 25, 2009. On February 13, 2009, I again directed the Applicant to provide to CHA certain data that I had originally directed the Applicant to provide in my October 24, 2008 letter-ruling. I denied a motion by CHA that was essentially for additional discovery concerning the Applicant's maps, and reserved decision on receipt of certain exhibits. In the February 25, 2009 letter-ruling, I denied CHA's request that Mr. Pejan and four employees of the Applicant's consultant be available at the hearing to be called as witnesses, and denied CHA's request for discovery related to questioning these persons. I also denied the Applicant's motions to close discovery and to limit cross-examination of its additional two witnesses to one hour per party per witness.

The hearing continued on March 5 and 12, 2009, and March 12 was the final day of testimony. Closing briefs were due May 29, 2009, a date requested by DEC Staff and agreed to or accepted by the other parties. The Applicant proposed that replies be allowed, and the deadline for these was July 17, 2009. On May

12, 2009, DEC Staff requested, and was granted, a postponement to June 12, 2009 for the closing briefs and July 31, 2009 for the replies.

On May 26, 2009, CHA moved that the briefing schedule be suspended, that DEC Staff be directed to seek a formal ruling from the New York City Department of Buildings as to whether siting the proposed facility in Spring Creek Park is consistent with the New York City zoning resolution, and that CHA be permitted to make discovery requests concerning the application by CMW Industries, Inc. ("CMW") for a solid waste management facility (Application No. 2-6104-01410/00001-0). In support of these motions, CHA argued that the Department's review of the present project was inconsistent with actions it later took in reviewing the CMW application. Both the Applicant and DEC Staff opposed these motions, by letters dated June 5, 2009. On June 11, 2009, I denied CHA's three motions, for reasons stated in the ruling I made on that date. CHA submitted an exception to the ruling on June 17, 2009.

All four parties submitted closing briefs on June 12, 2009. On June 17, 2009, CHA moved to exclude DEC Staff's brief from the record in its entirety on the basis that the brief did not comply with the page limits, format requirements and requirements about mailing that I had specified. DEC Staff and the Applicant both opposed the motion. On June 25, 2009, I denied the motion to exclude the brief in its entirety but stated that I would include only the main text of DEC Staff's closing brief in the record, omitting the attachments.[6]

CHA then moved, on July 2, 2009, to exclude the portions of DEC Staff's and the Applicant's briefs that pertained to the coastal consistency certification for this project, on the basis that this is not an issue for adjudication, or in the alternative, to allow additional response to these arguments. DEC Staff and the Applicant both opposed the motion. Baykeeper stated it was prepared to respond to the arguments if I advised it was appropriate to do so despite this subject not being an issue for adjudication. On July 9, 2009, I wrote to the parties stating that the arguments by DEC Staff and the Applicant concerning the coastal consistency determination were essentially appeals of my February 19, 2008 ruling, although they were not described as appeals in the briefs, and that pursuant to 6 NYCRR

[6] All of the attachments to DEC Staff's closing brief were documents that were already part of the correspondence in this matter.

624.8, any ALJ ruling may be appealed to the Commissioner as part of a party's final brief. I denied the motion to exclude these portions of the briefs but allowed additional pages in the reply briefs for response to the appeals.

The parties submitted reply briefs by electronic mail on July 31, 2009, with paper copies also mailed that date. CHA submitted two reply briefs, responding to the closing briefs of DEC Staff and the Applicant, respectively. On August 3, 2009, the Applicant moved to strike one of CHA's two briefs and stated it had no preference which brief would be stricken. Also on August 3, 2009, DEC Staff suggested that CHA be directed to choose which of its two reply briefs would be considered, or that I consider only 100 pages from the two reply briefs (which together consisted of 136 pages). On August 4, 2009, CHA opposed the Applicant's motion. On August 6, 2009, I notified the parties by e-mail that CHA would have until August 14, 2009 to submit one revised reply brief that would be within the 100 page limit, or I would consider only the first 50 pages of each of CHA's reply briefs. CHA replied that it would submit a revised reply brief by August 14, but asked that it have until August 25, 2009 to submit the paper copy. I granted this request. CHA submitted its revised reply brief as scheduled.

On August 26 and 27, 2009, CHA and DEC Staff sent e-mail messages about CHA's additional arguments, made earlier that day by e-mail, concerning review of the CMW hearing. In an August 31, 2009 memorandum to the parties, I considered the information presented by CHA and DEC Staff and stated that nothing had changed that required revisiting the June 11, 2009 ruling.

The record of this hearing closed on August 31, 2009.

WATERFRONT REVITALIZATION PROGRAM CONSISTENCY

As noted above, the issues ruling and supplemental issues ruling identified an issue for adjudication regarding the project's consistency with the New York City Waterfront Revitalization Program (issues ruling, at 32-37; supplemental issues ruling, at 5-7). The interim decision reversed the decision to include this subject as an issue for adjudication, stated that no public hearing is required as part of coastal consistency review by a State agency, and described the administrative review process to be followed in conducting this review (interim decision, at 19-26). The review process is the one used for review of a SEQRA negative declaration that is challenged in a DEC permit hearing (interim decision, at 23-24).

The interim decision stated:

> "Where a proposed project is located within the coastal area, and a local waterfront revitalization program ('LWRP') for the area has been approved by the New York State Secretary of State, the Department is required to review the project's consistency with the purposes and policies of the approved LWRP. Specifically, where, as here, a determination is made pursuant to SEQRA that an action will not have a significant effect on the environment, and where the action is within the boundaries of an approved LWRP and is identified by the New York Secretary of State pursuant to Executive Law § 916(1)(a) as an action requiring consistency review, a State agency such as the Department must file a certification with the Secretary that the action will not substantially hinder the achievement of any of the policies and purposes of the applicable approved LWRP and, whenever practicable, will advance one or more of such policies (see 19 NYCRR 600.4[c]). If the action will substantially hinder the achievement of any policy or purpose of the applicable approved LWRP, the State agency must instead certify that (1) no reasonable alternatives exist which would permit the action to be taken in a manner which would not substantially hinder the achievement of such policy or purpose, (2) the action taken will minimize all adverse effects on the local policy and purpose to the maximum extent practicable, and (3) the action will result in an overriding regional or statewide public benefit (see id.)." (Interim Decision, at 19-20).

The June 14, 2006 interim decision required DEC Staff to prepare a State Coastal Assessment Form ("CAF") and a revised consistency certification, and to submit these to the ALJ and the parties for review. The ALJ would review whether DEC Staff's consistency determination was irrational or otherwise affected by an error of law; if the determination was rational and not affected by an error of law, the ALJ would not disturb DEC Staff's certification (Interim Decision, at 24-26).

On September 20, 2006, DEC Staff submitted a CAF and a certification. Following additional correspondence and an opportunity for the parties to comment, I made a ruling on February 6, 2007 that remanded the CAF and consistency certification to DEC Staff for further review and revision, as described in the ruling. The CAF had stated that the project itself would have various adverse effects on natural resources but that these would be adequately offset by the Applicant's proposed remediation of 20 acres on which soil would be

rehabilitated and native plants would be established. The ruling stated, among other things, that neither the location of the remedial project nor the work to be undertaken had been identified, and that therefore no one could take a "hard look" at the remedial project and its effectiveness.[7] The ruling found that the CAF and certification were not rational, and that the lack of a "hard look" constituted an error of law. The ruling also stated that the proposed remedial work would need to be included as a condition of a revised draft permit, if the remediation is taken into account by DEC Staff in its revised determination.

Additional correspondence concerning this review was submitted in 2007, as summarized at pages 2 through 5 of a subsequent ruling dated February 19, 2008. In that ruling, I reviewed the revised coastal consistency certification that DEC Staff submitted on May 11, 2007 and the revised permit condition DEC Staff provided on October 19, 2007.[8] The February 19, 2008 ruling concluded that, even with the remediation identified in revised special condition 35, issuance of a part 360 permit for the Spring Creek composting facility would substantially hinder numerous policies of the City of New York's New Waterfront Revitalization Plan ("NWRP"). The ruling concluded that portions of the revised consistency determination were not rational. The ruling also concluded that the revised consistency determination was affected by an error of law in not concluding that the action will substantially hinder the achievement of policies or purposes of the NWRP, and then proceeding to conduct the additional analysis required by 19 NYCRR 600.4(c)(1) through (3).

The February 19, 2008 ruling remanded the revised CAF and coastal consistency determination, and the revised permit condition, to DEC Staff for further revision consistent with the ruling. The ruling stated that, if DEC Staff elected not to revise its State CAF and coastal consistency determination

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[7] The term "hard look" comes from the standards for deciding whether a SEQRA review has been done in an acceptable manner. See, H.O.M.E.S. v New York State Urban Development Corp., 69 AD2d 222, 232, 418 NYS2d 827, 832 [4th Dept 1979]; 6 NYCRR 617.7(b); and the discussion at page 8 of the February 6, 2007 ruling on the coastal consistency review in the present case.

[8] This permit condition is the October 19, 2007 version of Special Condition 35. On November 7, 2007, the Applicant notified me that it consented to this revised permit condition.

further, the hearing report would note that position and would recommend that the Commissioner conclude that the certification required by 19 NYCRR 600.4(c) cannot be made.

On March 14, 2008, Mr. Nehila notified me that DEC Staff did not intend to further revise its State CAF and coastal consistency determination, and stated that Staff believed the Commissioner would ultimately agree with DEC Staff that the determination is neither irrational nor affected by an error of law.

As noted above, the Applicant and DEC Staff included arguments in their closing briefs that essentially appealed the February 19, 2008 ruling. DEC Staff's statement that "the ALJ should find that DEC Staff's Coastal Zone Consistency Determination was rational, and made without error of law" (DEC Staff closing brief, at 37) also suggested that DEC Staff was re-arguing the dispute ruled on in the February 19, 2008 ruling.

The revised CAF and coastal consistency determination, and the revised permit condition have already been the subject of review in this hearing, and the arguments presented by DEC Staff and the Applicant in their briefs do not raise any matters that change the outcome of the earlier review.

One argument in DEC Staff's closing brief underlines a concern that should be noted in the event that the Commissioner disagrees with the February 19, 2008 ruling and concludes that the required certification can be made. This relates to the need for the permit condition about restoration of habitat to be written specifically and unambiguously. DEC Staff asserted that it was an "absurd proposition" for the February 19, 2008 ruling to state that "[a] literal reading of the preliminary proposal would allow the Applicant to argue it had complied with revised special condition 35 if it planted more than two trees and more than two shrubs of native species, plus enough native herbaceous seed to control erosion." (DEC Staff closing brief, at 34; Ruling, at 22).

In the present case, the Applicant has argued that it did not need to show the Brooklyn Developmental Center as a residence on its maps because "given that the regulations do not define residence, it was reasonable for [the Applicant] to decline treating individuals who may be residing with the Center as 'residences.' [sic]" (Applicant's June 4, 2008 letter, at 6). The Applicant's reply brief, at 32, argued that the Applicant could leave winds less than ten miles per hour out of its analysis of wind because no regulatory requirement was identified

requiring winds of all speeds to be included. The Applicant's Director of Waste Prevention, Reuse and Recycling characterized a date in the permit condition about habitat restoration at the Soundview compost facility as an "arbitrary deadline" (5/15/07 Tr. 86) and testified that the Applicant was not about to submit a mitigation plan if it was going to have to close the Soundview facility due to budget problems in the early 2000s (5/15/07 Tr. 80).

In the context of this hearing, caution about what the Applicant might do under a possible interpretation of the permit condition is not misplaced.

The February 6, 2007 and February 19, 2008 rulings concerning DEC Staff's Waterfront Revitalization Program consistency determination are incorporated by reference into this report.

FINDINGS OF FACT

1. In October, 2001, the New York City Department of Sanitation ("Applicant") applied for a permit under 6 NYCRR part 360 for the Spring Creek yard waste composting facility, at a site located at 12720-B Flatlands Avenue, Brooklyn, New York. The site is southeast of the intersection of Flatlands Avenue and Fountain Avenue and consists of 19.6 acres of land within the Brooklyn portion of Spring Creek Park, an undeveloped city park. (Directions referred to in this report are approximate because the street grid in this area does not line up precisely with compass directions. Flatlands Avenue is referred to as an east-west street and Fountain Avenue as north-south.)

2. The Applicant built the facility without having a permit from the New York State Department of Environmental Conservation ("DEC") for construction and operation of the facility. The facility is already in existence and has operated, although it has not yet received a DEC solid waste management facility permit. The facility's construction began in the summer of 2001. The mulching pad at the eastern end of the facility (Pad 3) was built in the spring and summer of 2002 and was the last area constructed (Ex. 4, at 4-27; Ex. 57; 5/15/07 Tr. 19-20). DEC Staff, in its response to comments on the application, stated it exercised its discretion in deciding to encourage the Applicant to pursue a permit application rather than taking enforcement action (Ex. 3, section 3.F, at 1).

3. During the fall of 2001, the Applicant delivered approximately 5,261 tons of leaves to the Spring Creek compost facility (Ex. 37). In subsequent years, the New York City Department of Parks and Recreation ("Parks") has composted leaves from Brooklyn parks at this facility, although the dates and quantities are not specified in the record. In at least some subsequent years, the Applicant brought finished compost from other facilities to the Spring Creek facility for distribution to the public (5/15/07 Tr. 22-23).

4. The application proposes that the facility, in its first two years of operation under a permit, would receive approximately 61,900 cubic yards per year (approximately 12,300 tons per year) of material consisting of leaves, Christmas trees and brush delivered by the Applicant and other city agencies. During year three and later years, the facility would receive approximately 69,400 cubic yards per year (approximately 15,000 tons per year)[9] consisting of those materials plus grass, brush, virgin wood chips, logs, trees and stumps delivered by landscapers and horse manure delivered by stable owners (Ex. 4, at 4-2).

5. The facility would accept material from all portions of the City of New York, but the overwhelming majority of the material would be produced by the residential areas of Brooklyn and Queens (Ex. 4, at 3-1 to 3-5).

6. Compost produced at the facility would go to a variety of users. According to the Applicant's engineering report, the Applicant would reserve 10 percent of the compost generated each year for distribution to residents and for public greening projects such as community gardens. For the remaining 90 percent of the compost, the engineering report identifies two alternative uses: 1) the compost would be made available to Parks to use "at its discretion and expense in restoration and/or beautification projects throughout the City"; or 2) "Parks may designate all or

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[9] Mr. Simmons, the principal author of the engineering report for this facility, stated that the volume/weight ratio for yard waste is roughly five cubic yards per ton (6/28/07 Tr. 138). The quantities that the engineering report identifies for the first two years of operation correspond to this ratio. The ratio of the quantities identified for year three and later is about 4.6 cubic yards per ton (69,400 cubic yards and 15,000 tons). Dr. Rowland stated that the ratio for leaves can vary from eight to four cubic yards per ton, and that the application used a ratio of five cubic yards per ton which is within the normal range (5/16/07 Tr. 112-114).

part of the remaining compost produced to be utilized in restoration projects at Spring Creek." Under the second alternative use, the Applicant would furnish the labor and materials necessary for such projects (Ex. 4, at 6-3 and 6-4; see also, Ex. 3, section 2.D, at page 1 of the Environmental Assessment Statement [EAS] Attachment and pages 2-3 of the EAS Appendix 1).

7. In recent years, the Applicant has conducted compost give-back events at the facility, allowing members of the public to take compost. These events also include the opportunity to drop off unwanted electronic equipment for recycling and used clothing for donation (Ex. 47; 5/15/07 Tr. 23).

8. The compost facility consists of an area paved with asphalt millings, surrounded by chain link fence and mostly, although not entirely, surrounded by earthen berms that are located immediately within the fence (5/15/07 Tr. 31-32; Exs. 114, 120). The berms vary in height above the paved area, ranging from about four to eight above the surface of the asphalt millings, and are approximately 30 to 50 wide at their bases. A row of small white pines is planted along the top of the berm. The paved area is divided into two composting pads and a mulching pad, plus a fenced-in security area that includes the office and scale for weighing trucks (see, Exs. 114, 120 and 73; Ex. 4, at 4-24 to 4-27 and 6-4). A reduced copy of Ex. 120 is included as Appendix A in the paper copies of this hearing report.

9. Water runoff within the facility would flow to recharge basins. The recharge basin for the western portions of the facility has an overflow structure from which runoff would flow into an existing sewer line that flows to the 26th Ward Water Pollution Control Plant (Ex. 4, at 2-11, 4-18 to 4-23; Ex. 114).

10. Yard waste materials would be composted at the facility in windrows that would be turned periodically. The composting that took place in 2001-2002 at this site was also done using turned windrows (5/15/07 Tr. 37, 65; 5/30/07 Tr. 15, 23). The windrows are long piles of yard waste material placed on the asphalt surface. The Applicant proposes to use windrows that would be approximately 250 feet long, and that would be between 6 to 14 feet high and between 18 to 22 feet wide, depending upon the windrows' composition. Leaf and mulch windrows would have larger dimensions and would be turned using front end loaders. Windrows consisting of grass mixed with leaves or horse manure mixed with leaves would have smaller dimensions and would be turned using a compost windrow turning machine (Ex. 4, at 4-17, 6-2 to 6-3 and A-26; 6/28/07 Tr. 161).

11. As proposed in the engineering report, yard waste would be brought into the facility by trucks that would be weighed as they enter. Bagged waste would be formed into staging windrows and subsequently would be de-bagged using a trommel. Unacceptable materials would be removed for disposal, and the compostable wastes would be composted in windrows. The completed compost would be screened, using the trommel, prior to use. Christmas trees, brush and other woody waste would be chipped using a tub grinder and would be placed in mulching windrows (Ex. 4, sections 4 and 6).

12. The Applicant operates or operated several other yard waste composting facilities at other locations within New York City. Such facilities currently exist in Soundview Park (DEC Permit No. 2-6007-00277/00001; Ex. 8) and at Fresh Kills. Two other yard waste composting facilities, that are now closed, operated at Ferry Point Park and Canarsie (Seaview) Park. The Applicant also delivered leaves for composting at Idlewild Park in 1999, with additional smaller amounts delivered there in the following two years (5/15/07 Tr. 12-15; Ex. 13; Ex. 4, at 1-2).

13. On August 27, 2001, the Applicant and Parks entered into a memorandum of understanding (MOU) under which the Applicant would use land in Spring Creek Park as a composting facility. The MOU stated that Parks and the Applicant desired to discontinue the composting operation in Canarsie Park and to have the area restored by the Applicant. The Applicant would begin to phase out its composting operation at Canarsie Park upon commencement of composting operations at Spring Creek Park. The MOU contained provisions for restoration at both Canarsie Park and, upon termination or expiration of the MOU, at Spring Creek Park (Ex. 4, at section 7, attachment 1).

14. The day-to-day operations at the Applicant's compost facilities are carried out by an operations contractor. At the time the adjudicatory hearing in this matter began, the operations contractor was Organic Recycling, Inc ("ORI"). On July 1, 2007, while this hearing was taking place, the Applicant substituted WeCare Organics LLC as the new operations contractor in place of ORI.

15. The part 360 application form submitted by the Applicant identifies the Applicant both as the facility owner and as the facility operator, and identifies the New York City Department of Parks and Recreation as the site owner (Ex. 3, section 1.A). The draft permit prepared by DEC Staff in February 2004 identifies the permittee as "NYC Department of Sanitation, John Doherty, Commissioner, as owner & operator, and Organic Recycling,

Incorporated, Beng Leong Ooi, President, as operations contractor" (Ex. 30).

16. The area within the facility perimeter includes portions of the following blocks and lots: Block 4580, Lot 2 (the majority of the facility, including composting pads 1 and 2 and the security and storage areas); Block 4584, Lot 1; Block 4585, Lot 1; Block 4585, Lot 64; and Block 4585, Lot 69 (Exs. 114 and 116). Exhibit 119, a portion of the Applicant's most recent revision of its site plan, identifies "Department of General Services (Now Known as Department of City-wide Administrative Services)" as the owner of the portion of Block 4580 that is within the facility perimeter, and "Parks & Rec" as the owner of the remainder of the area within the facility perimeter.[10] Ex. 114 contains similar identifications. The New York City Department of City-wide Administrative Services is the property manager for the City and designates some city properties to specific city agencies (5/15/07 Tr. 127 - 128).

17. A map entitled "Record Map of Spring Creek Park, B-165 and B-165A," dated April 16, 1993 and revised October 2002, contains the following note regarding the portion of Block 4580, Lot 2 that is within the facility perimeter and southeast of it: "Boundary of original park mapped by map 2606 (R-RW-165-1) adopted by the Bd. of Est. on March 3, 1938, Cal.131 D. Acquired as public park by condemnation. T.V. in the city of N.Y. and Park Dept. jurisdiction - May 12, 1938" (Ex. 112).

18. The deeds the Applicant submitted concerning ownership of Block 4580, Lot 2 (Ex. 151 and 152) were made in 1971 and 1972, and do not identify the City of New York or any City agency as the owner of this lot. They appear to convey property at the Brooklyn Developmental Center, located across Fountain Avenue from the composting facility, from the People of the State of New York to the New York State Housing Finance Agency. It is uncertain who owns Block 4580, Lot 2 at present (3/12/09 Tr.151, and 148-169 generally; Exs. 139, 151 and 152).

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[10] Exhibit 119 includes two areas, identified as portions of Sheridan Avenue and as a New York City Department of Environmental Protection (NYC DEP) access road, as being within the "site location" boundary, while Exhibit 114 does not include these areas within the "facility perimeter". In view of the greater level of detail in Exhibit 114, this report considers these areas as being outside the facility perimeter.

19. The land uses in the area surrounding the facility are a mixture of parkland, public facilities and institutions, residential uses, vacant land, and transportation or utility land uses (Ex. 118). The NYC DEP's 26th Ward Auxiliary Water Pollution Control Plant, a structure in which combined sewer overflows are held prior to being released into either the 26th Ward sewage treatment plant or into Jamaica Bay, is located immediately south and east of the composting facility and is in the corner of the roughly L-shaped area occupied by the facility (5/30/07 Tr. 18, 29-31; Ex. 4, at 2-11; Ex. 114). The remaining areas south and east of the compost facility are undeveloped city parkland. Across Fountain Avenue from the southwestern portion of the compost facility is the Brooklyn Developmental Center, a residential institution of the New York State Office of Mental Retardation and Developmental Disabilities at which approximately 286 clients reside (10/10/07 Tr. 138). North of the Brooklyn Developmental Center is an area of vacant land that is part of the Fresh Creek Urban Renewal Area and is zoned as residential (Exs. 118, 125, 140 through 142; Ex. 139, at 6). North of that, and immediately south of Flatlands Avenue, is a lot that contained satellite antennas at the time of the application but is now vacant. The Applicant's most recent vicinity map describes the former satellite site as "No land use data provided" (Ex. 4, Fig 2-9; Ex. 118; 10/10/07 Tr. 136). A large lot identified as now or formerly owned by New York Telephone, and as "transportation and utility" land use, is diagonally across the intersection of Fountain and Flatlands Avenues from the facility. North of Flatlands Avenue, across the street from the northwest corner of the facility, are a block of houses, some of which were built between 2002 and 2008 (Ex. 4, fig. 2-9; Ex. 114). Going east along the north side of Flatlands Avenue, the area across the street from the compost facility is occupied by a bus depot (MTA Bus, formerly Command Bus Company, Inc.), a U.S. Postal Service general mail and vehicle maintenance facility, and two additional blocks of residential buildings that are located north and northeast of Pad 3 of the compost facility. The residences on these two blocks were built between 2001 and 2008. Two blocks that are mostly undeveloped parkland, through which Spring Creek flows, are east of the eastern corner of the facility, and a residential area of Queens is east of the creek (Exs. 57, 114, 118, 119, 120). A NYC DEP scavenger waste facility is located on the northern side of the compost facility, south of Flatlands Avenue. This is a sewer access facility at which septic waste and portable toilet waste can be piped from trucks into the sewer. During the time the compost facility application was pending, the scavenger waste facility was re-built at a new location immediately east of its old location (Ex. 4, fig. 4-2; Exs. 114 and 120; 5/30/07 Tr. 19).

Noise

20. Section 360-1.14(p) of 6 NYCRR requires that noise levels resulting from equipment or operations at a solid waste management facility in an urban[11] area "must be controlled to prevent transmission of sound levels beyond the property line at locations zoned or otherwise authorized for residential purposes" that exceed an Leq energy equivalent sound level of 67 decibels (A) during 7 A.M. to 10 P.M. (daytime) and 57 decibels (A) during 10 P.M. to 7 A.M. (nighttime). Section 360-1.14(p) describes the Leq as "the equivalent steady-state sound level which contains the same acoustic energy as the time varying sound level during a one-hour period." Decibels(A) (dBA) is a unit of measurement of sound that is adjusted or weighted to take into account the differences in how humans perceive individual sound frequencies (Ex. 40, at 5).

21. The engineering report included a very limited section concerning noise (Ex. 4, at 6-5 to 6-6). This section of the engineering report consists of two paragraphs and contains no quantitative information about measured or predicted sound levels.[12]

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[11] The interim decision, at 19, confirmed that the urban noise standard applies to this application. Lower noise limits apply to solid waste management facilities in suburban or rural areas.

[12] The Applicant's Environmental Assessment Form (EAF) contained a reference to noise measurements having been made and the EAF presented one noise level value from those measurements. The August 30, 2004 issues ruling required the Applicant to provide a copy of the noise analysis discussed in the EAS, among other information (issues ruling, at 41-43; Ex. 3, section 2.D, pages 8-9 of EAS Attachment). In a September 10, 2004 letter, the Applicant provided this analysis, which consisted of a memo listing equipment to be used, sound measurements made by ORI in late 2002 for four of the items of equipment, and a memo from an equipment manufacturer about the engine noise levels for the trommel. At the hearing, the Applicant did not introduce this document as an exhibit. Most of the measurements from late 2002 were not used in the noise analyses that are Ex. 40 and 53, although information from the memo about the trommel might have been (Ex. 40, at 22, concerning noise levels obtained from manufacturers; 7/12/07 Tr. 58-59). Contrary to the assertion in Ex. 40 (at 3), the noise measurements transmitted with the

22. On June 29, 2006, following the interim decision's identification of noise as an issue for adjudication, the Applicant submitted a Final Noise Analysis Report dated January 23, 2006 (Ex. 40). The Applicant submitted a Supplemental Spring Creek Noise Analysis dated May 23, 2007 (Ex. 53) with the supplemental prefiled testimony of its witness on noise. The analyses that are reported in Exhibits 40 and 53 were done using the Cadna-A acoustical analysis software package. The receptors that are identified in Exhibits 40 and 53 are locations for which noise levels were predicted by use of Cadna-A, not measuring devices at which operational noise was measured (7/12/07 Tr. 58-59). The noise analyses compared the predicted noise emissions from the facility to the urban noise standards in 6 NYCRR part 360 (Ex. 40, at ES-1 and at 39; Ex. 53, at 1).

23. Operation of the compost facility would involve use of equipment that would generate different levels of noise depending on which processing activities are being carried out. Equipment on the site that would generate noise would include front end loaders, sanitation trucks, landscapers' trucks, compost removal trucks, a tub grinder and a windrow turner. A trommel would be used for debagging yard waste that arrives in bags[13] and for screening both the waste and the finished compost. These items of equipment were included in some or all of the operational scenarios that were the subject of noise modeling by means of the Cadna-A software. The engineering report, however, identifies additional equipment that would be used on site (a dump truck and a conveyor system) and that was not included in the noise analysis (Ex. 4, at 4-11 to 4-17 and A-33; Exs. 40 and 53). The engineering report also states that the equipment anticipated to be used "includes, but is not necessarily limited to" the listed equipment (Ex. 4, at 4-11 and A-33). During compost give-back events, private cars would be on the site but these also were not included in the noise analysis.

24. The facility's operation would not be limited to daytime, weekday hours. Under the draft permit, it could operate 24 hours per day during October 1 through December 31, and on weekends "in

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Applicant's September 10, 2004 letter were not included in the application, with the exception of the one measurement cited in the EAS.

[13] As discussed below, the Applicant is considering not debagging some or all of the yard waste, if it is contained in paper bags rather than in plastic bags.

the event of peak overloads" (Ex. 30, at 1; Ex 4, at 4-5 as revised on February 12, 2004).

25. Based on the record as a whole, it is likelier than not that the facility's operation will exceed the noise standards of 6 NYCRR part 360 at times during the year, both with respect to the daytime noise limit and the nighttime noise limit. The noise analyses submitted by the Applicant showed small exceedances of both these limits under certain operating scenarios. Although the Applicant has identified and accepted additional permit conditions that its noise witness stated would bring the noise levels below the applicable noise limits, deficiencies in the modeling support a finding that the Applicant has not demonstrated compliance with the 6 NYCRR part 360 noise standards even with these additional permit conditions.

26. The noise analyses can be given very little weight because Ms. Santiago, the person the Applicant offered as a witness to testify about them, had not used the Cadna-A software in the modeling for this facility, did not have experience or training in using the Cadna-A software, and stated she would not be able to answer technical questions about the Cadna-A software or to respond to certain questions about its use in evaluating noise at this facility (7/12/07 Tr. 27-28, 149-157). Ms. Santiago submitted prefiled testimony dated September 8, 2006 (Ex. 50) and May 25, 2007 (Ex. 51). Both of these documents conveyed the impression, without specifically stating it, that Ms. Santiago had done the noise modeling.[14] Exhibit 50, at 10, includes the following question and answer:

> "Q: Did anyone else at HDR [the consulting firm retained by the Applicant to evaluate noise from the facility] review the Noise Analysis?
>
> "A: Yes. Timothy Casey, HDR's National Acoustics Program Manager assisted with the noise analysis and reviewed the report."

27. In response to questions during the latter part of cross-examination, Ms. Santiago stated that she had helped manage and coordinate the model run for this facility, but did not run the model. She stated that Mr. Casey used the Cadna-A model for this

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[14] Ms. Santiago's responses to questions about the modeling also suggested, until late in her testimony, that she ran the model to produce the results reported for this facility (see e.g. 7/12/07 Tr. at 73, 93 and 113-115).

facility and that his work was then subject to quality control review by Mike Parsons (7/12/07 Tr. 149-150). The Applicant did not call Mr. Casey or Mr. Parsons as witnesses. Ms. Santiago conveyed information about the project to Mr. Casey from the Applicant, its operations contractor, and its other consultant and Mr. Casey used this information in doing the noise modeling.

28. The modeling that is reported in Exhibit 40 predicts that the project, as proposed in the application and as conditioned by the draft permit (Ex. 30), would slightly exceed the noise limits in 6 NYCRR 360-1.14(p) at one or two receiver locations in three of the operating scenarios. These scenarios and locations are as follows:

(a) at night during November and December (leaf season, scenario A2), at receiver locations 19 and 20 which are across Fountain Avenue from the facility, at the intersection of Fountain and Vandalia Avenues. Receptor 19 is at the northeast corner of the Brooklyn Developmental Center property. Receptor 20 is at a lot zoned residential that is north of the intersection. The predicted noise levels are 57.2 and 57.4 dBA, at receivers 19 and 20 respectively, in comparison with the nighttime standard of 57.

(b) during the daytime in January (processing leaves, brush and Christmas trees, scenario B1), at receiver location 6 which is across Flatlands Avenue from the facility, at the intersection of Flatlands and Sheridan Avenues. Receptor 6 is on the south edge of the Postal Service property. The predicted noise level is 67.1, in comparison with the daytime standard of 67.

(c) during the daytime in March through May, also at receptor 6. This result was for scenario D[15] when the facility would be receiving “other materials,” screening materials, and grinding brush. Under these conditions, the model predicts that the noise level would be 67.1, in comparison with the daytime standard of 67.

29. The supplemental noise analysis (Ex. 53) expanded on the modeling of scenarios C through E (February through October scenarios) by adding 5 landscaper trucks or 10 landscaper trucks as noise sources in additional runs of the model. This analysis predicted that the noise levels at receptor 6 in scenario D

[15] Scenario D and D1 are the same scenario; no scenario designated as D2 was involved in these analyses (7/12/07 Tr. 163).

(daytime operations, March to May) would be 67.2 dBA (five landscaper trucks) or 67.3 dBA (ten landscaper trucks). This analysis also predicted that the addition of five or ten landscaper trucks would not cause exceedences of the relevant noise limits in scenarios C (February operations) or E (June through October operations).

30. The Applicant's noise analyses attributed the exceedences at receptors 19 and 20 to noise from the unloading sanitation trucks and two front end loaders operating in active compost pad #1. The Applicant's noise analyses attributed the exceedences at receptor 6 to the tub grinder operating in the active mulching pad (pad #3)(Ex. 40, at 25: Ex. 53, fifth unnumbered page).

31. As mitigation for the exceedence predicted at receptors 19 and 20, the noise analyses proposed increasing the height of the western berm to 9 feet or restricting nighttime operations to not occur within the area from the western berm to 35 meters east of the western berm. As mitigation for the exceedence predicted at receptor 6, the noise analyses proposed moving the tub grinder approximately 46 meters further to the east in the active mulching pad (Ex. 40, at 25 and 34; Ex. 53 at fifth unnumbered page). The noise analyses included results of modeling that incorporated these proposed mitigation measures.

32. With regard to increasing the height of the western berm, the analysis equated 9 feet with 3 meters (Ex. 40, at 34). The consultant probably used 3 meters, rather than 9 feet, as the height of the berm in the revised model run (Ex. 40, Fig. 3-8).[16] Three meters converts to 9.84 feet, not 9 feet.[17] Exhibit 40 predicted that a "9-foot (3 m) western berm" would reduce the noise level at receptors 19 and 20, during leaf season operations at night (scenario A2) to 55 dBA (Ex. 40, at 25, 34 and 39).

33. The modeling predicted that the other mitigation measure for this scenario, of restricting the location of nighttime operations, would reduce the noise level at receptors 19 and 20 to 56.3 and 56.4 dBA, respectively (Ex. 40, at 34). This

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[16] Three meters, rather than 9 feet, was the value in the title of Figure 3-8 of Ex. 40. In addition, the Cadna-A software is the product of a German company, and the manual for Cadna-A lists some distance and area values that are expressed in metric units (Ex. 55, inside of cover page and section 2.5).

[17] Official notice is taken that one meter is approximately 39.37 inches. Three meters is 118.1 inches, or 9.84 feet.

mitigation measure, if adopted, would preclude operating noise-generating equipment in at least the western one-third of active compost pad #1 during nighttime operations in leaf season (see, Ex. 114).

34. The noise analysis lists the tub grinder as having the highest noise level of the individual items of equipment that were included in the noise model (Ex. 40, at 14). The tub grinder was originally proposed to be located near the northwest corner of pad #3 (Ex. 39). This location is near an entrance to the facility and a gap in the berm (Ex. 114). The mitigation proposed for the noise exceedence at receptor 6 would be to move the tub grinder to a location further east and near the south (inside) edge of the berm (Ex. 53; Ex. 114, drawings 5 and 12). This change is predicted to reduce the noise at receptor 6 to 59.9 dBA (assuming five landscaper trucks) or 60.3 (ten landscaper trucks), results that are below the daytime noise limit (Ex. 53, Table 3). It also, however, brings the tub grinder closer to the residences located between Grant Avenue and Eldert Lane, north of the compost facility (Ex. 114). The supplemental noise analysis predicts that the daytime noise limit at receptor 9, which is near these residences, would increase slightly with this change in the tub grinder's location but would not exceed the daytime noise limit (Ex. 53, Table 3).

35. Although Ms. Santiago's supplemental pre-filed testimony (Ex. 51, at 4) described scenario B1 of the January 2006 noise analysis as representing "a reasonable worst case scenario for noise-generating operations at the facility," this was shown not to be so. The noise analyses presented in Exhibits 40 and 53 include assumptions that are inconsistent with aspects of what other parts of the hearing record identify as the operating conditions that would occur, and that are inconsistent in ways that under-estimate the operational noise impacts.

36. With two exceptions, most of the noise levels that the noise analyses used in modeling specific items of equipment were based upon noise levels obtained from the manufacturers of the equipment listed in the engineering report.[18] One exception was the sanitation trucks, for which noise measurements were taken at

[18] The Applicant did not provide the noise information from manufacturers, with the possible exception of the trommel engine. The supplemental issues ruling in this hearing had noted that the Applicant's noise information about the trommel was just for the engine of the trommel, not the whole trommel unit (supplemental issues ruling, at 14).

the compost facility. The other exception was the loaders, for which the manufacturers' noise level for only the least noisy of the loaders identified in the engineering report was used in the noise analyses (Ex. 40, at 22-23; 7/12/07 Tr. 58, 90-92).

37. The measurements of noise from a sanitation truck were made while the truck moved forward, backed up and idled. No measurements were taken of a truck dumping material. In the modeling, the noise from a truck backing up was used to represent the noise of a truck unloading. Noise from a truck backing up would be only part of the total noise a truck would produce while unloading, and the modeling was done using the assumption that the noise from backing up "would be the most significant part of that unloading process." The Applicant's noise witness described this as "just an assumption that was made" and provided no other basis for this assumption (7/12/09 Tr. 99-101).

38. The Applicant's noise witness did not know whether the sanitation trucks that would be delivering leaves to the facility would have back-up alarms (Tr. 7/12/07, at 101). There is no indication that noise from back-up alarms, on trucks or on any of the equipment, was included in the noise analyses. No mitigation measures for noise from such alarms were evaluated. The engineering report describes the windrow turner as having backup alarms (Ex. 4, Appendix A, Attachment 6).[19]

39. The engineering report identifies eight different models of loaders as being representative of the loaders to be used at the facility (Ex. 4, at 5-1; Ex. 4, Appendix A, Attachment 5 and Appendix A at A-33 to A-34). The noise modeling, however, used the noise level of the loader with the lowest noise level (Ex. 40, at 22; 7/12/07 Tr. 90-91). The noise level used in the modeling is identified as being for a Caterpillar Standard 950G loader (Ex. 40, at 14). Neither the application nor the draft permit contain a limitation on what type of loader can be used on the site.[20] Instead, special condition 16 of the draft permit states that operation of the facility must conform to the

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[19] The supplemental issues ruling noted that noise from back-up alarms on the windrow turner or on other equipment was not considered in the application documents (supplemental issues ruling, at 14).

[20] Special condition 37 of the draft permit, transmitted by DEC Staff with Mr. Nehila's letter of December 18, 2007, also does not contain any limitation on the types of loaders that could be used at the facility.

engineering report, which would allow operation of noisier kinds of loaders (Ex. 30, at 3). The Applicant's noise witness testified that she did not know whether the various loaders that are listed in the engineering report have identical capacities for movement of materials (7/12/07 Tr. 90), but the descriptions of the loaders in Appendix A, Attachment 5 of the engineering report identify the 950G loader as having the smallest bucket capacity of the three Caterpillar loaders described in that attachment.[21]

40. Several of the operating scenarios assume that three or fewer loaders would be operating at the site. The engineering report, however, states that four front end loaders would be used at the facility (Ex. 4, at 5-1). Equipment lists elsewhere in the engineering report and the operations and maintenance plan identify four loaders in a list of facility equipment that "includes, but is not necessarily limited to," the equipment listed (Ex. 4, at 4-11 to 4-12, A-33). The draft permit does not limit the equipment usage to only the equipment that the noise analysis included in its scenarios (Ex. 30).

41. In the modeling that is reported in Exhibits 40 and 53, the height of the noise receptors was modeled as being at about 5 feet above ground level.[22] It is possible that the effectiveness of the berm as a noise barrier would be decreased if the receptors were at a higher level above ground. The modeling did not account for multistory dwellings on Flatlands Avenue across from the facility. Modeling would be required in order to test whether the facility's operations would cause exceedences of the noise levels for receptors located at the second floors of such residences, but there is no indication in the record that such modeling was done (7/12/07 Tr. 97-99). The windows of residences can be seen from within the facility (Ex. 73; 9/20/07 Tr. 186; 10/25/07 Tr. 549-550; see also, 5/31/07 Tr. 37). Land that is zoned as residential, and that is identified as residential on the land use map and the ownership map prepared in September 2008, is located in blocks 4565, 4570 and 4571, all of which are

[21] The descriptions of the five Komatsu loaders do not include the bucket capacities.

[22] The analysis assumed that the noise emission source height would be 6.6 feet (2 meters) for loaders (Ex. 40, at 25), but the noise emission source height for the other equipment is not specified in Ex. 40 or 53.

directly across Flatlands Avenue from the facility (Exs. 118, 119 and 125).[23]

42. In the noise modeling, the Applicant's noise consultant modeled the berms as being eight feet high, except where a higher berm was modeled in evaluating a mitigation measure (7/12/07 Tr. 156; Ex. 50, at 6). The height of the existing berm actually varies. At places, the top of the western berm is as little as four feet above the level of the compost pad that is next to it (Ex. 114, drawing 4; 3/12/09 Tr. 49-52). Substantial portions of the northern berms are also less than eight feet above the elevation of the adjacent compost pad (3/12/09 Tr. 48-49; Ex. 114, drawings 4 and 5). Other portions are at or about eight feet high (Ex. 14, drawings 4, 5, 7, and 8). According to the Applicant's engineer, the contours on the "Site Plan: Location and Topographic Survey" represent both the existing topography and the proposed topography within the site perimeter, and no additional construction or grading of the site is anticipated (Ex. 127, at 11).[24]

43. The noise receptors on the north side of the site were modeled as being across Flatlands Avenue from the compost facility, at the residentially-zoned land rather than at the property line of the facility (7/12/07 Tr. 36-38; Ex. 40, Figs. 2-3 to 2-9). North of the western portion of the facility, Flatlands Avenue exists as a paved street. Between Sheridan Avenue and Grant Avenue, however, Flatlands Avenue is blocked by berms and is not a paved street (Ex. 114, drawing 5; Ex. 119). Between Grant Avenue and Forbell Street, the status of Flatlands Avenue remains unclear in the record, but the preponderance of the evidence suggests that it is no longer a city street and it may be private land (see Discussion, below). The Applicant's topographic survey shows this section of Flatlands Avenue as being partially occupied by a berm that is outside the facility's fence (Ex. 114, drawing 5).

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[23] Block 4565 is between Fountain Avenue and Crescent Street. Block 4570 is between Grant Avenue and Eldert Lane. Block 4571 is between Eldert Lane and Forbell Street. As noted below, it is unclear whether Flatlands Avenue is actually a city street in the area between Grant Avenue and Forbell Street.

[24] In its reply brief, that Applicant changed its position and stated that the berm would need to be built up to at least eight feet in height. This is discussed in the "Discussion" section below and in the "Dust" section of this hearing report.

44. Active mulching pad #3, as shown on the Applicant's Site Plan - Location Map and Topographic Survey (Ex. 114, drawing 5) extends farther east than is shown on the maps in the noise analyses (Ex. 40, Figs. 2-3 to 2-9). Exhibit 114 is the more accurate depiction with regard to where the eastern end of this pad is located. The location as shown in Exhibit 114 puts the facility's operations, and its noise generation, closer to some residences than was assumed in the noise analyses.

45. The noise receptors on the western side of the facility were also modeled as being across the street from the facility, at residentially-zoned property west of Fountain Avenue. One of these receptors (#19) is at the northeast corner of the Brooklyn Developmental Center property and the other (#20) is at the southeast corner of land that was vacant as of September 2008 (Ex. 40, Figs. 2-3 to 2-9; Ex. 118 and 119).

46. The largest number of sanitation trucks included in any of the scenarios was 20 trucks. No scenarios in which more than 20 sanitation trucks were on site were modeled (7/12/07 Tr. 81). The noise scenarios that included sanitation trucks modeled three trucks as being on pad #1, and five trucks as being queued at the scale and between the scale and the intersection of Flatlands Avenue and the NYC DEP access road. The noise scenarios assumed that the additional sanitation trucks on site would queue along the south edge of the northern berm, with the twentieth truck located just inside the entrance gate at Sheridan and Flatlands Avenues (Ex. 40).

47. The engineering report, however, states that five sanitation trucks can queue at the facility, on the scale and between the scale and the DEP access road, and that if additional trucks arrive at the facility at the same time they would queue in the security area of the site. The engineering report stated that queueing in the 56 by 80 foot area to the northwest of the scale would allow an additional ten to twelve sanitation trucks to queue on site (Ex. 4, at 4-10; see also Ex. 4, Fig. 4-2). To determine whether the queueing arrangement described in the engineering report would show higher noise levels than the scenarios that were modeled, it would have been necessary to run the model with assumptions consistent with the engineering report's queueing arrangement. The noise analyses did not model noise levels that would be produced if these additional trucks were to queue in the security area instead of queueing next to

the northern berm (7/12/07 Tr. 74-80). No berm exists on the north side of the security area (7/12/07 Tr. 79; Ex. 120).[25]

48. The draft permit provides that all truck queuing and parking associated with the facility's operation must occur on the facility site. The noise analyses did not include any situations in which a truck queue would extend onto Flatlands Avenue, nor situations with more than 20 trucks queued at additional locations within the site (Ex. 30, special condition 29; 7/12/07 Tr. 64-66). Neither the engineering report or the noise analyses showed where additional trucks would queue if more than 20 waste delivery trucks were at the site at the same time.

49. The record indicates that more than 20 sanitation trucks could be expected to be delivering leaves to the site at the same time, under peak circumstances. The Applicant elicited testimony about some possible ways the project's operations might be modified to deal with more than 20 trucks being at the site (9/20/07 Tr. 188-191) but these measures are not included in application and a witness for the Applicant was not aware of any efforts by the Applicant and DEC Staff to work out such modifications (6/28/07 Tr. 154-155, 157).

50. Neither of the noise analyses in the record included noise from private vehicles removing finished compost from the facility during give-back events. At these events, residents of New York City can receive unlimited amounts of compost, to be taken away in non-commercial vehicles including pickup trucks. The Applicant's publicity about such events in 2006 states that they were scheduled for weekend dates in April and May, at the Spring Creek, Soundview and Fresh Kills composting facilities (Ex. 47). During a compost give-back event on a weekend in May 2007, approximately 1,400 vehicles came to the site to pick up compost on Saturday and approximately 1,000 did so on Sunday. Vehicles queued on the streets on these occasions (5/16/07 Tr. 144-146). The effects of this number of cars coming to the site were not analyzed in the engineering report or the noise analyses (7/11/07 Tr. 187-191; Exs. 40 and 53).

51. None of the noise scenarios included operation of noise sources in the area that the site plan identifies as the finished product screening and storage area (Ex. 40, Figs. 2-3 to 2-9; Ex.

[25] In addition, the depiction of a berm northwest of the security area on the figures in the noise analysis (Ex. 40) is inconsistent with the September 2008 Site Plan - Location Map and Topographic Survey (Ex. 114, drawing 5).

114, drawing 5; Ex. 120). Figure 2-8, depicting the equipment locations for March to May operations that include screening, shows the trommel as being located near the western berm. The engineering report states that finished compost from the windrows would be transported to a screening area and would be screened using a trommel (Ex. 4, at 4-25). The noise analyses did not evaluate the noise levels that would be produced if this process takes place where the engineering report depicts it as taking place. This use of the trommel pertains to processing of finished compost, and it would remain a part of the process even if use of the trommel for debagging decreases due to use of paper bags.

Discussion

In General

The findings in this section of the hearing report involve comparing the noise levels predicted by the Applicant's consultant to the urban noise standards in 6 NYCRR 360-1.14(p), and reviewing whether the assumptions used in making these predictions are consistent with the project as proposed in the application and as conditioned by the draft permit. The Applicant's Final Noise Analysis Report included a discussion of sound power levels and sound pressure levels that identified these as two distinct attributes, but the Applicant's report then discussed its predictions primarily in terms of "noise levels." The report stated that its analyses are based upon the standards in section 360-1.14(p) and compared the calculated noise levels with the noise levels in these standards (Ex. 40, at 7-8). Thus, this report considers the output of the noise analyses as being in the appropriate units for comparison with the noise standards in part 360.

The Final Noise Analysis Report also stated that changes in noise levels of less than 3 dBA will barely be perceived by most people (Ex. 40, at 7). This cannot be interpreted to mean that exceedence of the numerical noise standards in section 360-1.14(p) by less than 3 dBA is negligible, because part 360 sets those values as upper limits, rather than requiring that those values not be exceeded by a perceptible amount.

The Applicant was uncooperative in providing noise-related information that was requested in discovery by the intervenors. This is outlined in detail in my rulings dated February 6, 2007 (one of two rulings on that date) and May 8, 2007, and need not be described at length in this section of the report.

Hours of operation

DEC Staff's brief stated, "The facility is authorized to operate only from 7 a.m. to 4 p.m., Monday through Friday. [Exhibit ('Ex.') 30, Draft Permit, Description of Authorized Activity, pg. 1]" (DEC Staff's closing brief, at 2). This portion of the draft permit, however, actually states, "The facility is authorized to operate during the following hours only: 7am to 4pm, Monday through Friday, *with excursions as described in Section 4.1.3 of the December 2002 Engineering Report* cited in Special Condition 16, below." (Emphasis added). The "excursions" from the stated hours would actually allow the facility to operate 24 hours per day during October 1 through December 31, and on weekends "in the event of peak overloads" (Ex. 30, at 1; Ex. 4, at 4-5 as revised on February 12, 2004 and at A-2 as revised on February 12, 2004. The first cited portion of Exhibit 4 is the Section 4.1.3 that is cited in the draft permit).[26] The additional draft permit condition proposed by DEC Staff in its letter of December 18, 2007, identifying additional noise mitigation measures, did not include any change in the quoted provision on page 1 of the draft permit, nor any special condition that would limit the hours of operation to those identified in DEC Staff's closing brief.

Location of receptors in noise modeling

The noise analysis evaluated noise at the north side of Flatlands Avenue, rather than at the facility's property line, on the basis that Flatlands Avenue is a road right of way and section 360-1.14(p) refers to "sound levels beyond the property line at locations zoned or otherwise authorized for residential purposes" in setting noise limits (7/12/07 Tr. 81-85). Flatlands Avenue currently has a dead end at Sheridan Avenue (Ex. 114). Maps in the engineering report portrayed Flatlands Avenue as continuing through to at least several blocks east of Sheridan Avenue (for example, Ex. 4, Figs 2-3 and 2-9). At the hearing, CHA questioned whether certain streets shown were actual streets and whether certain land uses north of the site were depicted accurately (7/11/07 Tr. 26-41).

The revised maps that the Applicant submitted in April 2008 were inconsistent with regard to how they depicted this section

[26] This difference between daytime, weekday hours and the hours the draft permit would actually allow the facility to operate was discussed in the issues ruling (at 22, fn 15) and in the supplemental issues ruling (at 9-11).

of Flatlands Avenue and some streets immediately north of it. My July 11, 2008 ruling noted this specifically in connection with the noise analyses and where land "beyond the property line at locations zoned or otherwise authorized for residential purposes" begins in the area north of the compost facility (Ruling, at 17-18). The Applicant's September 2008 maps depicted Flatlands Avenue from Grant Avenue to Forbell Street as a "Built, Unmapped Street" (Exs. 115-120). The testimony of the Applicant's witnesses concerning the September 2008 maps did not clarify this question (3/5/07 Tr. 61-66; 3/12/07 Tr. 83-95; 101-106).

An exhibit submitted by the Applicant describes construction of a berm on private property north of the site, that appears to be the berm that is parallel to and immediately north of the facility perimeter on the north side of pad #3 and is located in what is shown as the right of way of Flatlands Avenue (Ex. 57, at 3; Ex. 114, drawing 5; see also, 3/5/09 Tr. 115-120). This suggests that noise receptor 9 should be located at the compost facility's property line rather than across what is depicted as Flatlands Avenue, but the question remains unclear.

In addition, the compost facility itself is located on land that is zoned as residential (Exs. 117 and 125), suggesting that the noise receptors should have been located at the facility's property line, rather than across the street, all along Fountain and Flatlands Avenues. In view of the reasons why the noise analysis underestimates the likely noise levels, however, it is not possible from this hearing record to determine to what extent changing the model's receptor locations would affect the noise levels that would actually be observed at the new receptor locations.

Numbers of vehicles assumed in modeling

Sanitation trucks delivering yard waste to the facility were among the sources of noise that were included in the noise analysis. The engineering report states that there would be an approximate maximum of 25 truck deliveries per day during peak production seasons, which it identifies as the fall leaf season running from October 1 through December 31. This estimate was based upon the amount of yard waste that would be delivered under the permit and the capacity of the trucks, but the annual number of truck trips was apparently evenly divided by 81 days (Ex. 4, at 4-5).[27] The actual deliveries of yard waste, however, are

[27] The engineering report also included a prediction of eight trucks delivering per day on the basis of 260 operating

concentrated on fewer days and are not evenly distributed over this three month time period (Ex. 38, Attachment E2; 6/28/07 Tr. 140-141).

The engineering report also estimated the average maximum number of vehicles that would visit the facility per hour, but this estimate was based on the busiest 24-hour period of the 2001 leaf collection season, when the facility was accepting slightly less than half the quantity of leaves it would accept under the application and the draft permit. This estimated average maximum was seven trucks, based on the maximum number of trucks received by the Spring Creek facility during the busiest 24-hour period of the 2001 leaf collection season (147 sanitation trucks, on November 25, 2001)(Ex. 4, at 4-5 to 4-9, and at A-17; Exs. 30 and 37; 6/28/07 Tr. 136-139). The engineering report states, "This truck traffic [on November 25, 2001] was distributed throughout the 24-hour, three-shift day." (Ex. 4, at 4-9).

This truck traffic was not, however, evenly distributed throughout this 24 hour period. Mr. Simmons's prefiled testimony made reference to data from the Applicant showing that 32 trucks arrived at the facility during the peak hour of deliveries at Spring Creek on November 25, 2001,(Ex. 31, at 26-27).

Mr. Simmons's prefiled testimony also included a calculation assuming that 50 percent of the trucks would arrive in a single eight-hour shift, and calculated a peak hour truck count of approximately 10 trucks based on that assumption (Ex. 31, at 26-27). Data for the Fresh Kills composting facility, however, indicates that substantially more than 50 percent of the trucks per day can be concentrated into one shift (Ex. 38, Attachment E2; 6/28/07 Tr. 151-153).

Based on the November 25, 2001 data for the Spring Creek facility, and the time it would take for trucks to enter, be weighed, unload and leave, Mr. Simmons estimated that as many as 16 to 20 trucks might be on site at any one time during the peak delivery season (Ex. 31, at 27). This estimate, however, was based upon data from 2001, a season in which the facility received approximately 5,261 tons of leaves as opposed to the 11,000 tons of leaves that would be allowed under the draft permit (Ex. 4, at A-17; Ex. 37; 6/28/07 Tr. 141-151). A higher peak number of trucks could be expected from a similar

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days per year, which also involves an unrealistic assumption about when deliveries will be made (6/28/07 Tr. 140-141; 7/11/07 Tr. 181-183).

calculation that took into account the larger quantity of leaves that would be received in the future. Mr. Simmons's response that "the operation information on how the trucks will get there" precludes making this prediction was not persuasive because he did not identify any such operation information and instead relied on the facility operators having agreed with his conclusion (6/28/07 Tr. 149-150).

The Applicant's March 8, 2006 request for proposals for operation of its organic waste facilities (including yard waste composting) included a table showing the number of truckloads and tons received at the Fresh Kills compost facility in the fall of 2004, broken out by days and shifts. During that season, the Fresh Kills facility received approximately 10,000 tons of leaves, about 1,000 tons less than the amount proposed to be received at Spring Creek (6/28/07 Tr. 142). The table indicates that some shifts had many deliveries (up to 279 in an eight-hour shift) while other shifts had none. No deliveries were shown as occurring on Fridays or Saturdays during that time period; the highest numbers of trucks were reported as arriving between 8 AM and 4 PM on Sundays and between midnight and 8 AM on Mondays. The table states that it illustrates the frequency of deliveries typical at the Applicant's leaf composting facilities each fall, and that although the precise schedule will vary from year to year, "the above summary is a good indication for planning purposes" (Ex. 38, Attachment E2). Although Mr. Simmons testified that it is possible that there could be differences between the Fresh Kills and Spring Creek facilities in how the leaves are collected (7/11/07 Tr. 216), he did not explain the reasons or nature of any such differences, nor why they might lead to lower peak truck traffic at Spring Creek. Mr. Simmons himself used data from Fresh Kills in estimating numbers of landscaper trucks that would deliver to Spring Creek (Ex. 33), and the Applicant described the Fresh Kills leaf delivery data as something its potential contractors could use for planning purposes (Ex. 38, Attachment E2).

The table in Ex. 38 reports trucks per shift and does not include information on trucks per hour. In view of the uneven distribution of trucks per day and trucks per shift, the record does not support assuming that truck arrivals would be distributed evenly among the hours in an eight-hour shift. In addition, on a day when Spring Creek received 147 trucks, in a season when it received somewhat less than half the leaves it is proposed to receive in the future, 32 trucks (about 21 percent of the total) arrived in the peak hour. Overall, the prediction that the Applicant would not need to accommodate more than 20 trucks at one time is not reliable.

Mr. Watt, who worked at a site next to the Spring Creek compost facility at the time it began receiving yard waste in 2001, testified that he first learned that the compost facility was operating when he came to work and saw a large number of sanitation trucks lined up at the facility and coming in to unload. He testified that the trucks were queued on Flatlands Avenue, extending back at least to Fountain Avenue. While he acknowledged that he was guessing when he stated the number of trucks he saw, this testimony does indicate that it is not far-fetched to expect that large numbers of trucks could arrive within a short enough time that they would exceed the predictions in the Applicant's submissions (5/30/07 Tr. 12, 73, 77-78).

Compost removal vehicles, including vehicles at give-back events, would need to be taken into account in evaluating the proposed operations. Removing finished compost is part of the functioning of a compost facility. Although DEC Staff asserted that distribution of the finished compost is not an activity that DEC regulates (5/16/07 Tr. 159), that interpretation is not borne out by the applicable regulations, the application or the draft permit. The current version of 6 NYCRR 360-5.7(b)(12) and (13) and 360-5.7(c) include provisions about the use, storage and distribution of the finished compost.

Height of berms

As of the end of the testimony, the Applicant's exhibits and the affidavit of the Applicant's engineer stated that the contours on the "Site Plan: Location and Topographic Survey" represent both the existing topography and the proposed topography within the site perimeter, and no additional construction or grading of the site is anticipated. The Applicant introduced this exhibit in evidence on the second to last day of the hearing. On the last day of the hearing, Baykeeper questioned the Applicant's surveyor about the elevations of the berm as shown on Exhibit 114, eliciting testimony that the berm was less than eight feet high at two locations (3/12/09 Tr. 48-52).

The Applicant's July 31, 2009 reply brief acknowledged that the berm is less than eight feet high in some locations. The reply brief stated, however, that eight feet is the berm height "required by the proposed permit" and that if a permit is issued, the height "of the majority of the berm" would need to be increased to at least eight feet. The Applicant portrayed this change as a "new control measure" for mitigation of dust (Reply brief, at 18-20). The effectiveness of berms in controlling dust is discussed further below in the section on dust impacts.

The Applicant cited a reference to an 8-foot high berm at page 4-18 of the engineering report (Ex. 4) as the permit requirement to which it was referring. Special Condition 16 of the draft permit does require that construction of the facility must conform to the engineering report, among other documents cited in that condition (Ex. 30). The engineering report, however, also includes a site plan map which has now been superceded by the site plan map that consists of Exhibits 114, 116, 119 and 120 (Ex. 127, at 2; see, October 8, 2008 memorandum to the parties, concerning exhibit numbers. Exhibits 114 through 120 superceded Exhibits 105 through 111 and the related figures in the engineering report). Exhibit 114 portrays the existing berm, which ranges from about four to seven feet high in many places.

During the correspondence about the Applicant's revised site plan map and vicinity map, I asked the Applicant to confirm whether the contours on the site plan map represent both the existing and the proposed contours, which appeared to be possible in view of the fact that the facility was already built. I stated that the existing and proposed contours would need to be depicted in areas where these differed from each other (July 11, 2008 ruling, at 22).

The September 26, 2008 affidavit of Barry J. Cheney, P.E. (Exhibit 127), initially submitted by the Applicant on September 26, 2008 with maps that included Exhibit 114, replied to this question. The Applicant introduced this affidavit in evidence at the hearing on March 5, 2009. Mr. Cheney's affidavit stated that the contour lines shown on the "Site Plan: Location and Topographic Survey" "represent both the existing topography as well as the 'proposed' topography within the site perimeter, as no additional construction or grading of the site is anticipated" (Ex. 127, at 11; Mr. Cheney's affidavit referred to Exhibit 114 as Exhibit 105, the exhibit number assigned to the earlier version of this map). Mr. Cheney testified on March 5, 2009 and did not change this portion of his affidavit.

The engineering report materials that would be incorporated into the permit are internally inconsistent in that page 4-8 of the engineering report describes an eight foot high berm while the more detailed and more recent site plan shows contours in which the berm is less than eight feet high in places. The position the Applicant adopted in its reply brief is inconsistent with its case as of the close of the testimony.

Permit conditions

The Applicant's closing brief argued that the facility will comply with the part 360 noise standards, for reasons that included the noise monitoring the Applicant would undertake and the ability to take corrective action if actual facility operations exceed the noise standards (Applicant's brief, at 15).

The draft permit, if it were issued as the permit, would require that all construction and operation associated with the facility must conform with the December 2002 engineering report (Exhibit 4), among other documents, although provisions of the permit would prevail if any portions of such documents conflict with any provision of the permit (Ex. 30, at 3 [Special Condition 16]). The draft permit does not contain a special condition about monitoring of noise levels during operation of the facility.[28] The engineering report, however, does contain a very brief description of such monitoring:

> "[A]t the start up of the next operational season, the [Applicant] or its contractor will measure decibel levels of its equipment during operation. Sound monitoring will occur at the property line of the facility, and levels will be recorded during facility operations. The [Applicant] will report the data from the noise level monitoring to the NYSDEC within 60 days of the completion of the monitoring program" (Ex. 4, at 6-6).

This provision would be incorporated into the permit through Special Condition 16.

If a permit is issued for this facility (which this hearing report does not recommend), the requirements for noise level monitoring should be expanded and made more specific. The reference to "the start up of the next operational season" appears to be a reference to the start of the fall leaf season. The highest noise levels predicted by the Applicant's consultant, however, included noise during January (scenario B1) and during March through May (scenario D). Monitoring should be required during several times of the year, to assess the noise levels of the different operating conditions including the ones predicted to be noisiest, and should be done during nighttime operations in addition to during the day. The permit condition should also

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[28] DEC Staff's additional permit condition (Special Condition 37, attached with its December 18, 2007 letter) also does not require monitoring.

specifically allow for DEC Staff to require the Applicant to undertake additional monitoring in the event of complaints by the public about noise. In addition to such permit requirements, 6 NYCRR section 360-1.14(p) includes requirements about the measuring equipment and procedures.

Sufficient monitoring of noise would be particularly important in view of DEC's reliance on the Applicant itself to do noise measurements in the event of a possible noise problem, due to DEC Staff's lack of the necessary noise measuring equipment (9/19/07 Tr. 139-141), and the possibility of noise problems occurring during the night hours that are not typically times when DEC Staff does inspections (10/10/07 Tr. 122-127).

The additional special condition proposed by DEC Staff on December 18, 2007 includes a restriction on where nighttime operations could occur, based upon a mitigation measure suggested by the Applicant's noise witness. As stated above, this would preclude operating noise-generating equipment in at least the western one-third of active compost pad #1 during nighttime operations in leaf season. It is questionable whether this restriction would be carried out, due to the extent to which it would restrict the Applicant's operations. If, however, a permit is issued that incorporates this measure, the special condition should be re-worded to read as it is stated in the Applicant's noise report (Ex. 40, at 39; "restrict nighttime operations to not occur within the area from the western berm to 35 meters east of the western berm," rather than "restrict nighttime operations to the area 35 meters east of the western berm.").

Odor

52. Decomposition of yard waste in composting facilities can occur aerobically (by microbes that require oxygen) or anaerobically (in an oxygen-limited state, by microbes that grow in such conditions). Both types of decomposition can break down yard waste into compost, but composting in outdoor windrows is intended to be an aerobic process. Composting of yard waste in windrows can produce malodorous conditions if the windrows become anaerobic (5/16/07 Tr. 27-28; 5/31/07 Tr. 40-43, 83). Various windrow management measures can be used to minimize malodorous conditions in composting yard waste. These include ensuring that materials other than yard waste are excluded from the windrows, maintaining the proper ratio of carbon to nitrogen, mixing the yard waste materials thoroughly, building windrows of a size that promotes air circulation through the windrow, using relatively bulky materials such as wood chips to increase porosity of the

windrows, maintaining proper moisture content in windrows, preventing accumulation of standing water, and monitoring the pH, moisture content and oxygen content of windrows to detect problems quickly (Exs. 24 and 25; Ex. 31, at 17-20; 6/28/07 Tr. 59-61, 88-98). As the yard waste materials decompose, they generate heat that causes air to be pulled through the windrow (5/16/07 Tr. 28-29; 5/31/07 Tr. 94-96).

53. In addition to management of the windrows, malodorous conditions can be decreased by removing windrows that have become anaerobic and disposing of them elsewhere (7/11/07 Tr. 213-214; Ex. 31, at 20).

54. Turning the windrows can accelerate the composting process, but it also releases odors that are in the windrow (5/16/07 Tr. 61; 5/31/07 Tr. 91). Turning a windrow generally increases its oxygen content but this is usually only a short-term increase, for approximately several hours. Frequent turning of windrows can increase the density of the compost, leading to less air circulation in the windrow (5/31/07 Tr. 42, 94; 6/28/07 Tr. 95-97; Ex. 25). Odor impacts can be reduced by refraining from turning windrows during times when the wind is blowing towards residences and businesses, but this is not proposed in the application or required by the draft permit (5/31/07 Tr. 97-98; 183-184; Ex. 30).[29]

55. The facility operated in the fall of 2001 and into 2002. During that time, the Applicant composted approximately 5,261 tons of leaves (Ex. 37), using turned windrows. During this initial operation of the facility, the facility generated rotten or putrid odors that were observed by four witnesses who testified at the hearing, two of whom live on Crescent Street across Flatlands Avenue from the facility (north of the facility). The other two witnesses work in the area, one at the bus depot that is across Flatlands Avenue from the facility and one at the 26th Ward Auxiliary Water Pollution Control Plant. The odors that these witnesses, and at least one DEC witness, attributed to the compost facility were different from the odors associated with the scavenger waste site that is located on the south side of Flatlands Avenue in an indentation in the northern boundary of the compost facility, at which odor is due to raw

[29] The Applicant's witness Mr. Simmons acknowledged that an operator could suspend certain operations on windy days (7/11/07 Tr. 209-210), but the Applicant's reply brief (at 32) argues that the facility was designed and will be operated to comply with part 360 no matter what direction the wind is blowing.

sewage or contents of portable toilets being dumped into a sewer access (5/30/07 Tr. 95, 135-136, 149-150; 9/19/07 Tr. 116; 10/10/07 Tr. 32). The odors from the compost facility were also distinct from the odor of the 26th Ward Auxiliary Water Pollution Control Plant. The plant's odors were described as being like seawater (5/30/07 Tr. 40-42), a faint smell of raw sewage but not at a nuisance level (9/19/07 Tr. 118), a mild odor of decaying seafood (10/10/07 Tr. 34-35), or like marsh land (10/11/07 Tr. 506-507). Once a week when the plant is cleaned, there is a hydrogen sulfide or rotten egg odor (5/30/07 Tr. 18-19). The odor from the compost was described as being more like tobacco, like tea leaves mixed with dirt and sometimes with a burnt odor to it, like an odor characteristic of compost, like dead wet leaves, or as rotting, putrid, or unpleasant (5/15/07 Tr. 27, 35; 5/30/07 17-20, 86-88, 99, 135, 148-149; Tr. 10/25/07 Tr. 546-549). The bus depot installed charcoal filters in its air conditioning system in an attempt to exclude the odor associated with the compost facility (Ex. 6; 5/30/07 Tr. 159).

56. The compost odors coincided with the time period during which the Applicant was operating the compost facility, particularly with when the windrows were being turned (5/30/07 Tr. 17-20, 38-39, 149-150, 153).[30]

57. During the fall of 2001, the Spring Creek facility accepted approximately 5,261 tons of leaves and did not accept other materials (Ex. 37; 5/16/07 Tr. 171). Under the draft permit, the facility could accept up to 15,000 tons of yard waste in any one calendar year. "Yard waste," as that term is used in the draft permit, consists of leaves, grass clippings, discarded Christmas trees, brush, logs, trees, stumps, horse manure, and wood chips (Ex. 30, at 1). Three of these materials (yard waste from landscapers, grass clippings and horse manure) would only be received after the facility had completed two years of operation and the Applicant had submitted a statement describing how it proposed to handle these materials and had received written authorization from the DEC to accept such materials (Ex. 30, Special Condition 34; see Ex. 30 for the full wording of this condition). The engineering report states that, in the third and subsequent years, the projected weight of the waste types received annually would be: leaves, 11,000 tons; grass, 2,000

[30] Odors may also be released when leaves are debagged. Odors that generated public complaints occurred at the Soundview compost facility when leaves were debagged from plastic bags after a snow-related delay in processing yard waste (5/15/07 tr. 26-27, 35, 120-123).

tons; Christmas trees, 1,000 tons; horse manure, 500 tons; and brush, logs, trees, stumps and virgin wood chips delivered by landscapers and City agencies, 500 tons (Ex. 4, at A-17).

58. The odor control measures that would be used in the facility's future operations under the draft permit are similar to those used when the facility operated in 2001 and 2002, with the possible exception of adding use of an odor neutralizing spray[31] and the requirement that yard waste put out for collection by the Applicant must be in paper bags or open containers rather than plastic bags (5/15/07 Tr. 18-19, 37-39). At the same time, however, during future operations under the draft permit the facility would receive almost three times as much yard waste as it did during its initial operation and this waste would include grass and horse manure.

59. When the facility was operating in 2001, a significant amount of leaves arrived in plastic bags. In 2006, the City of New York adopted a local law (discussed further in this report's section on litter, below) that would require most of the yard waste to be in paper bags rather than in plastic bags. The Applicant's witnesses stated that, with paper bags, debagging the yard waste either would become unnecessary, might become unnecessary, or might not need to be done as soon after the waste arrives at the facility as would be needed for waste in plastic bags (5/15/07 Tr. 19, 63-65; 6/28/07 Tr. 84-88; Ex. 31, at 16-17). These projections were based on the assumptions that the paper bags would break during collection and handling, and that anaerobic decomposition would not be a problem in paper bags in comparison with plastic bags (5/15/07 Tr. 63-65; 6/28/07 Tr. 88; Ex. 31, at 19).

60. Although anaerobic conditions would be less likely with paper bags than with plastic bags, grass could become anaerobic in a paper bag and leaves left in a bag for months could become anaerobic (5/31/07 Tr. 74-75, 90-91). Much of the grass at this facility would be delivered by landscapers, who are exempt from the City's paper bag requirement (7/11/07 Tr. 194; Ex. 5, sections (g) and (h)). Debagging also serves the purpose of allowing the facility operator to detect and remove unauthorized

[31] The use of odor neutralizing spray was mentioned only in passing in the engineering report and the testimony. While the usefulness of odor masking materials is questionable, it is not clear that odor neutralizing and odor masking substances are the same kind of product (5/15/07 Tr. 38; 5/31/07 Tr. 190; Ex. 4 at 6-7 and B-27).

waste that has not been detected earlier in the collection process, as well as screening out oversized items (6/28/07 Tr. 121-134; Ex. 4, at 6-2, A-13, A-23 to A-24).

61. The windrows, as proposed in the application, would be approximately 250 feet long. They would be between 6 to 14 feet high and between 18 to 22 feet wide, depending upon the particular windrow's composition. Windrows 18 to 22 feet wide will not allow for sufficient air circulation to maintain aerobic conditions and to prevent the windrows from becoming malodorous. A large windrow would retain heat, but would have more potential for becoming anaerobic (5/31/07 Tr. 80-83, 88-91, 94-96, 135-137; 5/16/07 Tr. 70-72). It would be preferable to use narrow windrows early in the composting process and windrows about 14 feet wide later in the process (5/31/07 Tr. 81-83, 135-137).

62. The engineering report, at 4-3, describes the time periods during which various types of waste would be received for composting. According to this schedule, leaves would be received during October 1 to December 31 and grass would be received from March 1 to November 30 (Ex. 4, at 4-3; see also, 5/16/07 Tr. 30). This calls into question the assumption by Dr. Rowland that the proportion of leaves to grass would routinely be about ten to one by volume and that this would contribute to controlling odor (5/16/07 Tr. 26, 109-114).[32] The quantities on which this testimony was based were annual quantities (Ex. 4, at A-17). At the time of year when grass would be received, the leaves would already be at least partially composted and would have become dense (5/31/07 Tr. 87-88; see also, Ex. 4, at A-21). Leaves that had been packed in bags, transported in a packer truck and placed into a windrow would be denser, even at the start of the composting process, than loose leaves in a barrel (5/31/07 Tr. 137-142). The engineering report proposes that leaves would normally serve as the primary bulking agent, and that wood chips would be used as a backup bulking agent for composting of grass and horse manure (Ex. 4, at 4-1).

63. The Applicant's engineering report presented information about wind in the area of the site that was based upon National Oceanic and Atmospheric Administration (NOAA) data from John F. Kennedy International Airport (JFK). The report stated:

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[32] Mr. Simmons's prefiled testimony stated that leaves would be 79 percent of the yard waste, by volume, but this number also includes Christmas trees, horse manure and other yard waste in the total amount (Ex. 31, at 20-21).

> "Daily wind speeds over 10 mph [miles per hour] were analyzed to determine the frequency (percent of time per year) of winds in a given direction. Overall, the data shows that the winds normally blow in a northwesterly (i.e., to the northwest) pattern during the year (Fig. 2-11)" (Ex. 4, at 2-32).

64. At the hearing, the Applicant's witness who compiled the engineering report stated that the section quoted above contained a typographical error and should instead read "i.e., from the northwest" (6/28/07 Tr. 56-57). He stated that the analysis was limited to wind over ten miles per hour because the data was available, or maybe more readily available than data on wind speed generally (6/28/07 Tr. 68). A former employee of HydroQual, not the witness who testified, prepared the wind section of the engineering report (6/28/07 Tr. 66-67).

65. Data that includes wind speed and direction for wind in general, including winds below ten miles per hour, is available from NOAA (6/28/07 Tr. 69-72; Ex. 35; see also Ex. 48). The NOAA summary of wind data for JFK identifies the prevailing wind direction as being from the northwest in January, February, March, November and December, from the west-southwest in October, and from the south in April, May, June, July, August and September (Ex. 35, fifteenth unnumbered page of tables; 6/28/07 Tr. 70; see also Exs. 49, 99; 7/11/07 Tr. 207-209). These data indicate that the prevailing winds in the spring and summer would be blowing from the compost facility towards the residences and places of business that are across the street from the facility, north of Flatlands Avenue.

66. In addition to the residences north of the compost facility, residences exist approximately 1,000 feet east of the facility, and approximately 286 persons reside at the Brooklyn Developmental Center southwest of the facility (Ex. 114, cover page; 10/10/07 Tr. 138).

67. The presence of a berm was not shown to be an effective odor control measure. It was not proposed as an odor control measure by the Applicant's consultant who prepared much of the engineering report (Ex. 31, at 17 through 21) and was mentioned in passing by that witness and other witnesses (5/16/07 Tr. 70; 5/31/07 Tr. 158-161; 7/11/07 Tr. 210, 226-227). As with dust (discussed below), the record does not demonstrate that the berm would block odors as opposed to just distributing them differently in the area around the facility.

68. The facility is likely to cause odor problems at the residences and businesses across the street from it, even with the odor control measures identified in the engineering report and the draft permit.

Discussion

The testimony by the four fact witnesses who live and work in the area around the Spring Creek compost facility was generally credible and, taken together, demonstrates that the facility had odor problems during its initial operation. Mr. Croft's testimony about odors at Soundview, although consistent in part with this other testimony, was given lesser weight because garbage may have been on the Soundview site in addition to yard waste (5/30/07 Tr. 187-191). In addition, Mr. Croft's testimony appeared dramatic while that of the other witnesses appeared to be simply a description of their experiences, although with a tone of frustration.

Mr. Lange's testimony concerning odors is given little weight in this report because of his dismissive response to complaints about the Applicant's compost facilities in general, and odor complaints in particular, including his willingness to blame odors on other facilities that have qualitatively different odors (for example, 5/15/07 Tr. 26-29, 68-76, 120-122). DEC inspection reports for three of the Applicant's compost facilities (Spring Creek, Canarsie and Soundview) report either that odors were under control or that the facilities were not inspected with regard to odor. A substantial number of these reports, however, were done at times when the facilities were not operating. Mr. DeAngelis testified that, when doing such inspections, he never asked neighbors of the facilities about whether they noticed odors (9/19/07 Tr. 62).

Dr. Rowland stated that she was not testifying about the actual operation activity on the site (5/16/07 Tr. 84). She had not been to the facility and was not aware of the residences that are near the facility 5/16/07 Tr. 48, 61). Dr. Rowland had read through the application and the engineering report but did not review them "in depth" with respect to questions such as sizing of windrows; she had not reviewed the draft permit (5/16/07 Tr. 96-97, 100) and was not involved in the review of the application for this facility other than to review the variance requests in connection with basic information from the engineering report (5/16/07 Tr. 37; 9/19/07 Tr. 106-109). While Dr. Rowland has extensive education and experience related to composting (5/16/07

Tr. 19-25; Ex. 80), her involvement with this facility was limited.

Ms. Harrison has extensive work experience with composting and other ways of managing organic wastes. This included work in the late 1980s in preparing a manual for DEC on yard waste composting and consulting in the late 1990s for the EPA about composting and waste reduction in New York City (5/31/07 Tr. 7-36; Ex. 22). Ms. Harrison reviewed the engineering report, the variance applications and the draft permit, and visited the area around the site in May, 2007 although she did not go into the site (5/31/07 Tr. 36-38). Her work involves promoting and improving the use of composting as a means of waste disposal, and providing assistance in response to problems associated with composting (5/31/07, Tr. 9-13, 19-22).

With regard to the engineering report's wind information, the omission of winds under 10 miles per hour changed the result of the analysis in a manner that made it appear that the wind would be blowing away from the nearest residences much of the time, while looking at the winds of all speeds demonstrated that the prevailing wind would be towards those residences much more of the time including in the summer. Mr. Simmons justified the omission initially on the basis of what data was readily available, but later suggested that wind less than ten miles per hour might not have an impact, and might not even move a weather vane (7/11/07 Tr. 118-119). This statement is not given weight because the weather data distinguishes between winds of (for example) 4 and 5 miles per hour and assigns a direction to them, indicating that winds at these speeds can be measured (Exs. 35, 48; see also Exs. 49 and 99). The incomplete and misleading wind information from the engineering report was referenced on the Applicant's most recent site plan map (Exs. 114, 120; 3/5/09 Tr. 111-112; 3/12/09 Tr. 54-55). The engineering report's information about wind omits a substantial amount of the wind observations from the weather measurement station nearest to the compost facility (7/11/07 Tr. 197-209).

Using large windrows, as proposed by the Applicant, would probably maximize the amount of yard waste that could be windrowed on the site (5/31/07 Tr. 80-81, 88-89). The testimony did not include discussion of how the quantity of yard waste that could be composted at the facility would be affected if smaller windrow dimensions were required. It appears possible, however, that if smaller windrows are required more space would be taken up by the aisles between the windrows, reducing the amount of yard waste that could be processed per acre of compost pad. If the Commissioner determines that a permit should be issued and

that a condition should be added to specify smaller width and height for the windrows, the Commissioner should also re-evaluate the quantity of yard waste that the facility would be allowed to receive.

The engineering report currently states that leaves would be debagged as soon as possible after arrival at the facility and "before reaching an odor-causing state," and would be debagged within two months after arrival except during declared snow emergencies (Ex. 4, at 6-2). Although Mr. Lange, the Applicant's Director of Waste Prevention, Reuse and Recycling stated that this provision had been superceded by a local law requiring paper bags and that debagging might no longer be necessary (5/15/07 Tr. 63-64), the engineering report has not been amended and the draft permit requires operations to occur as described in the engineering report, among other documents. DEC Staff did not change the permit condition about debagging after adoption of the local law about plastic bags. The extent to which the Applicant intends that debagging would still be part of the process, and the timing of this step, are unclear apart from what is stated in the engineering report and the draft permit.

The draft permit currently contains a special condition that requires debagging, as well as a condition about mixing potentially odorous material with a bulking agent and/or lime that might involve debagging in some manner (Ex. 30, Special Conditions 31 and 30, respectively). A witness for the Applicant expressed the opinion that the debagging stage could be removed from the process without changing the draft permit conditions because the future use of paper bags is already included at two places in the engineering report (6/28/08 Tr. 87-88, citing Ex. 4 at 6-6 and A-23). These references to future use of paper bags are not sufficient to negate the special conditions in the draft permit,[33] or to give the Applicant the degree of flexibility it appears to be seeking with regard to debagging the waste. While eliminating debagging might be advantageous in terms of removing a noise-generating activity and simplifying the process, it might be disadvantageous in terms of increasing the likelihood of odor impacts and decreasing the ability to keep undesirable material out of the windrows. The engineering report's references to future use of paper bags were in the application at the time the

[33] Special condition 16 of the draft permit states that operation of the facility must conform to the engineering report, among other documents, but that if any portion of such documents conflicts with a provision of the draft permit, the permit provision must prevail (Ex. 30).

draft permit, and its requirements for debagging, were written. DEC Staff did not offer revised draft permit conditions that would remove debagging from the process, for any type of waste.

The permit term, according to the draft permit, would be five years. If a permit is issued and the Applicant wishes to eliminate debagging of waste, this change could be considered in the context of a permit renewal.

Litter

69. In the fall of 2001, when the Applicant composted leaves at the facility, most of the leaves arrived at the facility in plastic bags. When the bags were separated from the leaves using the trommel, and during the 2001-2002 operation of the facility, many bags blew away and got onto the fence around the facility, into trees, onto the roof of the 26th Ward Auxiliary Water Pollution Control Plant, and into the fence of the bus depot (5/30/07 Tr. 16-17, 33, 37, 88, 131-132; Ex. 6).

70. During the time when the facility was operating in 2001, the fence around the facility was already in place, as was the berm (5/30/07 Tr. 12-13, 16-17). During the 2001 operation, the Applicant made use of a portable fence to control litter and had employees picking up bags and litter during debagging (5/15/07 Tr. 37). The litter control measures used at the site in 2001 were the same as those proposed in the application and required under the draft permit. As of 2006, the Applicant included an additional litter-reduction measure of requiring paper bags in place of plastic bags under certain circumstances.

71. In September, 2006, the New York City Council enacted a local law (Int. No. 431-A, Local Law 40 of 2006) that would require that yard waste that is set out by residents for collection by the Applicant must be in paper bags or rigid containers (Ex. 5). The draft permit, however, does not contain a requirement concerning use of paper bags rather than plastic bags for yard waste brought to the facility by the Applicant (Ex. 30).

72. Local Law 40 of 2006 requires businesses that generate yard waste (which would include landscapers) to collect and dispose of such yard waste at a permitted composting facility[34] but such

[34] This provision applicable to businesses includes an exception if the New York City Commissioner of Sanitation had

businesses are excepted from the requirement to use paper bags or rigid containers (Ex. 5, sections (g) and (h); subdivisions 16-308(g) and (h) of the Administrative Code of the City of New York). The majority of the yard waste to be composted at the facility would be collected by the Applicant rather than being delivered by businesses (Ex. 4, at A-17), but even under this local law some unidentified amount of yard waste could be brought to the facility in plastic bags by landscapers.

73. Paper yard waste bags are large bags made of heavy paper that have a volume of approximately 30 gallons (Ex. 36; 6/28/07 Tr. 121). Use of such bags, as oppose to plastic bags, for containing yard waste that would be accepted by the facility would decrease the likelihood of litter problems at and around the facility because the paper bags would decompose along with the yard waste and would be less likely to blow around than would plastic bags (9/19/07 Tr. 102-103; 6/28/07 Tr. 83-87).

Discussion

The facility's operation in 2001 created a litter problem. The testimony of the witnesses who live and work in the area around the facility was more credible on this subject than was the testimony of the witnesses for the Applicant or DEC Staff. Although the Applicant argued that none of the intervenors' fact witnesses except for Mr. Swanburg offered documentation for their observations (Reply brief, at 8), maintaining such documentation was not part of Mr. Watt's job duties (5/30/07 Tr. 70-71) and there is no reason to expect that Mr. DeJesus should have kept documentation of his observations and their dates.

The testimony by Mr. Croft, a witness for the intervenors, concerning litter at the Applicant's Soundview composting facility, would support the testimony of the intervenors' other fact witnesses on this subject. Mr. Croft's testimony, however, was given little weight in arriving at the findings about litter because, although he emphasized that he has taken photographs that show litter problems at the Soundview composting facility, no such photographs were offered as evidence by the intervenors (5/30/07 Tr. 192, 197-199, 201-204, 247-251). Mr. Croft's role, and what would be expected from him in the way of documentation, differed from that of the intervenors' other fact witnesses in

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made a written order determining that there is insufficient capacity at permitted composting facilities within a certain geographic area (Ex. 5).

that he is an advocate who spends much of his time investigating conditions in city parks, as opposed to someone noticing nuisance conditions in the area where they live or work.

Mr. Lange, a witness for the Applicant, appeared dismissive with regard to litter issues at the Applicant's Soundview compost facility (5/15/07 Tr. 29). With regard to DEC Staff's testimony and exhibits on this subject, the notice of incomplete application that was issued by DEC Staff on June 19, 2002 mentions an April 17, 2002 site visit and states that during that visit, DEC Staff observed plastic bags in the trees and littering the ground on surrounding properties (Ex. 3, section 1.E, item 11). At the hearing, a photograph taken at the site by a member of DEC's Division of Solid Waste staff on April 17, 2002 was introduced in evidence (Ex. 60), demonstrating that DEC Staff visited the site on that date, but the witness testified that he had no recollection about this site visit other than being able to vouch for the accuracy of the photograph (9/19/07 Tr. 33-34). In the course of trying to establish whether DEC Staff had provided all of the documents the intervenors had requested in discovery, I asked whether an inspection report existed for the Spring Creek site for April 17, 2002 (9/19/07 Tr. 109-115). On a subsequent hearing date, counsel for DEC Staff stated that DEC Staff had found no record of that inspection and could only assume that there was an error in the notice of incomplete application (10/10/07 Tr. 43-44).

The inspection reports for the Spring Creek compost facility that were put in evidence reported on inspections made while the facility was not operating or was inactive (Ex. 61, 62, 63, 64, 76).[35]

Four of the nine inspection reports for the Soundview compost facility that are in the record[36] were for dates on which

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[35] The inspection report dated May 14, 2007 states that two windrows on site at that time were "active," but this is a reference to their state of decomposition, from yard waste to finished but unscreened compost, not an indication that the facility was "active" in the sense of receiving or turning materials (Ex. 76; 9/19/07 Tr. 116-117, 130; 10/10/07 Tr. 58-59). This report's observations concerning access, litter, dust and odor are also questionable due to inconsistencies regarding how and why the report was modified (9/19/07 Tr. 127-130; 10/10/07 Tr. 53-55).

[36] Exs. 69, 70, 71, 72, 82, 83, 84, 85, and 86.

the facility was not operating, and two were from inspections just before or just after a compost give-back event in the spring. Three of the Soundview inspection reports were for dates on which the facility was operating (Ex. 82, 83 and 86) and these report that the facility was in compliance with regard to control of litter on those dates. The dates of these three inspections were in August 2005, April 2006 and June 2007. None of the Soundview inspections for which reports are in the record were done during November or December, and only one (Ex. 70) was done in the months from September through January. The three inspection reports for the Canarsie compost facility that are in the record[37] are from November and December 2001 and January 2002. These reports state that the Canarsie facility was in compliance with regard to control of litter on those dates, but the reports also state that leaves were still in bags and had not been debagged. As of the December 4, 2001 inspection, some of the bags had broken due to turning of the windrows, and as of the January 30, 2002 inspection nearly half of the bags were broken (Exs. 95 and 96).

The litter problems at the Spring Creek compost facility occurred while the Applicant was accepting yard waste contained in plastic bags. Substituting paper bags for plastic bags would reduce the potential for litter problems. Under the local law passed in 2006, the majority of the yard waste arriving at the Applicant's yard waste composting facilities would arrive in paper bags. Some amount of waste generated by landscapers could still arrive in plastic bags, however, under the local law and the draft permit as it is currently written.[38] Landscaper waste would include grass (7/11/07 Tr. 194). In addition, the requirements in Local Law 40 of 2006 are City requirements that could be changed by the City government. If the Commissioner decides that a DEC permit should be issued for the facility, the permit should contain a provision requiring that yard waste received at the facility be contained in paper bags or be loose, and should make this requirement applicable to landscaper-

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[37] Exs. 94, 95 and 96.

[38] In the pre-filed testimony of Mr. Simmons, the Applicant's witness who testified about the engineering report, the question about the impact of paper bags on litter assumed that "only paper bags" would be allowed at the site (Ex. 31, at 23). Elsewhere in Mr. Simmons's prefiled testimony, a question assumes that not all leaves are delivered in paper bags (Ex. 31, at 16).

delivered waste as well as to waste delivered to the facility by sanitation trucks.

Dust

74. At yard waste compost facilities generally, dust can be produced due to movement of vehicles on dusty surfaces, turning of windrows that are not sufficiently moist, and final screening of finished compost. During final screening, the compost must be dry enough that it does not clog the screen, and at this stage the compost consists of finer particles than the yard waste does when it is delivered to the facility. Paving the working surface and keeping it clean reduces dust, as does applying water, although the amount of water needs to be controlled in order to prevent ponding and odor problems associated with ponded water. (5/16/07 Tr. 34, 36-37; 5/31/07 Tr. 44-45; 6/28/07 tr. 134-136; 9/19/07 Tr. 100-101).

75. Studies have been conducted concerning bioaerosols produced by composting facilities, and possible health effects of these materials both on workers at compost facilities and on persons living near them. Bioaerosols from compost facilities have been variously described as micro-organisms suspended in air (Ex. 26, at vii), aerosolized biological agents (Ex. 27, at 1; see also pages 1 through 19 for discussion of specific types of constituents), a combination of microorganisms, arthropods, protozoa and organic constituents of microbial and plant origin (Ex. 29, at 9), or particles of microbial, plant or animal origin that may be called organic dust (Ex. 23, at 2)[39] The organisms and materials in bioaerosols at compost facilities also occur in other environments. Although some studies have observed respiratory health effects of bioaerosols on workers at compost facilities and neighbors of such facilities, the current understanding of the extent of these effects is inconclusive due to the difficulties in measuring concentrations of bioaerosols, difficulties in monitoring health effects, and differences in individuals' sensitivity to bioaerosols (5/31/07 Tr. 45-60, 154, 170-178; 5/16/07 Tr. 45-48, 132-134).

76. During the Spring Creek compost facility's operation in 2001 and 2002, the facility generated black dust. The dust generation coincided with receipt of leaves and later with turning of windrows. A person who works at the 26th Ward Auxiliary Water Pollution Control Plant observed visible dust when windrows were

[39] The page numbered 2 is the first page of Exhibit 23.

turned, and accumulation of dust on cars at the plant (5/30/07 Tr. 13-15, 23, 37, 67). The manager of the bus depot across the street from the compost facility observed a visible dust cloud at the end of the trommel, although the visible cloud dissipated on-site of the compost facility (5/30/07 Tr. 180, 182-183). Dust accumulated on buses at the bus depot, necessitating additional cleaning. It also accumulated in the condensers of the air conditioning units at the bus depot, leading the bus depot manager to have the condensers cleaned monthly instead of quarterly, at additional cost (5/30/07 Tr. 132-134, 138-140; Ex. 6). A person who lives immediately across Flatlands Avenue from the facility had to discard window blinds due to the dust, which he described as black dust that was different from dust due to construction (10/25/07 Tr. 547-548, 552-553). His neighbor also experienced problems with dust during the facility's operation (5/30/07, Tr. 84-86, 112-115). Although other dust sources, including construction dust from various projects and bus exhaust, exist in the area around the facility, the increase in dust coincided with the compost activities and the dust decreased when the compost activities decreased (5/30/07 Tr. 28, 37-38, 66-67, 84-86, 101, 112-115, 143-144, 156, 158-160; 10/25/07 Tr. 548, 552-553, 556-563).

77. At the Spring Creek yard waste compost facility, the pad areas and other areas on which vehicles would be moving are paved with asphalt millings (Ex. 4, at 4-22 and 6-5; Ex. 60; 5/15/07 Tr. 31-32; 9/19/07 Tr. 26). This would help to control one source of dust, if dirt is not allowed to accumulate on the pavement, but does not affect the dust that would be produced from screening finished compost or from turning windrows that are dry enough to generate dust (5/31/07 Tr. 45, 123). The Applicant proposes to screen the compost "on the back end" (i.e., after it has finished decomposing and prior to being used) but has not proposed measures to control dust during this screening process (6/28/07 Tr. 134-135; 5/31/07 Tr. 44-45, 90).

78. The facility has water hydrants that would be used as a water source for wetting the pavement and the windrows (6/28/07 Tr. 162-163; Ex. 4, at 4-17, 6-3, 6-7, A-9). Water might be applied to the windrows by means of hoses. It is unclear whether a water truck would be used to apply water to the pavement, but the record does not indicate that this uncertainty would pose a problem with regard to vehicle dust due to the paved surfaces at the facility (5/31/07 Tr. 45, 186-187; 6/28/07 tr. 162-163).[40]

[40] The engineering report's list of equipment anticipated to be used does not include a water truck, but the report states

79. The dust control measures as proposed in the application, and as conditioned by the draft permit, consist of the already-paved surface of the compost pads and other areas of the facility on which vehicles would travel, the use of water to clean dust off the paved surfaces, and applying water to the windrows to maintain appropriate moisture levels (Ex. 4, Ex. 30, Ex. 31 at 21). These measures are not different from those used during the initial operation of the facility in 2001 and 2002 (5/15/07 Tr. 38), although the observations cited above indicate that they were not carried out in a manner that successfully controlled dust. The berm around most of the facility (other than pad #3) was built during the initial construction of the facility and was in place during the facility's initial operation (5/30/07 Tr. 12-13, 130-131; Ex. 4, at 2-1). There is no indication that the initial composting operations took place on the area that is now pad #3. The berm was not shown to be an effective measure of controlling the dust generated by the facility's operations that occurred in 2001 and 2002.

Discussion

The Applicant and DEC Staff sought to portray the observations about dust problems as either not credible or as due to other sources of dust. The testimony of the witnesses for the intervenors, however, was credible in view of the witnesses' demeanor and the level of detail that a layperson living or working near the site might be expected to recall or have recorded.

The other potential sources of dust suggested by the Applicant and DEC Staff included construction at the 26th Ward Auxiliary Water Pollution Control Plant, construction of pad #3, construction of Gateway Mall, construction of a wall around the Brooklyn Developmental Center, exhaust from buses, and truck traffic on Crescent Street. The witnesses' observations of dust, however, were not shown to be due to these other sources instead of the compost facility.

The Applicant and DEC Staff presented very limited evidence concerning when the other construction took place, identifying the dates of the pad #3 construction as starting around May 2002

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the equipment is not necessarily limited to the items in the list (Ex. 4, at 4-11 to -12 and A-33).

(Ex. 57, at 2; see also, 5/15/07 Tr. 20)[41] and construction at the 26th Ward Auxiliary Water Pollution Control Plant as a multi-year project that was still ongoing as of May 2007 (5/15/07 Tr. 32-33; 75-76; 9/19/07 Tr. 115, 118; see also, Ex. 62, at 2, that states that pad #2 was closed due to NYC DEP construction activity at the time of the March 16, 2004 inspection). The construction of pad #3 may have coincided with the latter part of the Applicant's compost management operations in 2001 and 2002, but not with the observations about dust that relate to the initial receipt and debagging of leaves nor the time period between the fall of 2001 and shortly before May of 2002.

The record demonstrates that some of these potential dust sources occurred after the composting operations in 2001 and 2002 or were ongoing activities that occurred both before and after those composting operations. Mr. Watt, who formerly worked at the 26th Ward Auxiliary Water Pollution Control Plant, testified that the construction there was not taking place during the fall of 2001 (5/30/07 Tr. 28, 54-57, 67). The bus depot was at its present location before and after the dust observations (5/30/07 Tr. 128-131; 10/25/07 Tr. 558-562). The wall around the Brooklyn Developmental Center was built in the 2005 to 2007 time period (10/10/07 Tr. 143, 148). The dates of the mall construction are unclear.

The pad #3 construction and the mall construction were also at a greater distance from the homes or businesses of the witnesses who testified about the dust problems than the distance from these witnesses to the composting operations, with the possible exception of Mr. Watt's former work location (5/30/07 Tr. 9-12, 79-81, 100-101, 128-130, 174-179, 180-182; 10/25/07 Tr. 545; Exs. 18, 114, 115).

The Applicant's arguments about other sources of dust do not inspire confidence that the Applicant would take responsibility for carefully carrying out dust control measures if the permit were issued, or deal responsibly with dust problems that might develop. With this, as with other issues, the disregard shown by the Applicant's representatives for the residents and employees in the surrounding neighborhood was apparent. One example of this was the response by the Applicant's Director of Waste

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[41] A timeline for the pad #3 construction that appears as Appendix G in Ex. 4 shows this project as taking about four months including landscaping and installation of a fence; see also, Ex. 4, at 2-1.

Reduction and Recycling to the complaints by the manager of the bus facility (5/15/07 Tr. 30, 70-71, 75-76).

The DEC inspection reports for the Applicant's compost facilities, that either report that the facilities were in compliance or that the facility was not inspected with respect to dust, do not negate the observations by the intervenors' witnesses. None of the inspection reports in the record were for the Spring Creek facility while it was operating in 2001 and 2002 (9/19/07, Tr. 68-71; Exs. 61 through 64 and 76). Many of the other reports (for Spring Creek, Soundview and Canarsie) were for dates on which the facilities were not operating or had only a low level of activities.

The reliability of the dust information on the inspection reports is also questionable. Mr. DeAngelis testified that, in inspecting a compost facility, he would note visible dust that was moving through the air, or tire tracks in mud and dirt, but he would not ask any neighbors of the facility if they had noticed dust (9/19/07, Tr. 60-62). Dust occurring in conditions other than those at the particular time of the inspection would be missed. The response of DEC Staff to the dust shown in a photograph taken at the Spring Creek compost facility (Ex. 73) also calls into question the reliability of the inspection reports with respect to dust (9/19/07 Tr. 71-76; 10/11/07 Tr. 507-514).

In its reply brief (at 18-19), the Applicant stated it would increase the height of the berm around the facility to the eight feet identified as the berm's height in the engineering report. As noted above, this proposal was first made in the Applicant's reply brief and is contrary to the testimony the Applicant's engineer gave on the second to last day of the hearing, stating that no additional construction or grading of the site is anticipated. The reply brief suggests that this increase in height, plus planting of trees and other vegetation, represent additional mitigation measures and a change in conditions from those existing in 2001-2002.

An eight foot high berm does not appear to be any meaningful change from conditions that existed in 2001 and 2002. The July 30, 2001 site plan, which has now been superceded, and the July 30, 2001 drawing labeled "site sections and details," sheet 2 of 3, both show the berm as being eight feet high (Ex. 4, drawings

in pocket at end of exhibit).[42] The most detailed survey of the site (Ex. 114) shows topography as of January 2008, and numerous portions of the berm were less than eight feet high at that time. It is reasonable to infer that the berms probably had a height of about eight feet when they were initially built in 2001 and have eroded since that time. A row of pine trees was planted on the top of the berm shortly after it was built (5/30/07 Tr. 130-131; Ex. 3, section 2.D, EAS Attachment at 4 and 5; Ex. 31, at 10; 5/16/07 Tr. 199-200) and although the condition of these trees was questioned by the intervenors' expert witness (5/31/07 Tr. 38, 58), trees and vegetation on the berm are not a new mitigation measure at this facility.

Several witnesses made statements about the effect of berms on air movement and dust dispersion at compost facilities, but none of them presented testimony at a level of detail that would allow one to conclude how the berms would affect dust impacts at the houses and buildings near the compost facility, nor to evaluate the difference between the effects of a four foot high berm and an eight foot high berm on dust conditions around the facility (5/16/07 Tr. 70, 199-200; 5/31/07 Tr. 132-133, 157-163, 168-169, 182-183, 209-210; 7/11/07 Tr. 210, 226-227; 9/19/07 Tr. 18)[43]. Mr. Simmons's pre-filed testimony, cited by the Applicant in support of its argument about increasing the berm height, did not even mention berms as a dust control measure (Applicant's reply brief, at 18-19; Ex. 31, at 21).

The Applicant's brief (at 18) states that the use of an enclosed trommel will contain dust generated during screening of finished compost. The Applicant's citation in support of this statement, however, is a citation to testimony about whether enclosing a trommel, or enclosing a conveyor that leads to a trommel, would help reduce dust conditions (5/31/07 Tr. 198-199). The Applicant's brief provided no citation to a provision in the application or the draft permit that would require the trommel at this facility to be enclosed, and there does not appear to be one. DEC Staff did not propose this as a permit condition.

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[42] The site survey in Exhibit 4 (by Angle of Attack Land Surveying, LLC) shows topography from December 2000, prior to construction of the berms, and thus would not be informative about the height of the berms at the time of the initial operation of the facility in 2001. In May 2007, Mr. Lange testified that the berm was eight feet high (5/16/07 Tr. 199).

[43] The last statement referenced assumed the berm was 10 or 15 feet high.

Vectors[44]

80. During the initial operation of the facility, both Mr. Swanburg and Mr. Watt observed an increase in flying insects (flies and gnats) during the time when the facility was operating in 2001-2002, that subsided after this period of activity (5/30/07 Tr. 22-23, 48-49, 68-69, 134-135, 146-148). Other than a brief reference to rats and seagulls (5/30/07 Tr. 88), no increase in other vector organisms was attributed to the compost facility operations.

81. The main means of preventing vector problems at a compost facility would be to prevent food waste from being present at the facility and to incorporate yard waste into windrows quickly (5/16/07 Tr. 34-36; 6/28/07 Tr. 114-119; 9/19/07 Tr. 101-102; Ex. 31, at 23-24). The Applicant has accepted Halloween pumpkins in its yard waste collection program, and these are a food material that would need to be mixed into windrows properly in order to avoid vector problems (5/15/07 Tr. 39; 6/28/07 Tr. 116-118). Horse manure would be composted at the Spring Creek facility in the third and later years of operation under a permit (Ex. 30, Special Condition 34).

82. Eliminating the debagging step of the process would reduce the ability to detect and remove food waste (6/28/07 Tr. 121-127).

Discussion

The hearing record contains a brief reference to conditions that could have attracted vectors at the Applicant's Fresh Kills yard waste composting facility, at a time when it was accepting manure and food waste, but no details about whether any vector problems actually occurred (9/19/07 Tr. 101).

Baykeeper's expert witness had not encountered complaints about flies at composting facilities, nor about insects being attracted to yard waste composting piles, although she noted that mosquitos could become a problem if water ponded at a compost facility (5/31/07 Tr. 130-131). Baykeeper and CHA presented

[44] As used in 6 NYCRR part 360, "vector" means "a carrier that is capable of transmitting a pathogen from one organism to another, including but not limited to flies and other insects, rodents, birds and vermin" (360-1.2[b][181]).

testimony from fact witnesses about insect problems during the Spring Creek facility's initial operations, but they did not recommend additional control measures for vectors. The significance of this testimony is that, although the control measures that the Applicant proposes to use could be effective in preventing vector problems, the manner in which the Applicant's operations in 2001-2002 were actually conducted led to the presence of nuisance levels of flies and gnats. This testimony is relevant to the variance issue, in that there is little margin for error when operating a facility of this kind within 132 feet of residences, and the facility's past performance suggests that one cannot assume that the control measures in the engineering report and the draft permit will always be carried out or will always work.

Variances

83. The Applicant is seeking variances from three setback requirements that are specified in the version of part 360 applicable to this project: (a) the 50 foot setback between the property line and the perimeter of the site, (b) the 200 foot setback between the perimeter of the site and residences or places of business, and (c) the 200 foot setback between surface waters and the perimeter of the site.

84. The perimeter of the site is shown on Exhibit 114. The line is marked as "fence - facility perimeter." This fence surrounds the composting pads, mulching pad, security area, finished product screening and storage area, berms and recharge basins. The facility perimeter is generally at the property line along the north and west sides of the compost facility. On the west side of the compost facility, and along the north side of compost pad #1, the distance between the property line and the perimeter of the site is essentially zero feet. At a location near the intersection of Flatlands Avenue and Crescent Street, the facility perimeter is actually outside the property line, by about a foot or two. Along the north side of pad #2, the facility perimeter is approximately 15 feet outside the property line. Along the north side of pad #3, the facility perimeter is approximately three feet outside the property line.

85. The variance application concerning the property line stated that although the facility would be "less than 50 feet from the existing property line" (Ex. 3, Section 1.B), an earthen berm would be developed along the northern and western borders of the site. This variance application stated that actual proposed operations would occur inside the berm, roughly 32 feet from the

property lines. The berm, as described in the variance applications, would be approximately 30 feet wide at its base and eight feet high (Ex. 3, sections 1.B, 1.C and 1.D). These berms, as shown on Exhibit 114, range from about 30 to 50 feet wide at their bases.

86. On the eastern side of the compost facility (east side of pad #1), the compost facility perimeter is the fence line separating the compost facility from site of the NYC DEP 26th Ward Auxiliary Water Pollution Control Plant. This does not appear to be a property line, and is identified as a site line on the map of the 26th Ward auxiliary plant's property (Exs. 114, 116, 119 and 158).

87. At part of the southern side of the compost facility, the facility perimeter follows a fence line that is between the compost pads and the 26th Ward auxiliary plant, but that does not follow the 26th Ward auxiliary plant's site line that is shown on Exhibit 158. Land that is shown on Exhibit 158 as part of the 26th Ward auxiliary plant's site is within the perimeter of the compost facility as shown on Exhibit 114. East of the 26th Ward auxiliary plant, the compost facility's southern perimeter follows a fence that is not on a property line and that cuts across three lots and land that is identified on Exhibit 114 as Grant Avenue and Eldert Lane.

88. At the southern end of pad #1 and along the south side of pad #3, public parkland is immediately outside the compost facility's perimeter. This parkland is about 30 or 60 feet away from the pads. Along the western side of the compost facility, two bus stops are located on the sidewalk along the east side of Fountain Avenue, within 10 feet of the facility perimeter (Ex. 114; 5/15/07 Tr. 42). The bus on Fountain Avenue near the Brooklyn Developmental Center is used by employees of the center and visitors to the center, among others (10/10/07 Tr. 132, 156-157).

89. Residences and places of business are located across Fountain Avenue and across Flatlands Avenue from the compost facility, as described in Finding 19 above. The right of way of Flatlands Avenue is approximately 100 feet wide in the segment between Fountain Avenue and Sheridan Avenue. Several residences on the north side of Flatlands Avenue, between Fountain Avenue and Crescent Street, are located quite close to their property lines (approximately 2 to 12 feet north of the property lines). These residences are approximately 102 to 112 feet from the facility perimeter, and the residential properties in this block are approximately 100 feet from the facility perimeter. The

closest residence is about 132 feet from where composting operations would occur on compost pad #1 inside the berm (Ex. 114). The buildings of the Brooklyn Developmental Center are located greater than 200 feet from the perimeter of the yard waste composting facility, although a portion of the grounds of the center is within that distance (Ex. 114). The land on which the 26th Ward Auxiliary Water Pollution Control Plant is located is directly adjacent to the facility perimeter and the buildings at the plant are within 200 feet of the compost facility perimeter (Exs. 114, 120).

90. Unreasonable nuisance conditions occurred during the initial operation of the facility, during which a smaller amount of yard waste was processed than would occur under the draft permit and the waste was limited to leaves rather than including grass and manure. Some studies of composting have recommended even larger setbacks than the 200 feet to residences required in the applicable version of part 360 (5/31/07 Tr. 78-79; Ex. 23, at 7-9; Ex. 27, at 20-21 and 28-29). The facility as proposed could not be operated without creating unreasonable nuisance impacts on the surrounding area (5/31/07 Tr. 93-94, 98).

91. The perimeter of the facility is within 200 feet of surface waters at two locations: southeast of the southeastern corner of pad #1 (160 feet from surface waters) and south of the southern side of pad #3 (192 feet from surface waters; Ex. 114, drawings 5 and 8). At both of these locations, however, the composting or mulching pad is separated from the surface water by a berm.

92. Runoff within the facility would drain to recharge basins, with a recharge basin[45] located next to each of the three pads. Water in the recharge basin would percolate into the soil. The recharge basin next to pad #1 has an overflow structure through which excess water would flow into the sanitary sewer when the water in the basin reached a certain level that is below the top of the basin (7/11/07 Tr. 80-85; Ex. 4 at 4-18 to 4-23). The engineering report contains proposals for containing stormwater and leachate within the site even if the percolation characteristics of the basins change (Ex. 4, 4-23). The record indicates that the composting facility is designed in such a way that stormwater and leachate will be contained within the facility and/or within the sewer system.

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[45] The recharge basins are also referred to in the record as retention basins (7/11/07 Tr. 81) or infiltration basins (Ex. 4, at 4-22).

93. Each of the three variance applications states, “The proposed site is located on City-owned land and requires no purchase or condemnation, thereby conserving economic resources.”[46] Each variance application identifies the acreage by which the facility would need to be reduced in order to comply with the setback distance from which the respective variance is sought. The application for a variance from the property line setback goes on to state that, “With the implementation of such a size restriction, the City would have to locate a composting facility at another site, perhaps one that would require purchase or condemnation, in an area less suitable for operations, thereby substantially increasing capital and operating costs.” The application for a variance from the setback from residences and places of business contains a nearly identical statement. The application for a variance from the surface waters setback states that the size reduction resulting from compliance with this setback could result in an increase in operational costs (Ex. 15).

94. The variance applications did not assert any technological or safety burdens that would be imposed by complying with the setback distances from which the Applicant is seeking variances.

Discussion

Part 360 requires that applications for variances must, among other things, “demonstrate that compliance with the identified provisions would, on the basis of conditions unique to the person’s particular situation, and to [sic] impose an unreasonable economic, technological or safety burden on the person or the public” (6 NYCRR 360-1.7[c][2][ii]).

The issues ruling stated that the intervenors were not disputing that use of this site would save the Applicant money, and that no testimony or evidence was necessary regarding section 360-1.7(c)(2)(ii). The issues ruling described the question whether the Applicant has met this portion of the variance standard as a legal question to be decided in the Commissioner’s

[46] Each variance application also states that the site was also chosen for its operational suitability and “the generally compatible surrounding land uses.” Even if true, these assertions do not relate to unreasonable economic burdens, technological burdens or safety burdens associated with complying with the requirements from which the Applicant is seeking variances.

decision (Issues ruling, at 32). The fact issue being adjudicated regarding variances concerned whether the Applicant had made a sufficient demonstration under section 360-1.7(c)(2)(iii), which requires an applicant to "demonstrate that the proposed activity will have no significant adverse impact on the public health, safety or welfare, the environment or natural resources and will be consistent with the provisions of the ECL and the performance expected from application of [part 360]."

The variance applications do not state that no other City-owned land is available for the purpose of building a compost facility, nor do they state that purchase or condemnation of land would definitely be necessary in order to provide adequate composting facilities if these variances are denied.

The application does not quantify the cost increases that might be associated with using another site, other than to describe them as substantial. Determining whether an economic burden is an "undue economic burden" in this context would involve balancing the cost of compliance against the adverse impacts of carrying out the activity as proposed with the variance. The possibility of needing to find an additional or alternative composting site that might require purchase or condemnation, or the possibility of a substantial increase in operational costs, would not be an unreasonable economic burden in a situation where violations of applicable requirements of part 360, and adverse environmental effects that were significant at least in the areas near the facility, have occurred with the facility's past operations or would be likely to occur in its proposed future operation.

To allow the variances, other than the one from surface waters, on the basis of the economic burden asserted by the Applicant would be in effect saying that an unreasonable economic burden can be shown if what an applicant proposes to do might be cheaper than complying with the requirement of part 360 from which the applicant is seeking a variance, even if the proposed activity has violated requirements of part 360 in the past and is likely to do so again.

The Applicant's testimony in support of the variance applications was primarily provided by Mr. Lange, who the Applicant presented as a fact witness, not an expert witness (5/15/07 Tr. 142, 145-151). When questioned about impacts of the facility at its distance from residences or the property line, Mr. Lange stated that the facility would have no impacts "if it is operated properly," and that the demonstration of this was "the application as a whole" (5/15/07 Tr. 54-62). The assumption

that the facility would be operated properly, preventing adverse impacts, is not a valid assumption in view of the problems that occurred during the facility's initial operation. The conclusion is also inconsistent with the testimony of the expert witnesses about the operational problems that can arise and require correction, and cause dust or odors, even at a properly operated yard waste composting facility (for example, delivery of unacceptable material, windrows becoming anaerobic or too dry, etc.; see, for example, 5/31/07 Tr. 40-45; Ex. 31 at 17-21). Ms. Harrison's testimony about the facility being too close to residences was given substantial weight in preparing this hearing report because she is both a proponent of composting and familiar with the complications that can arise in operating a yard waste composting facility, and had visited the area around the site (5/31/07 Tr. 20-22, 93-94, 98; see generally, 5/31/07 Tr. 7-38).

At the time when Dr. Rowland reviewed the variance requests and recommended that they be granted, the application materials did not include a depiction of certain lines that are key elements of the setbacks from which variances were sought. Although the general layout of the site was shown on drawings in the engineering report (Ex. 4, Fig. 4-2; see also drawings in back pockets of Ex. 4), nothing was labeled as the property line and the eastern end of the site was depicted as being shorter than was later shown in a more reliable depiction (Ex. 114). Mr. Brezner, when questioned about the maps and site plans in the application as of September 2007, was not aware of any drawing that showed the site perimeter and the property line on the same drawing, nor of any site plan containing the locations of property boundaries in the manner required by 6 NYCRR section 360-1.9(e)(2) (9/19/07 Tr. 150-160). Dr. Rowland had not been to the site, and Mr. Brezner had not been there until the day before the testimony began in May 2007 (5/16/07 Tr. 48; 9/19/07 Tr. 109, 115-119, 122-126).

The application materials, at the time of Dr. Rowland's testimony, were misleading in their depiction of the land uses across Flatlands Avenue from the site, in that they showed the U.S. Postal Service facility as occupying an additional block that is actually residential (Ex. 4, Fig. 2-9; Ex. 119).

Although the residential buildings north and northeast of pad #3 may not have been present at the time of the December 2002 engineering report (see Ex. 57 regarding construction in this area in May 2001 and May 2002), they should have been taken into account by DEC Staff and the Applicant once they were there. In May, 2007, Mr. Lange was unable to provide even general information about how many people lived within 200 feet of the

facility, and instead focused on conditions when the Applicant "originally developed the site," at which time "only a handful" of people lived within this distance (5/15/07 Tr. 62). He did acknowledge that there had been a lot of development in the area while the application was pending and that quite a few people work there (5/15/07 Tr. 39-41, 62-63). As late as September, 2007, DEC Staff was asserting that the relevant conditions are those that existed "on the date of this application and its approval, not necessarily current conditions" (9/19/07 Tr. 160). This was contrary to the statement in the issues ruling, that the parties could present evidence to update the record so that it reflects existing conditions (Issues Ruling, at 31). In its March 2004 petition for party status, CHA had stated that the Environmental Assessment Statement for the project failed to consider certain new residential buildings in the project area. In general, it would be irrational to ignore existing conditions in deciding whether to grant, deny or condition a permit (see discussion at page 4 of my September 25, 2007 memorandum to the parties).

The Applicant was resistant not only to updating its application materials but also to providing information that part 360 required the application to include (9/19/07 Tr. 160-167). Even after I specifically required the Applicant to provide maps that included the required information, the Applicant's April 2008 revised maps failed to include a line labeled as the site perimeter (July 11, 2008 ruling, at 15-16). This line was shown and labeled on the Applicant's September 2008 maps (Exs. 114 and 120).

With respect to the variance from the required distance between the composting facility and surface waters, the record demonstrates that stormwater and leachate will be contained within the facility and/or within the sewer system. The intervenors questioned whether runoff from the facility might be bypassed into Spring Creek as combined sewer overflow through the 26th Ward Auxiliary Water Pollution Control Plant during major storm events, but the record is unclear concerning whether the facility's runoff would get into the 26th Ward Auxiliary Water Pollution Control Plant under such conditions (compare, 7/11/07 Tr. 81-85 and 5/30/07 Tr. 29-31). Even if runoff from the compost facility might get into the 26th Ward Auxiliary Water Pollution Control Plant and be released during a major storm event, however, there is no indication that the compost facility's contribution of pollutants would be detectable, nor that it would contribute to an adverse impact, under such conditions. There is also no indication that granting the variance concerning surface waters would lead to any

inconsistencies with requirements of the ECL or the performance expected from application of the part 360 regulations. This variance, unlike the other two requested by the Applicant, could be granted based on the record of this hearing.

Other Matters

Identity of the owner(s) and operator(s)

The identity of the site owner, the facility owner and the facility operator were not identified as issues for adjudication. CHA's discovery requests and arguments that related to site ownership appeared to me to be directed towards the question of alienation of parkland, an issue that the interim decision had excluded from adjudication (see, November 21, 2006 ruling, at 2 and at 4-5). As late as November 20, 2007, it appeared that inconsistencies in the record related to these identities could be resolved fairly simply (see November 20, 2007 ruling on additional proposed issue, at 8-9).

In the course of the Applicant's submissions of its revised site plan maps and vicinity maps in 2008, however, it became apparent that it is uncertain who owns a large portion of the land on which the facility is located. The various maps and application forms submitted by the Applicant identified different entities as the owner of the site. In a memorandum dated August 11, 2008, I directed the Applicant to provide a copy of the deeds for several properties including Block 4580, Lot 2. This is the lot on which the majority of the compost facility is located (8/11/08 memorandum, at 6; Exs. 114 and 116). The Applicant initially provided an incomplete copy of a deed that had "4580 Lot 2" marked in the margin (see September 26, 2008 affirmation of Mr. Pejan, Exhibit 3). In a memorandum dated October 8, 2008, I noted that the deed appeared to be incomplete. On October 16, 2008 the Applicant provided a deed with the same initial pages plus additional pages, that was marked as Exhibit 151 at the hearing on March 12, 2009.

CHA questioned Mr. Emilius, the Applicant's surveyor, about exhibit 151 (3/12/09 Tr. 148-169). During that questioning, counsel for the Applicant produced a correction deed (Ex. 152) for the deed that is Exhibit 151. The Applicant also offered an additional deed, which the Applicant described as the deed for the Brooklyn Developmental Center (Ex. 153). All of these deeds

convey property to and from New York State entities,[47] not New York City entities. All of these deeds also contain a property description that appears to be the land under buildings of the Brooklyn Developmental Center, described by a lengthy series of courses and distances that follow the exteriors of buildings.[48] None of these deeds demonstrate that any New York City entity owns Block 4580, Lot 2, or the portion of that block containing part of the compost facility. The Applicant was unable to produce a deed that shows that it or the City of New York owns Block 4580, Lot 2.

The identity of the site owner, while not an issue for adjudication, is a question that is being called to the attention of the Commissioner because it could affect the Department of Environmental Conservation's ability to ensure that the facility is properly closed at the end of its operational life, whether that occurs after some years or decades of operation under the requested permit or whether that occurs after denial of the application.

In another hearing in which a question arose concerning ownership of a portion of a site, the hearing was adjourned until that question could be resolved in the appropriate forum (Matter of Beverly Sinkin, Ruling of the ALJ, September 27, 2005). In the present case, the record has closed. An appeal by CHA still remains pending before the Commissioner, however, concerning the November 20, 2007 ruling on a proposed additional issue. While that ruling pertained primarily to Baykeeper's proposed issue about the change in operations contractors, CHA had also sought to expand the proposed issue to include the question of ownership of the site. I ruled that identity of the site owner was not an issue for adjudication (November 20, 2007 ruling, at 8-9). Based upon the evidence and testimony produced after that ruling, it appears that ownership of the site is in question, but would not be decided in the DEC hearing. I recommend that, if the Commissioner decides to grant the permit, the Applicant be required to demonstrate by a deed or court order that it, or the

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[47] People of the State of New York, acting by and through the Health and Mental Hygiene Facilities Improvement Corporation (the corporation name is not clearly legible, but this is what it appears to be); New York State Housing Finance Agency; and People of the State of New York, acting by and through Facilities Development Corporation.

[48] Exhibit 153 also appears to include property at completely separate locations on Hanson Place, Brooklyn.

City of New York as the municipal corporation, owns the site, and that this documentation be provided to the Commissioner prior to issuance of the requested permit.

The identity of the facility owner (distinct from the land owner) and the facility operator also underwent changes. This was due in part to the change in operations contractor, but also due to changes in the municipal entities and officials identified by DEC Staff as the owner and/or operator in the draft permit and subsequent correspondence.[49] Mr. Nehila's letter of July 2, 2007 stated that the Applicant would be the permittee, and the operations contractor would not be included as a permittee. At the hearing on June 28, 2007, DEC Staff noted that the facility owner is different from the property owner (6/28/07 Tr. 172).

The draft permit included the New York City Commissioner of Sanitation, by name, as "owner and operator" (Ex. 30). On November 20, 2007, I asked DEC Staff why a particular individual was named in addition to a governmental entity, and asked DEC Staff to provide any directive or guidance it may use in identifying permittees for solid waste management facilities or for permits under ECL article 70 in general (11/20/07 ruling, at 9). DEC Staff replied that the New York City Department of Sanitation would operate the facility and that references to NYC DOS Commissioner Doherty would be removed from the draft permit (December 14, 2007 e-mail message from Mr. Nehila). DEC Staff subsequently stated that it was unaware of any guidance documents regarding this subject (April 18, 2008 e-mail from Mr. Nehila; see also, February 14, 2008 memorandum to the parties, at 2-3; April 17, 2008 memorandum to the parties, at 1). Mr. Pejan's letter of December 14, 2007 stated that the Department of Sanitation would operate the facility.

An applicant for a part 360 permit must be the owner or operator of the facility. While the record remains unclear concerning the site owner and, to some extent, the facility owner, the New York City Department of Sanitation would be the operator of the facility and would be a permittee if a permit is issued for this facility. DEC Staff stated that the operations contractor would not be a permittee, and no party showed why the operations contractor should be a permittee for this facility.

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[49] See, among other documents, the June 28, 2007 transcript, at 168-173; Mr. Nehila's July 2, 2007 letter; Mr. Dillon's July 4, 2007 letter; Mr. Nehila's October 5, 2007 letter, at 1-2; November 20, 2007 ruling, at 8-9; and Mr. Pejan's December 14, 2007 letter.

Construction and operation without a permit

The Applicant constructed the Spring Creek compost facility without having a part 360 permit for the facility, and received approximately 5,261 tons of yard waste in 2001. To the extent that the Applicant is suggesting that it would have been proper for it to construct a compost facility without a permit if it did not operate the facility at a level that would require a permit (5/15/07 Tr. 88), that suggestion is without merit. The facility is designed for a quantity of waste that clearly requires a permit. Part 360 prohibits construction or operation of a solid waste management facility, or any phase of it, except in accordance with a valid part 360 permit (6 NYCRR 360-1.7[a][1][i]).

The Applicant also constructed and operated its Soundview yard waste composting facility prior to receiving a part 360 permit for that facility, and received more yard waste at the Soundview facility in 2006 than that facility's permit allowed (Ex. 8, 13, 65-69, 86; 10/10/07 Tr. 60-62).[50] As of May 2007, the Applicant had also failed to comply with a provision of the Soundview permit that required a habitat restoration plan (5/15/07 Tr. 80-86).

In view of the recalcitrant approach openly shown by the Applicant during this hearing, its construction of at least two compost facilities without having first obtained a part 360 permit, and the non-compliance with various part 360 requirements (litter, etc.) that occurred during the initial operation of the Spring Creek compost facility, any permit issued for the Spring Creek yard waste composting facility should be tightly written to increase the likelihood of compliance or to ensure that it is enforceable if that becomes necessary. This hearing report includes some suggestions concerning revisions to the draft permit, plus identification of permit terms that have become unclear due to inconsistencies with the application documents and/or with the Applicant's evidence. The overall recommendation of this report, however, is that the application be denied.

[50] Exhibit 13 suggests that the Applicant exceeded the permitted quantity of waste at Soundview in 2004 and 2005 as well.

Composting

The most recent update of the New York State Solid Waste Management Plan encourages composting as an effective waste reduction measure (SWMP 1999-2000 Update, at 12-13, 19-20).[51] Composting needs to be done properly, however, and at an appropriate location. Section 360-1.10 of 6 NYCRR requires that solid waste management facilities, including composting facilities, must comply with the requirements of part 360, and permit applications for such facilities must demonstrate an ability to operate in accordance with the requirements of the ECL and part 360. The present application does not demonstrate that the Spring Creek yard waste composting facility would comply with part 360 with respect to several of the issues identified for adjudication.

CONCLUSIONS

1. Part 360 contains requirements concerning confinement of solid waste, dust control, vector control, odor control, and noise levels that apply to solid waste management facilities including the project reviewed in the present hearing (6 NYCRR 360-1.14[a], [j], [k], [l], [m] and [p]). Section 360-1.7(c) of 6 NYCRR governs variances from provisions of part 360. Due to the date on which this application was determined to be complete, the provisions of former sections 6 NYCRR 360-5.5(g) and 360-4.4(d) govern setbacks between the facility's perimeter and the facility's property line, residences or places of business, and surface water bodies.

2. The Applicant did not demonstrate that the project as proposed, and as conditioned by the draft permit and DEC Staff's additional special condition 37, would comply with the noise standards for urban areas specified in 6 NYCRR 360-1.14(p). The hearing record demonstrates that it is likely that operation of the compost facility would violate both the daytime and the nighttime noise limits during some seasons of its operation.

3. The Applicant did not demonstrate that the project as proposed and conditioned by the draft permit will adequately control odor or dust. During the facility's initial operation, both odor and dust migrated off-site to an extent that adversely

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[51] www.dec.ny.gov/docs/materials_minerals_pdf/2000update.pdf, viewed on Oct. 30, 2009; see also, www.dec.ny.gov/chemical/41831.html

affected persons at residences and businesses near the facility. The Applicant did not demonstrate that odor or dust would be adequately controlled in future operations of the facility. The evidence indicates that future operations might cause even larger odor impacts due to receiving a larger amount of waste than was received during the initial operation, and adding grass and manure as new waste types. If DEC Staff were to interpret the draft permit as allowing the Applicant to leave waste in paper bags as opposed to debagging the waste, this would also increase the likelihood of odor problems.

4. The facility's initial operation caused plastic bags to blow off the site, resulting in a litter problem on properties around the compost facility. A New York City local law would now require the majority, but not all, of the yard waste brought to the Applicant's compost facilities to be in paper bags. This would reduce the potential for litter blowing off-site. The hearing record does not demonstrate that the facility would fail to confine solid waste if all the yard waste is brought to the facility in paper bags or loose. If a permit is issued for the facility (which this report does not recommend), this provision should be made a condition of any DEC permit that may be issued for the facility, so that it is an enforceable part of the permit rather than being solely a local law, and should be expanded such that all yard waste brought to the facility must be in paper bags or loose.

5. Insect problems at locations near the facility coincided with its initial operation. The record is unclear concerning whether the insects observed are capable of transmitting a pathogen from one organism to another, which is part of the definition of "vector" in part 360. The proposed operation of the facility would add horse manure as an additional waste type. No parties proposed additional vector control measures, beyond mixing the waste materials into windrows appropriately. As discussed above, the prior insect problem during the facility's actual operations is relevant to the variance issue, in view of the facility's proximity to residences and places of business, and in view of the facility's past performance.

6. The facility is close enough to residences and places of business that operating open windrow composting as proposed will cause problems with odor, dust, noise, and possibly vectors that are inconsistent with the performance expected from application of the applicable part 360 requirements. The requested variances from the setbacks required by former sections 6 NYCRR 360-5.5(g) and 360-4.4(d) between the facility perimeter and the facility's property line (variance 1), and between the facility perimeter

and residences or places of business (variance 2) should be denied. Requiring compliance with the setbacks involved in variances 1 and 2 would not impose an unreasonable economic, technological or safety burden on the Applicant or the public.

7. The requested variance from the setback from surface water bodies (variance 3) could be granted. Even though the economic burden associated with compliance is similar to that for the other variances, allowing this variance would have no adverse impacts due to the berms that separate the facility from the water bodies and the drainage system that would prevent site runoff from entering these water bodies.

8. Issuance of a part 360 permit for the Spring Creek composting facility will substantially hinder numerous policies of New York City's New Waterfront Revitalization Plan. As discussed in the February 19, 2008 ruling in this matter, the certification required by 19 NYCRR 600.4(c) cannot be made.

RECOMMENDATION

I recommend that the application be denied. I further recommend that the Commissioner conclude that the certification required by 19 NYCRR 600.4(c) cannot be made.

If the Commissioner disagrees with this recommendation, I recommend that the permit conditions be strengthened as stated at various places in the above report, and that the question about ownership of Block 4580, Lot 2 be resolved as recommended in this report. For reference, the permit conditions that would need to be changed are summarized here as follows:

- expanded and specific noise monitoring condition
- re-wording proposed condition about location of nighttime operations
- correct western berm height, in proposed noise condition, to reflect height used in modeling (approximately 10 feet)
- correct inconsistency in mapping, with respect to topography that would be incorporated (via the engineering report) into the permit
- requirement for all yard waste to be delivered in paper bags or rigid containers, including landscaper waste
- narrower windrows, and re-evaluation of total waste amount that could be processed with such windrows
- interpret the draft permit as including its conditions that require bagging of waste and mixing with a

debulking agent, notwithstanding the interpretation offered by the Applicant's consultant
- strengthen and clarify the proposed permit condition about habitat restoration.

If the permit is denied, the facility is an unpermitted solid waste management facility. Although the record of the present hearing includes evidence and testimony concerning violations of the ECL and part 360 by the Applicant, it was a permit hearing under 6 NYCRR part 624, not an enforcement hearing under 6 NYCRR part 622. This hearing did not consider allegations presented in the form of a complaint on which DEC Staff would have the burden of proof, and it did not consider any proposed penalties or remediation. In his decision, the Commissioner might choose to address additional steps DEC Staff would take if the permit is denied, but that subject is beyond the scope of this hearing report.

5/28/09

Exhibit list (Ex. 1 - 160)

Spring Creek Yard Waste Composting Facility application
DEC Application No. 2-6105-00666/00001

Transcript references are to date and page. All dates are 2007 unless noted otherwise.

#	Description	Marked for identification	Evidence
1	Daily News affidavit of publication for notice of hearing	5/15, 5	10/25, 538 (also 10/11, 528)
2	notice of hearing, ENB, 2/18/04	5/15, 5	10/25, 538 (also 10/11, 528)
3	hearing referral and background binder	5/15, 8	5/15, 9
4	Engineering Report	5/15, 9	5/15, 9
5	Local Law 431-A	5/15, 10	5/15, 18
6	Swanburg letters and comment	5/15, 69	5/30, 139
7	10/31/06 Daily News article	5/15, 82	5/16, 8
8	Soundview compost facility permit	5/15, 84	5/16, 8
9	April 2004 e-mails	5/15, 109	not received, 5/16, 9
10	redacted copy of April 2004 e-mails	5/15, 119	5/16, 8
11	3/3/06 e-mail	5/15, 125	not offered
12	7/5/00 memo	5/15, 126	not in evidence
13	table of compost facilities (Lange)	5/15, 233	5/15, 242
14	Rowland resumé	5/16,17	not in evidence (see Ex. 80 instead)
15	Spring Creek variance requests	5/16, 18	10/25, 570
16	table of tonnages	5/16, 171	not in evidence
17	letter, Burger to Dillon, 3/1/07	5/16, 174	same as Ex. 78
18	ownership map (Fig. 2-9 of eng. rpt.)	5/30, 10	5/30, 11

19	photo	5/30, 171	10/25, 539
20	photo	5/30, 171	10/25, 539
21	photo	5/30, 171	10/25, 539
22	Harrison resumé	5/31, 6	5/31, 22
23	draft of article summaries	5/31, 47	5/31, 49
24	article - checklist for odor management	5/31, 81	5/31, 82
25	Bruckner article (controlling odors)	5/31, 84	5/31, 200
26	Wheeler study	5/31, 159	5/31, 200
27	Ireland compost study	5/31, 161	5/31, 200
28	Browne article	5/31, 168	5/31, 200
29	compost article	5/31, 180	5/31, 200
30	2/18/04 draft permit	6/11/07 memo to parties	10/11, 529
31	Simmons's 5/24/07 prefiled testimony	6/28, 8	6/28, 55
32	Simmons's resumé (attached with 31)	6/28, 10	6/28, 56
33	traffic estimation (attached with 31)	6/28, 10	6/28, 56
34	web page re: resumés	6/28, 18	not in evidence
35	NOAA wind data	6/28, 69	6/28, 72
36	yard waste bag	6/28, 119	reserved (6/28, 165); received in evidence, 10/25, 541
37	HydroQual 11/6/02 memo re: tonnages	6/28, 137	6/28, 165
38	RFP for NYC organic waste facilities	6/28, 142	9/19, 5
39	general site layout (Fig. 4-2 of eng. rpt.)	6/28, 155	6/28, 165
40	1/23/06 noise report	6/28, 159	7/12, 112
41	Wikipedia definition	7/11, 6	not in evidence
42	NY Post article, 7/9/07	7/11, 12	not in evidence (7/11, 14)
43	photo along Flatlands Avenue	7/11, 32	7/11, 34
44	map along Flatlands Avenue	7/11, 32	7/11, 34
45	photo - tax blocks and Autumn Ave.	7/11, 33	7/11, 34
46	U.S. District Court document	7/11, 33	7/11, 42
47	list of NYS DOS events	7/11, 58	10/25, 570
48	NOAA local climate data (48A through 48F)	7/11, 113	7/11, 197
49	Coast Pilot pages	7/11, 207	received (see 10/30/07 e-mail)

50	Santiago's 9/8/06 prefiled testimony	7/12, 10	7/12, 16
51	Santiago's 5/25/07 prefiled testimony	7/12, 10	7/12, 16
52	Santiago's resumé, attached with ex. 51	7/12, 11	7/12, 16
53	5/23/07 supplemental noise analysis, att. w/ ex. 51	7/12, 11	7/12, 16
54	earlier version of Santiago's resumé	7/12, 13	not in evidence
55	Cadna-A manual	7/12, 147	received (see 10/19 memo to parties)
56	DeAngelis's resumé	9/19, 7	9/19, 85
57	Tomlinson affidavit and 4 photos	9/19, 7	9/19, 7
58	e-mail, 11/29/01, Brezner to Redis	9/19, 12	9/19, 15
59	e-mail, 11/4/02, DeAngelis to Rabkin	9/19, 12	9/19, 17
60	polaroid photo, 4/17/02, Spring Creek	9/19, 33	9/19, 33
61	inspection report, Spring Creek, 5/12/03	9/19, 34	9/19, 40
62	inspection report, Spring Creek, 3/16/04	9/19, 37	9/19, 39
63	inspection report, Spring Creek, 11/23/04	9/19, 40	9/19, 41
64	inspection report, Spring Creek, 6/7/05	9/19, 40	9/19, 44
65	polaroid photo, Soundview, 8/8/00	9/19, 46	9/19, 48
66	polaroid photo, Soundview, 10/4/00	9/19, 46	9/19, 51
67	polaroid photo, Soundview, 8/8/00	9/19, 46	9/19, 50
68	polaroid photo, Soundview, 8/8/00, Bronx River	9/19, 46	9/19, 50
69	inspection report, Soundview, 4/16/03	9/19, 46	9/19, 52
70	inspection report, Soundview, 10/2/03	9/19, 46	9/19, 53
71	inspection report, Soundview, 2/26/04	9/19, 46	9/19, 54
72	inspection report, Soundview, 6/6/05	9/19, 47	9/19, 56
73	Oct. 2006 photo, Spring Creek	9/19, 71	9/20, 186
74	memo, Lange to DeAngelis, 3/3/99	9/19, 82	9/19, 82
75	Brezner's resumé	9/19, 86	10/25, 570
76	inspection report, Spring Creek, 5/14/07	9/19, 109	10/25, 570
		(Ex. 75 and 76 also at 10/10, 17)	
77	notes about trucks not scaled	9/20, 181	received (see 10/19 memo to parties)
78	letter, Burger to Dillon, 3/1/07	9/20, 182	9/20, 182
79	memo, Tomlinson to Andreville, 11/16/04	9/20, 186	9/20, 187
80	Rowland's resumé with dates	10/10, 20	10/11, 20
81	Redis's resumé	10/10, 24	10/10, 52

82	inspection report, Soundview, 8/16/05	10/10, 35	10/10, 52
83	inspection report, Soundview, 4/10/06	10/10, 37	10/10, 52
84	inspection report, Soundview, 5/8/06	10/10, 39	10/10, 52
85	inspection report, Soundview, 6/5/07	10/10, 40	10/10, 52
86	inspection report, Soundview, 6/6/07	10/10, 48	10/10, 52
87	print-out of first page of 360-5.3 from website	10/10, 104	official notice taken of current text of subpart 360-5 (10/11, 529)
88	photo of Developmental Center wall	10/10, 146	in evidence for limited purpose 10/10, 164
89	Massachusetts Audubon web page	10/11, 406	10/11, 406
90	Purdue lab web page	10/11, 414	10/11, 419
91	Pestproducts web page	10/11, 419	not in evidence (10/11, 421)
92	Birdnature web page (map)	10/11, 424	not in evidence (10/11, 431)
93	Brooklyn Bird Club web page	10/11, 424	not in evidence (10/11, 431)
94	inspection report, Canarsie, 11/21/01	10/11, 444	10/11, 529
95	inspection report, Canarsie, 12/4/01	10/11, 445	10/11, 529
96	inspection report, Canarsie, 1/30/02	10/11, 445	10/11, 529
97	copy of 6 NYCRR subpart 360-5	10/11, 469	10/11, 470
98	4/21/04 supplemental notice, ENB	10/11, 529	10/11, 529
99	Coast Pilot 2 excerpt	10/25, 574	received (see 10/30 e-mail)
100	“Diseases of Wildlife” outline	11/7 letter from CHA (Exs. 100 thru 103)	not in evidence (2/14/08 memo to parties, re: Exs. 100 - 103)
101	Seagulls journal article		
102	Article from Emerging Infectious Diseases, December 2002		
103	Article from Emerging Infectious Diseases, Jan. - Feb. 1999	see previous page	

104	Nuisance Gulls, from DEC website	2/6/08 letter from CHA	in evidence (2/14/08 memo to parties)
105	Location plan and topographic survey, April 2008	7/11/08 ruling (Exs. 105	3/12/09, 184
106	GIS figure, Fig. 2-2, Site Location, April 2008	through 112)	3/12/09, 184
107	GIS figure, Fig. 2-3, Tax Block and Lot, April 2008		3/12/09, 184
108	GIS figure, Fig. 2-7, Zoning, April 2008		3/12/09, 184
109	GIS figure, Fig. 2-8, Land Use, April 2008		3/12/09, 184
110	GIS figure, Fig. 2-9, Ownership Information, April 2008		3/12/09, 184
111	Figure 4-2, General Site Layout, April 2008		3/12/09, 184
112	Record map of Spring Creek Park, as revised in October 2002	7/11/08 ruling	3/12/09, 185
113	Excerpts from 6 NYCRR Part 360 (prior version)	8/11/08 memo to parties	8/11/08 memo to parties
114	Site plan, location map and topographic survey, Sept. 2008	10/8/08 memo to parties	3/12/09, 9
115	GIS figure, Fig. 2-2, Site Location, Sept. 2008	(Exs. 114 through 120)	3/5/09, 7
116	GIS figure, Fig. 2-3, Tax Block and Lot, Sept. 2008		3/5/09, 7
117	GIS figure, Fig. 2-7, Zoning, Sept. 2008		3/5/09, 7
118	GIS figure, Fig. 2-8, Land Use, Sept. 2008		3/5/09, 7
119	GIS figure, Fig. 2-9, Ownership Information, Sept. 2008		3/5/09, 7
120	Figure 4-2, Site Plan: General Site Layout, Sept. 2008		3/5/09, 7
121	Zoning map 17c	10/8/08 memo	3/5/09, 8
122	Zoning map 17d	to parties (Exs.	3/5/09, 8
123	Zoning map 23c	121 - 126)	3/5/09, 8
124	Zoning map 18a		3/5/09, 8
125	Zoning map 18b	see previous page	3/5/09, 8
126	Zoning map 24a		3/5/09, 8
127	Cheney affidavit	3/5/09, 6	3/5/09, 7

128	List of NYC DCP products	3/5/09, 22	3/5/09, 108
129	2 pages from CHA comments	3/5/09, 23	3/5/09, 108
130	Bytes of the Big Apple web page	3/5/09, 24	3/5/09, 108
131	Excerpt from licensing agreement	3/5/09, 25	3/5/09, 108
132	letter, Pejan to DuBois, 1/21/09	3/5/09, 34	3/5/09, 108
133	letter, Pejan to DuBois, 2/17/09	3/5/09, 37	3/5/09, 108
134	letter, Pejan to DuBois, 2/20/09	3/5/09, 38	3/5/09, 108
135A	"What is PLUTO?"	3/5/09, 86	3/12/09, 6
135B	data excerpt	3/5/09, 86	3/12/09, 6
135C	PLUTO 07C columns	3/5/09, 86	3/12/09, 6
135D	PLUTO file layout, April 2008	3/5/09, 86	3/12/09, 6
135E	MapPLUTO users guide	3/5/09, 86	3/12/09, 6
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