STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION	
In the Matter of the Application of the **SULLIVAN COUNTY DIVISION OF SOLID WASTE** for permits for the Phase I (Cell 6) expansion of the County landfill in the Village of Monticello, Sullivan County. (Application No. 3-4846-00079/00021)	**RULINGS OF THE ADMINISTRATIVE LAW JUDGE ON PARTY STATUS AND ISSUES**

BACKGROUND AND BRIEF PROJECT DESCRIPTION

The Sullivan County Division of Solid Waste ("Sullivan County", or "the County") proposes to expand the County's landfill located south of Broadway in the Village of Monticello by an additional 3.4 acres, into an area referred to in the application documents as Cell 6. This project, also referred to as the "Phase I" landfill expansion, would involve area south of the existing waste footprint. The proposed Phase I expansion is separate from another proposed expansion that would encompass approximately 36 acres east of the existing landfill, toward Rose Valley Road. That project, also referred to as the "Phase II" landfill expansion, is the subject of another application that has not been deemed complete by Staff of the New York State Department of Environmental Conservation ("Department Staff").

The Phase I expansion, which would create Cell 6, requires modification of the following Department permits previously issued to Sullivan County:

1. The solid waste management facility permit, which addresses the landfill itself;
2. The industrial State Pollutant Discharge Elimination System (SPDES) permit, which addresses stormwater and leachate collection, treatment and disposal; and
3. The Clean Air Act Title V air permit, which addresses the collection and treatment of landfill emission gases.

The Phase I (Cell 6) landfill expansion and the Phase II landfill expansion were evaluated together pursuant to the State Environmental Quality Review Act (SEQRA) by Sullivan County as lead agency. The County determined that the landfill expansions would have a significant effect on the environment and, accordingly, issued a Positive Declaration on April 17, 1997. A Draft Environmental Impact Statement (dated December 1997) and a Final Environmental Impact Statement (dated March 1998) were prepared by the County, followed by a Decision with SEQRA findings.

The Phase I landfill expansion application was deemed complete by Department Staff on December 23, 2003. A combined Notice of Complete Application and Notice of Legislative Hearing appeared in the Department's on-line Environmental Notice Bulletin on January 7, 2004.

Based on public comments including those taken at the legislative hearing, which was held during the evening of February 10, 2004, Department Staff requested that an issues conference be held. A notice announcing both the issues conference and an extension of the public comment period was issued by James McClymonds, the Department's Chief

Administrative Law Judge, on March 5, 2004. That notice also appeared in the Department's on-line Environmental Notice Bulletin, and was published as a legal notice in the Catskill Shopper on March 12, 2004, and the Sullivan County Democrat on March 12 and 16, 2004. The Department mailed copies of the notice to relevant state and local government officials and to individuals and private organizations that had expressed a prior interest in the project.

As noted above, the Phase I expansion would add a sixth cell of 3.4 acres to the existing landfill footprint. The Phase I footprint, comprised of Cells 1 to 5, covers 42 acres in total. On April 15, 2004, when the issues conference began, the County said that Cells 1 and 2 and part of Cell 3 were capped, while Cells 4 and 5 and the remainder of Cell 3 were open and active. The landfill was first permitted in 1994, though the site on which it is located also contains two other municipal solid waste landfills, both of which are now closed: the Village of Monticello landfill, which operated from 1963 to 1982, and the fully capped former Sullivan County landfill, which operated between 1982 and 1994. If approved, Cell 6 would be built directly south of Cell 5, with some overfill of the previously constructed cells.

The landfill currently operates under terms of a solid waste management facility permit (Conference Exhibit No. 15) that expires on August 25, 2005, a Title V air permit (Exhibit No. 16) that expires on October 30, 2005, and a SPDES permit (Exhibit No. 17) that expires on July 10, 2008. The County prepared a list of the documents it says relate to the Phase I (Cell 6) expansion application, and a copy of that list was received as Exhibit No. 14.

A list of all the issues conference exhibits is attached as an appendix to these rulings. Those exhibits, along with the conference transcripts, constitute the record on which these rulings have been made. The last volume of the transcript was received on June 14, 2004, on which date the record closed.

LEGISLATIVE PUBLIC HEARING

As noted above, a legislative hearing addressing the Phase I landfill expansion was held during the evening of February 10, 2004. The hearing was conducted at the Sullivan County Government Center in Monticello, immediately following a question-and-answer session conducted by the County itself. Though the hearing, to receive public comments, was not scheduled pursuant to the Department's permit hearing procedures, its scheduling and format satisfied the requirements of a legislative hearing conducted pursuant to those procedures, which are found at Part 624 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York [6 NYCRR Part 624]. Therefore, after the matter was subsequently scheduled for an issues conference, a second legislative hearing was not scheduled.

At the February 10 hearing, Gary Abraham, Esq., representing landfill opponents, requested a 30-day extension of the February 20 deadline for the receipt of written comments, due to alleged difficulties he had in securing copies of application documents. This request was not addressed directly by Department Staff; however, after Staff referred the matter for an issues

conference, the March 5 notice announcing that conference created a new opportunity for the submission of written comments directly to me as the assigned administrative law judge (ALJ). These comments have been considered together with the written comments previously submitted to Department Staff in response to the Notice of Complete Application and Notice of Legislative Hearing, as well as the oral comments delivered at the February 10 hearing.

About 200 people attended the February 10 hearing, and 24 spoke, most of them people who reside near the landfill. The sentiment among the speakers, as well as in the vast majority of letters received by the Department, was against the County's proposal. Many speakers, including nearby residents, objected to any expansion of the facility, and favored its closure instead. Others, including Thompson Town Supervisor Anthony Cellini, contended there should be a moratorium on the landfill's expansion until existing problems, particularly with odors, are fully corrected.

Some commenters said the landfill is growing too quickly, a problem they attributed to the importation of waste from outside the county. Critics said the landfill should be used strictly for the county's own waste. To reduce imports and help pay facility closure costs, one person proposed sharply raising tipping fees for out-of-county waste haulers, while modestly lowering them for local haulers.

Speakers at the February 10 hearing, most of them people living within a mile or two of the landfill, complained of facility-derived odors they described as noxious, nauseating and appalling. Odors were described as particularly intense in the area east of the landfill property, along Rose Valley Road, and north of the landfill, along East Broadway.

The County has tried to control odors with a combination of gas collection pipes and flares, as discussed later in these rulings. However, neighbors said that the control measures have not worked as designed, citing wintertime freezing of the pipes and a power outage that extinguished the flares. Neighbors complained that an odor-masking agent recently used by the county was itself obnoxious, adding that they should be able to breathe clean air that carries no scent whatsoever.

Many commenters said that odors, though particularly bad this past winter, have been a continuing problem since the landfill opened in the mid-1990's. They said that County officials had not responded adequately to their complaints, which are now routed through an odor hotline. One person said that too much waste being placed over too short a time was aggravating the odor problem. Another expressed concern that expanding the landfill will simply spread the area of stench. Some people questioned why a large landfill should even be located in a population center like the Village of Monticello, where it is ringed by residential and commercial development. There were concerns that the landfill's location drives down neighbors' property values and destroys Monticello's potential for tourism and other new business opportunities.

The landfill emits air pollutants which neighbors associate with a wide range of health problems they say that they and family members have experienced, including respiratory

illnesses like asthma and bronchitis. Speakers expressed concern that certain of these pollutants could be associated with cancer or various disorders of the nervous and endocrine systems. Particular concern was expressed regarding impacts to the elderly and children like those who attend a day care center on Rose Valley Road. According to the center proprietor, the children do not play outside on days when the odors are particularly strong.

Neighbors are concerned not only about air pollution, but about the potential for groundwater contamination should leachate break through the landfill's liner system. Though there is no evidence of a leachate escape, neighbors are concerned that their well water could be affected. Neighbors also voice concern about litter blowing from the landfill, as well as noise and air pollution attributed to haul trucks that carry waste to the facility.

Because it contains a significant number of low-income residents, the area closest to the landfill is considered of special concern under the Department's environmental justice program. Despite attempts by the County and the Department to reach out to local residents, many say that the permitting process, particularly that for the air permit, has not been explained to them adequately. The County, they charge, has not held enough meetings to gather feedback from the public.

Though speakers at the legislative hearing were highly critical of the landfill expansion, some letters supportive of the project have been received. For instance, the Sullivan County Chamber of Commerce wrote that closing the landfill would create a hardship on local businesses by requiring that their refuse be trucked out of the county for disposal, at costs projected to be twice what they currently pay. Some local business owners said that they might need to reduce employment to offset the added expense of sending trash elsewhere in the event the expansion is not approved and the landfill closes. Thompson Sanitation Corp., a Rock Hill company that does household refuse pickup, described the Sullivan County Landfill as a state-of-the-art facility that provides a safe, affordable place for residents to dispose of their trash, and said that any problems at the facility are correctable.

Finally, the Association of Supervisors of Sullivan County wrote that it supports the Phase I expansion, warning that if it is not approved there could be a serious trash disposal crisis in the county, most likely resulting in illegal dumping along roadsides, in ravines, and in hidden wooded areas. The Association argues that if the expansion does not proceed, the County budget will be imperiled. Landfill supporters argue that this, in turn, could trigger an increase in property taxes.

ISSUES CONFERENCE

Pursuant to 6 NYCRR 624.4(b), an issues conference was held on April 15 and 16 as well as May 10, 2004, at the Sullivan County Government Center in Monticello. The purpose of the issues conference, over which I presided, was to determine party status for any person or organization that had properly filed, and to narrow and define those issues, if any, which would require adjudication concerning the Phase I expansion and the terms of draft permits that were prepared by Department Staff. Participating at the issues conference were counsel and other representatives of the County, Department Staff, and three prospective intervenors.

As permit applicant, the County was represented by Samuel S. Yasgur, the county attorney, and Cheryl A. McCausland, deputy county attorney.

Department Staff was represented by Jonah Triebwasser, deputy regional attorney, of the Department's Region 3 office in New Paltz.

Three timely petitions for full party status were received.

One petition (Exhibit No. 7) was received from Gary A. Abraham, an attorney in Allegany, New York, on behalf of Special Protection of the Environment of the County of Sullivan, Inc. (SPECS). According to the petition, SPECS is a not-for-profit membership corporation consisting primarily of Sullivan County residents, including a number of people who live, work, attend school and travel near the landfill. For various reasons discussed further below, SPECS argues that the Department should suspend its review of the expansion proposal or, if it proceeds with review, should litigate certain issues outlined in its petition.

A second petition (Exhibit No. 8) was received from J. Benjamin Gailey, Esq., of Jacobowitz and Gubits, LLP, in Walden, New York, on behalf of the Village of Monticello and Town of Thompson. The Village and the Town are hosts to the landfill, since the landfill is in the Village which itself is part of the Town. According to their petition, the two municipalities have received hundreds of complaints in recent years concerning noxious odors and other complaints concerning litter. They argue that the landfill and its operation have caused an environmental nuisance and that permits for the Phase I expansion should be denied unless stringent, enforceable and enforced permit conditions reduce the weekly tonnage limits and strictly control odor and litter.

A third petition (Exhibit No. 9) was received from David A. Engel, Esq., of Tuczinski, Cavalier, Burstein & Collura, P.C., in Albany, New York, on behalf of the Sullivan County Association of Supervisors. The Association consists of the elected supervisors of the 15 towns within Sullivan County. According to its petition, the Association was created in 1992, when the county form of government was altered from a board of supervisors system to a county legislature system. It was designed so that, in this new framework, elected town supervisors could address issues of mutual concern and express common interests to both the County and the state.

The towns represented by the Association depend on the Sullivan County landfill for the disposal of the waste that they generate. While the Association generally agrees with the conditions proposed by Department Staff in its draft landfill permit, the Association proposes that further conditions be included to assure that adequate disposal capacity is maintained for waste that is generated within the county. The Association is concerned that if the county landfill becomes unavailable, its member towns will have to find other means for the management and disposal of solid waste, a problem complicated by the fact there are no other solid waste disposal facilities within the county, and limited nearby disposal capacity.

The County and Department Staff both acknowledge that all three petitioners have environmental interests adequate to warrant participation in any adjudicatory hearing that is held in this matter. However, they do not find any of the petitioners' proposed issues to be deserving of such a hearing, and therefore argue that no further proceedings are necessary.

Department Staff takes the position that the Phase I modification can go forward consistent with modifications it has proposed for the existing permits. At the start of the issues conference, these modifications were identified. For the solid waste management facility permit, Department Staff produced language for special conditions that would be added to the permit as well as replacement language for existing special conditions. (See Exhibit No. 18.) A new draft Title V air permit (Exhibit No. 19) was produced in its entirety, as were proposed revisions to certain pages of the SPDES permit (Exhibit No. 20).

No issues have been proposed by the County or the petitioners with regard to Staff's proposed revisions to the SPDES permit. With regard to the other two permits, Staff proposed additional revisions as the conference moved forward. (See Exhibit No. 18-A, showing further revisions to the solid waste management facility permit, in relation to litter control, and Exhibit No. 19-A, showing additional language for the Title V air permit, in relation to federal regulations governing hazardous air pollutants.)

Once Staff identified the changes it proposed for the County's permits, the County was given an opportunity to respond. The County accepts the revisions Staff proposed for the SPDES permit, as well as both sets of revisions (Exhibits No. 19 and 19-A) Staff proposed for the Title V air permit. With regard to the solid waste management facility permit, the County sought and received from Department Staff certain clarifications of the proposed modifications in an on-the-record dialogue between counsel for the two parties. Subsequently, on the second day of the issues conference, the County indicated its acceptance of all the permit revisions outlined in Exhibits No. 18 and 18-A.

The issues conference determines which, if any, of the proposed issues require formal adjudication prior to a permitting decision. According to the Department's permit hearing procedures, an issue is adjudicable if it relates to a dispute between the Department Staff and the applicant over a substantial term or condition of the draft permit [6 NYCRR 624.4(c)(1)(i)]. If Department Staff is willing to issue a draft permit and the applicant accepts its terms, the only

issues that could require adjudication are those that are proposed by a prospective intervenor. Such issues must be both substantive and significant [6 NYCRR 624.4(c)(1)(iii)].

An issue is "substantive" if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry. In determining whether such a demonstration has been made, the ALJ must consider the proposed issue in light of the application and related documents, the draft permit, the content of any petitions for party status, the record of the issues conference and any subsequent written arguments authorized by the ALJ [6 NYCRR 624.4(c)(2)].

An issue is "significant" if it has the potential to result in denial of the permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit [6 NYCRR 624.4(c)(3)].

Where, as here, Department Staff has reviewed an application and finds that a component of the applicant's project, as proposed or as conditioned by the draft permit, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing any issue related to that component to demonstrate that it is both substantive and significant [6 NYCRR 624.4(c)(4)].

Apart from adjudicating issues, the Department may seek additional information from a permit applicant "which is reasonably necessary to make any findings or determinations required by law," and if the applicant fails to provide such information in a timely manner, its application may be denied [6 NYCRR 621.15(b)]. This involves a judgment as to what information should be provided by a permit applicant in the first instance, as part of its application, and what information should be provided by a prospective intervenor as part of an offer of proof pursuant to 6 NYCRR 624.5(b)(2)(ii).

ISSUES FOR POTENTIAL ADJUDICATION

Two issues may require adjudication in this matter, both concerning the ability of the landfill to maintain compliance with the Department's operational requirements for solid waste management facilities [6 NYCRR 360-1.14]. The first issue concerns the control of odors so that they do not constitute nuisances or hazards to health, safety or property. [6 NYCRR 360-1.14(m)]. The second issue concerns the control of blowing litter due to inadequate confinement of solid waste [6 NYCRR 360-1.14(j)].

From the perspective of Department Staff, the Sullivan County landfill has had chronic problems maintaining compliance with these requirements. This raises significant doubt about the County's ability to restore and maintain compliance in the future, at least in the absence of new plans for the facility's expansion.

Department Staff has proposed that the County submit a new odor control plan after the expansion is approved. However, under the terms of its draft permit, there is no understanding of what that plan would entail. This is a deficiency which can and should be corrected by requiring the new plan as part of the pending application, so it can be reviewed as part of this hearing, with the possibility that odor control issues may still require adjudication.

Department Staff has also proposed that the County submit a new litter control plan after the expansion is approved. Though the minimum substantive requirements of this plan are identified in the draft permit, the County has questioned these requirements on the bases of need and cost, arguing that an existing plan, which is apparently embodied in its operations and maintenance manual, is sufficient. If, in light of these rulings, the County wants to maintain its objection to a new litter control plan, the issue of litter control will require adjudication as a matter of dispute concerning terms of the draft permit.

Because one should expect that permittees, operating under the requirements of appropriate plans, can maintain compliance with the Department's operating standards for solid waste management facilities, any adjudication of these issues should, at most, result in modification of the draft Part 360 permit, rather than permit denial.

The need to adjudicate odor control issues will depend on whether the parties to this hearing can agree on measures to be employed. Adjudication would be required to the extent that Department Staff objects to the County's plan or, if Staff does not object, to the extent that other parties, with an adequate offer of proof, can raise issues about the plan.

The need to adjudicate litter control issues will depend solely on whether the County maintains its objection to the minimum requirements of Staff's most recent draft permit modification.

Odor Control

An issue exists as to the measures necessary for the landfill to maintain compliance with a Department regulation governing the control of odors. Existing odor control measures have not been effective, as evidenced by recent Department inspection reports. Department Staff's draft landfill permit would require the County to submit a new odor control plan within 15 days of the permit's issuance. The County needs to submit this plan now, prior to a permitting decision, to allow affected parties an opportunity to raise issues with regard to the proposed control measures. Those affected parties include the Town of Thompson and the Village of Monticello, as host communities, and SPECS, which draws membership and support from those people living closest to the facility.

To be meaningful, the opportunity to raise issues about new odor control measures must be afforded formally, within the context of this permit hearing, and not informally, after permit issuance, through comments to Department Staff. It should be possible for the parties to agree on appropriate measures that can be made part of the Part 360 landfill permit, in which case no

adjudication of this issue will be required. If such agreement is not possible, the issues conference will reconvene once the County presents its proposed plan in writing and the other parties have had an adequate opportunity to review it.

The issue of odor control is substantive because the landfill has had persistent problems maintaining compliance with the odor control requirement of the Department's Part 360 regulations. Recent non-compliance, as documented in the Department's inspection reports and attested to extensively at the legislative hearing, raises such doubt as to the County's ability to meet this requirement in the future, that submission of a new plan is reasonably necessary prior to any decision allowing the landfill to expand.

The issue of odor control is significant because it has the potential to result in the imposition of significant permit conditions beyond those in the draft landfill permit, even if, in all likelihood, it does not have the potential to result in permit denial. On the existing record, there is no reason to think that, with the implementation of appropriate plans, odor cannot be controlled adequately to assure that the landfill is not a nuisance to its neighbors.

The odor control issue is raised directly in the petition filed jointly by the Town and Village, and in the petition filed by SPECS. The Town and Village object to the draft permit because it does not require the County to take immediate specific measures to control odor. According to their petition, the County should be required to accelerate the placement of daily cover and take other odor control measures, including the installation of additional flares. The SPECS petition, like that of the Town and Village, notes that the landfill has had a persistent problem with odors. SPECS argues that compliance schedules should be added as conditions to the Part 360 and Title V air permits.

Among the operational requirements for all solid waste management facilities is one mandating that odors be effectively controlled so that they do not constitute nuisances or hazards to health, safety or property [6 NYCRR 360-1.14(m)]. As evidenced by statements made at the legislative hearing, a perceived lack of compliance with this requirement is the main concern of those living closest to the landfill. Even the County attorney, Mr. Yasgur, noted that in February, at the time of that hearing, there was a "significant odor situation" over which people were rightly upset, though he added that the County has since taken corrective measures.

The Draft EIS states that odor control measures that would be employed in the Phase I and Phase II expansions would be similar to those employed at the existing operation, and would include:

- - Operation of the landfill gas collection and control system;
- - Operational practices to minimize the size of the working face;
- - The application of daily, intermediate and final cover; and
- - Periodic monitoring of fugitive landfill gas emissions.

Should unacceptable odors be attributable to landfilling operations, despite these measures, the Draft EIS provides that additional mitigation measures would be employed, such as:

- - Screening incoming waste for excessive intense odors;
- - Ensuring that transportation vehicles are properly covered and sealed;
- - Placing additional cover;
- - Increasing the rate of the collection and control of landfill gas;
- - Employing various control measures when working in waste areas, such as minimizing the duration of time in which an area is open; and
- - Spraying odor masking agents at the working face. [See Draft EIS, Exhibit No. 21, pages 2-18 and 2-19.]

In October 2003, the County and the Department executed a consent order (Exhibit No. 26, for DEC Case No. R3-20030417-37) addressing violation of various requirements including 6 NYCRR 360-1.14(m), in that the Department had documented odors off-site in September 2002. A payable penalty of Five Thousand Dollars ($5,000) was assessed, and the County agreed to a schedule of compliance that was attached to the consent order. That compliance schedule required the following actions that are relevant to the issue of odor:

- - Prompt placement of intermediate cover on areas that would not receive waste for 30 or more days, unless otherwise approved by the Department, and prompt placement of soil material over noxious solid waste as well as placement of daily cover over solid waste;
- - Initiation of construction to enhance the collection efficiency of the perimeter gas system, including the installation of an 18-inch gas header south of the existing Phase I operating area (an enhancement initially proposed as part of the Phase I expansion, but pushed up as that application was still incomplete);
- - Establishment and maintenance of an odor complaint hotline for use by the public to report nuisance odor conditions; and
- - Submission to the Department of an approvable landfill gas and odor evaluation report and schedule, to be incorporated into the consent order. (A final version of this document, prepared by the County's consultants Malcolm Pirnie, was accepted by the Department in December 2003. A copy of the document was received as Exhibit No. 27.)

The landfill gas evaluation report said that the production of hydrogen sulfide - - which is generated from high-sulfate gypsum board, a common component of construction and demolition (C&D) debris - - was likely the primary cause of the malodorous gases being emitted from the landfill. The report said the County accepts C&D debris in two forms, both of which are permitted. They are raw C&D over the scale, and processed alternative daily cover from Taylor Recycling. According to the report, the hydrogen sulfide odors primarily come from Phase I Cells 3, 4 and 5, where intermediate low-permeability cover has not been placed and the relatively gas-permeable alternative daily cover materials (e.g., C&D screenings and municipal solid waste incinerator ash) do not hinder migration of landfill gas to the atmosphere.

For this reason, the report said that modifications to the landfill gas system (as described in the report) would be required to control off-site migration of gases. In the meantime, temporary landfill gas extraction wells, which were installed in Cells 3, 4 and 5 as a short-term odor control measure in early 2003, were reported to have greatly reduced the gas migration. [Exhibit No. 27, pages 3-5 and 4-1.]

As reported at the February legislative hearing, the landfill's gas collection and control system apparently suffered various breakdowns this past winter, including a flare malfunction due to the cold. On the first day of the issues conference, David Pollock, a Department engineer, said that the County's current efforts, as described in Exhibit No. 27, had not sufficiently addressed the odor problem, which is why the County had brought in a new firm, SCS Engineers, to improve conditions and develop yet another plan that would hopefully address the remaining issues.

As part of the issues conference, I requested that Department Staff provide its landfill inspection reports for the period since October 2003, when the consent order was signed. These reports (received as a group as Exhibit No. 43) cover the time frame until the last day of the issues conference, May 10. They show that, at least from Department Staff's perspective, nuisance-type odors have persisted on a fairly regular basis. Of 35 reports presented, violation of 6 NYCRR 360-1.14(m) was confirmed in 30, including the most recent report (for May 6). Nevertheless, Department Staff said that, in terms of odor control, things were improving by May, and were expected to improve even more. In particular, Staff reported that, after a period of problems during the winter, flares were again functioning properly.

One of the Department's monitors, William Myers, reported on the last day of the conference that he had seen preconstruction on a majority of the perimeter gas collection and control system. He also said he had seen additional flares brought on line to control gas, and diesel generators brought in to operate the flares during power outages. At the end of the issues conference, the County also reported the following measures, among others, that it had taken since the winter:

- - Thawing out lines to remove frozen condensate that would prevent gas from reaching the flares;
- - Replacing traps that are designed to release the condensate;
- - Replacing a rental flare that had been performing intermittently; and
- - Drilling 12 additional vertical wells to draw more gas from the landfill.

On the first day of the issues conference, the County reported that there were two flares, one permanent and one rental, operating on the west side of the landfill, between Cells 1 and 2. The County also said there were two flares, one operational and one a spare, both of them rentals, on the east side of the landfill, between Cells 3 and 4. (The location of the flares has been drawn onto Exhibit No. 10, a map of the facility.)

Staff's draft permit requires that a new odor control plan be submitted within 15 days of issuance of the permit authorizing the Phase I expansion. According to the draft permit, the plan "must evaluate at a minimum and include as appropriate the accelerated placement of daily cover, the effectiveness of various alternative daily covers in use to control and not contribute to odors (otherwise they must be discontinued), and an evaluation of historical odor problems encountered and the remedial actions taken. The plan should provide an inventory of odor sources and a perimeter monitoring plan with assigned threshold levels requiring a remedial response. Consideration must be given to temporary capping, permanent capping, and cessation of waste acceptance and capping." [Exhibit No. 18, replacement special condition No. 6(A), page 1 of 6.]

Staff's draft permit also requires that the odor control hotline be maintained 24 hours a day, that hot line complaints be responded to within specified time limits, and that new signage be posted conspicuously along the roadside, alerting the public to the hotline number. If the Department determines that the hotline is not being adequately maintained, the County is required to set up a third-party answering service.

Finally, the draft permit requires, at a minimum, weekly surface monitoring for landfill gas "hot spots," and the maintenance of 12 inches of intermediate cover on landfill surfaces where no additional solid waste has been or will be deposited within 15 days (or less, if deemed necessary by the Department).

Department Staff is satisfied that a new odor control plan can be submitted after the Phase I expansion is approved. However, SPECS argues that despite the County's recent efforts to come into compliance, the landfill has not yet established a record of compliance, and that if a new permit is granted the County may slip backwards in its efforts. SPECS contends that to better control odors, the County should cut back on its receipt of nonresidential waste, particularly C&D debris, which it says is largely to blame for the odors. The Town and Village agree with this, noting that hydrogen sulfide is released as C&D debris breaks down.

Department Staff and the County offered various reasons why the new odor control plan can be deferred until after permit issuance. At the start of the issues conference, Staff said it was willing to defer receipt of the plan because the County's new consultants, SCS Engineers, who are expected to submit the plan, became involved in this matter only recently, just before the February legislative hearing. On the other hand, these consultants have been on board and working at the landfill now for six months, so they should be familiar enough with the problems there to develop the plan in short order, without unduly delaying the permitting decision.

The County said it is not uncommon for the Department to defer the submission of certain plans until after permit issuance. However, that normally occurs in instances where minimum substantive requirements have been established beforehand. In this instance, while the draft permit identifies appropriate topics for discussion, actual control measures are not established.

Both Department Staff and the County said they are willing to take comments and suggestions on the new odor control plan when it is submitted. However, if it is submitted after permit issuance, with this hearing having concluded, there will be no opportunity for those most affected by the plan - - the Town and the Village, and the neighbors represented by SPECS - - to raise issues for adjudication. As Staff and the County point out, these parties have not yet provided an offer of proof, or proposed the testimony of an expert, as to the measures necessary to control odors at this facility. On the other hand, adequate plans in this regard should be part of the application in the first instance.

The County points out that it provided a plan, approved by the Department, as recently as last December on the subject of gas and odor control. On the other hand, Staff indicates that the plan is insufficient, which is why its permit anticipates that a new one be submitted.

Staff's draft permit condition requires submission of a new odor control plan and schedule within 15 days of permit issuance. However, there is no time frame for the plan's approval or implementation. If the County submits a timely plan, it fulfills the requirements of the permit condition, but if the plan is found to be inadequate and therefore not approvable, the permit does not indicate what happens next.

Department Staff said that if it received an inadequate plan, it could send it back to the County with a strict time frame for resubmission, or it could conditionally approve the plan to get some measures in place while others are fine-tuned. Staff points out that another permit condition (special condition No. 56, at page 6 of Exhibit No. 18) states that the County shall not operate Cell 6 without specific written authorization of the Department. The reasons why authorization would be denied are not spelled out, though Staff represents that it would not authorize the operation of Cell 6 until it is satisfied there is an odor control plan that will work. At the very least, that should be stated explicitly, should it be decided, on any appeal of these rulings, that the odor control plan can be submitted after permit issuance, while Cell 6 is being constructed but before it begins receiving waste.

SPECS has proposed that the landfill's odor problem be addressed with compliance schedules that would be added as conditions to the landfill's Part 360 and Title V air permits. Such an approach is not warranted. Compliance schedules are normally part of consent orders, not permits, and the Part 360 compliance issue is better addressed by the approach described in this ruling. Also, issues of Title V compliance - - which relate to wintertime flare outages and malfunctions - - have apparently been addressed since SPECS filed its petition, according to reports from the County and Department Staff on the last day of the issues conference.

Litter Control

The Department's operational requirements for solid waste management facilities require that blowing litter be confined to solid waste holding and operating areas by fencing or other suitable means, and that solid waste be confined to an area that can be effectively maintained,

operated and controlled [6 NYCRR 360-1.14(j)]. Though it has not drawn the same public outcry as landfill odors, blowing litter was documented as a Part 360 violation in 27 of 35 Department inspection reports for the period between October 9, 2003 and May 6, 2004, the last inspection before the issues conference ended.

The Draft EIS states that, for the Phase I and II landfill expansions, measures would be taken to contain litter as close to the working face as possible, and the working face would be restricted to as small an area as possible, to assist in litter control. The Draft EIS outlines these other litter control measures:

- - Routine litter pick-up as required both on and off the facility site;
- - Use of daily cover material to control the potential for blowing litter, including spreading small amounts of cover material on the waste during operations when wind presents a problem;
- - Sheltering of the work face, due to operational methods and sequencing of operations;
- - Installation of stationary wind fencing in working areas and periodic relocation of the fencing as the active work areas are moved;
- - Use of temporary wind fencing and screens at working areas, as required; and
- - The location of the truck untarping area well within the site boundary.

According to the Draft EIS, the County would require that all vehicles delivering waste or cover material to the landfill be appropriately enclosed, covered or their contents secured, to prevent the littering of roadways [Draft EIS, Exhibit No. 21, page 2-18].

The current landfill permit (Exhibit No. 15) provides that, within 60 days of its effective date (which is August 25, 2000), the landfill was to submit a new litter control plan to the Department which would evaluate measures in addition to those that had already been implemented (Special Condition No. 10, page 4 of 12). The County represents that it did submit a plan at that time and that it is part of the facility operations and maintenance manual.

Department Staff's initial draft permit modifications for the Phase I expansion (Exhibit No. 18) require that a revised litter control plan be submitted within 30 days of the permit's effective date. This plan is to evaluate measures, in addition to those now in place, that can be used to control and remove litter from the facility. It is to include the procedures to be followed for implementation of the control measures and specifically address times when the ground has snow cover, including what will be done prior to any storm events.

According to the initial draft permit modification, the new plan is to include at a minimum:

- - Assignment of staff to ensure that all waste is cleared from the litter control fences as well as other areas of the landfill at least twice daily (leaving the Department the option to determine that more frequent cleaning is necessary);

- - Immediate placement of soil or approved alternative daily cover, except incinerator ash, at the working face over any load of deposited waste that creates a blowing litter problem, with a stockpile of cover material continually maintained at the working face for this purpose;

- - The curtailment of operations and diversion of problem loads, as necessary, up to and including cessation of waste tipping, on days when litter controls are not working or wind gusts are excessive;

- - A thorough and comprehensive spring cleanup of the landfill and adjacent property, including the removal and disposal of litter observed in the woods or anywhere off the working face;

- - Relocation of temporary litter fencing to areas around the landfill's working face, and the operation of on-site construction activities in a manner that minimizes impacts on placement and maintenance of this fencing;

- - Strict adherence to the deployment and maintenance schedule of litter control fencing as presented in the facility's operations and maintenance manual (i.e., litter control fencing installed at the top of any outer landfill slope upon completion of every two lifts of waste above the perimeter berm);

- - The maintenance of fence runs until a final cap barrier and cover soils are deployed on landfill slopes and placed on top of barrier protection soils if determined necessary by the Department;

- - Identification of alternate staff for ensuring compliance with the litter control plan; and

- - Training of facility staff on their responsibilities under the litter control requirements, including an initial training session as well as regular refreshers. [See Exhibit No. 18, special condition No. 10, on page 3 of 6.]

After the first day of the issues conference, a revision to the initial draft permit provision addressing litter control (Exhibit No. 18-A) was negotiated between the County and Department Staff and agreed to by both parties. The revision made several changes to the earlier draft, while keeping certain parts of the condition intact.

The revised condition provides that the County would assign staff to ensure that litter control fences are functionally clean during the course of the day in order to avoid obstructions to wind, and requires that the fences as well as the other areas of the landfill be litter free at the end of the day.

The revised condition also provides that the County would curtail operations on days when wind gusts are hindering litter control operations and/or resulting in an unsafe condition, replacing language in the initial draft that operations would be curtailed on days when wind gusts are "excessive," wording that the County considered vague.

Finally, the revised condition provides that litter control fences shall be maintained and may not be removed until the Department deems it is acceptable to do so, noting that fencing may be required on top of barrier protection soils if deemed necessary by the Department.

With the negotiation of the revised draft litter control provision, the County and Department Staff were satisfied that litter control should not be an issue for adjudication. However, on the last day of the issues conference, the County said that if I should determine that an adjudicatory hearing is necessary on any other issue, it would not consent to the litter control provisions of the draft permit, because of the "excessive" costs of compliance and because these provisions allegedly exceed what is required of other landfills in the state. The County added that if I did not determine that an adjudicatory hearing is necessary, then, in order to expedite construction of the Phase I expansion, it would accept the provisions in the revised draft permit.

Department Staff responded that if a hearing is required on litter control, it reserved the right to go back to the control provisions in the original draft permit. These provisions are, on balance, more demanding of the County, since they require the clearing of waste and litter from the litter control fences as well as other areas of the landfill at least twice daily, not just at the end of the day so long as the fences remain "functionally clean" during the course of operations.

At this point, I have not determined that an adjudicatory hearing is necessary on the issue of odor control. That will be determined after the County provides a new odor control plan and the other parties have an opportunity to react to it. On the other hand, until these things occur, I am not authorizing permit issuance either.

The County apparently wants to argue that the litter control measures it now has in place, and which are part of its operations and maintenance manual, are sufficient, and that a new litter control plan is unnecessary. To the extent that the County objects to the conditions in Staff's draft permit, the grounds for its objection will be adjudicated, consistent with 6 NYCRR 624.4(c)(1)(i), which states that an issue is adjudicable if it relates to a dispute between Department Staff and an applicant over a substantial term or condition of the draft permit.

According to the County, implementing the conditions of Staff's draft permit would impose excessive costs on its taxpayers without corresponding public benefits. Though Staff argues that the costs of compliance measures cannot be an issue, I said at the conference that one can look at whether the steps to be taken to meet a regulatory standard are reasonable to accomplish the goal of compliance. This can include a weighing of costs and benefits.

At the end of the issues conference, the County said it was pursuing various measures to bring litter under control. For instance, it said that after the spring thaw, it deployed a public works crew to the landfill for a large-scale cleanup. Litter was being cleared from trees and the forest floor east of the landfill, and portable fencing had been ordered, to be installed close to trucks as they empty.

Staff's draft permit is explicit about the minimum measures it would insist on in a new litter control plan, whereas, on the issue of odor control, the permit identifies measures only for evaluation and consideration, without committing the County to any particular course of action. Also, the mechanics of litter control are more straightforward and less sophisticated than the steps one needs to take to control odors. Litter control depends largely on the proper deployment

of cover material, fencing, and manpower to pick up litter that escapes from the working face. These matters are all covered in the draft permit, and no prospective intervenor has made an offer of proof, such as proposed testimony of a solid waste engineer, that a key litter control element is missing.

For these reasons, no hearing on litter control measures is necessary unless, as noted above, the County now objects to revised special condition No. 10 of the draft permit, to which it initially consented. If the County indicates its written consent to this condition, the submission of a new plan can be deferred until after permit issuance. On the other hand, if the County objects to the condition, a hearing on its objections can be afforded forthwith. That hearing would afford Department Staff an opportunity to present evidence in support of the draft permit, and the County an opportunity to respond with evidence of its own. No prospective intervenor has demonstrated that it could make a meaningful contribution on this issue, and therefore hearing participation would be limited to the County and Department Staff.

NO ISSUE FOR ADJUDICATION

The following matters have been found to raise no issue for adjudication and to require no further submission of information.

Capacity Management Issues

The petition of the Supervisors Association and the petition filed jointly by the Town and Village both raise concerns that, generally speaking, bear on use of the landfill's remaining disposal capacity to best assure the County's ability to manage its solid waste and rationally plan for its future. To address these concerns, proposals have been advanced to stop the importation of waste from outside the county, and otherwise reduce the rate of waste intake. These proposals are discussed in detail below, along with the reasons advanced to justify them.

- - Waste Importation

While in general agreement with the permit conditions that have been drafted by Department Staff, the Supervisors Association notes that they do not limit the importation of waste to the landfill from out-of-county sources. The Association argues that a limit on waste imports is necessary to assure that the already-permitted capacity of the landfill is not exhausted before the Phase I (Cell 6) expansion becomes operational, and that, assuming Phase I is permitted, that the capacity of Cell 6 is preserved until Phase II become available.

According to the Supervisors Association, the importation of significant quantities of solid waste from outside Sullivan County makes it probable that Cell 5 will be exhausted prior to the availability of Cell 6. The Association's petition states that Sullivan County has contracted with Rockland County for disposal of 80,000 tons per year of solid waste, amounting to 40 percent of the landfill's permitted disposal capacity. Moreover, the Association alleges, the

County is allowing for disposal from other out-of-county sources, so that as much as 50 percent of the remaining capacity of Cell 5 and the further capacity of Cell 6 will be allocated to out-of-county waste generators.

In the event that the landfill reaches its total permitted capacity, the Association argues, the County risks being cast into a disposal capacity crisis because, at present, it has no other environmentally responsible or economically viable alternative means of solid waste management. The Association proposes to present expert testimony from Mark Millspaugh, an environmental engineer, addressing the environmental and economic impacts which would arise if the landfill becomes unavailable. Among other things, his testimony is intended to do the following:

- - Assess the present transfer stations within Sullivan County and the environmental and economic costs associated with developing and implementing, on an expedited basis, a system for long-haul waste transport and out-of-county disposal;
- - Analyze the regional solid waste management market within the Catskill and Hudson Valley regions, as relevant to support the need for a waste import limit at the Sullivan County landfill;
- - Assess the landfill's current operational practices, with recommendations to preserve capacity and assure environmentally responsible management; and
- - Analyze the County's need for disposal capacity, particularly for demolition debris, in order to facilitate and encourage the County's redevelopment.

Speaking at the issues conference, Mr. Millspaugh said Sullivan County towns have transfer stations that are primarily capable of getting small volumes of locally generated waste to the county landfill. Most of these stations, he added, have small container boxes that are not compatible with the long-haul trailers that would be needed to move waste out of the county for disposal. According to Mr. Millspaugh, there is a general lack of regional disposal capacity, so that if the county's landfill should close prematurely, a waste management service gap could develop, resulting in backyard burning and roadside dumping.

The Association's concern about waste importation is shared by the Town and Village. Their petition states that any permit authorizing expansion of the landfill should require not only a reduced tonnage limit, but prohibit importation of out-of-county waste in order to assure that the residents and businesses of Sullivan County are fully able to utilize the landfill. The Town and Village cite a federal court case, Swin Resource Systems, Inc. v. Lycoming County, 883 F.2d 245 (3rd Cir. 1989), cert. denied 493 U.S. 1077 (1990), as authority for the County, as owner/operator of the landfill, to prohibit out-of-county waste. Likewise, they say, the Department may impose such a ban by permit condition.

RULING: Issues about management of the landfill's remaining disposal capacity, to the extent they bear on the County's ability to plan for its waste management future, are outside the scope of this permitting proceeding, and shall not be entertained. These issues, which include whether or not to import waste to the landfill, are to be determined by the County as the

Department-recognized planning unit for solid waste management, and not by the Department itself.

As confirmed in ECL Section 27-0106(2), the state's solid waste management policy is that a state-local partnership be forged "in which the basic responsibility for the planning and operation of solid waste management facilities remains with local governments and the state provides necessary guidance and assistance." The policy is carried out by localities forming their own planning units and developing solid waste management plans that are then reviewed and approved by the Department. [See ECL Section 27-0107.] In this case, the County is the designated planning unit, as all conference participants concede. It has a plan, approved by the Department, for landfilling its solid waste. Expanding the County landfill is consistent with this plan, meaning that the plan need not be revisited as part of this permitting hearing.

The importation of waste from outside Sullivan County is not prohibited by the existing landfill permit. In fact, the landfill has received significant amounts of waste from Rockland County (through that county's solid waste authority) as well as Dutchess and Orange Counties (by contract with the Royal Carting Company). Both the County and Department Staff argue that it is not the Department's business to decide whether waste importation should continue. Staff counsel submits that, as a matter of law, the Department cannot control the landfill's service area, only the types of waste it accepts and, for purposes of assuring the landfill is run properly, the maximum rate at which waste is received, which is fixed in the permit in terms of tons per week and per year. The County agrees with Department Staff, saying that it knows of no case in which the Department has imposed a service area restriction on a municipal landfill.

The Town and Village cite Swin to demonstrate that the County, as owner/operator of the landfill, may prohibit importation of out-of-county waste. No one disagrees with that proposition, but it is different from whether the Department, as a permitting agency, may do the same thing. No one has cited authority under which the Department could ban waste importation.

On behalf of the Supervisors Association, Mr. Millspaugh said the Department has the power to restrict imports to assure continued landfill capacity for county businesses and residents, and to give the county more time to plan its solid waste management future, which could include the larger Phase II landfill expansion or, in the alternative, a shift to some other means of waste management. Such restrictions, however, would usurp the County's primary planning role, and be inconsistent with the more limited function the state is accorded by statute, which is to provide guidance and assistance to planning units. The County receives revenues by taking in waste from outside its borders. Whether to restrict or ban waste imports is a policy issue for the County and its elected officials. It is not an issue for the Department, because the source of waste - - whether it is comes from inside or outside the county - - has no bearing, by itself, on the environmental impacts of the landfill's operation.

- - Waste Intake Reductions

A reduction in the landfill's permitted rate of waste intake is sought by the Town and Village as well as by SPECS. The current landfill permit authorizes the County to accept for disposal "up to 4000 tons of waste in any given week, except that for the peak summer period (Memorial Day through Labor Day) up to 5500 tons per week may be accepted" (Exhibit No. 15, special condition No. 25). These limits remain in the draft permit prepared by Department Staff (Exhibit No. 18), with additional language stating the landfill's annual tonnage acceptance limit "shall remain 200,000 tons" (replacement special condition No. 25).

Applying only the weekly rate for waste acceptance, the landfill would be authorized to take in about 230,000 tons on an annual basis. In fact, according to counsel for the Supervisors Association, the landfill took in 207,000 tons during 2002, and the state's 2003 draft solid waste management plan described the landfill's capacity as 226,000 tons per year.

Department Staff argue that the annual waste acceptance limit for the landfill has always been 200,000 tons per year, that this was the limit in the original permit it issued in 1994 and that the County has never since requested - - and the Department has never since granted - - a change in this limit. The County disagrees, pointing out that there is no annual limit in the current permit, only weekly limits that vary depending on the time of year. Nevertheless, the County accepts the language of the draft permit, which in effect would impose a 200,000 ton per year limit, whether or not it is viewed as a new restriction or the continuation of a pre-existing one.

Department Staff argues that, with regard to waste acceptance, its function is to set peak tonnage limits, and that, as long as these limits are not exceeded, it is up to the County to determine how much waste the landfill accepts. Department Staff submits that the weekly and annual tonnage limits contained in its draft permit are supportable from the standpoint of environmental protection, and that though it would be open to lowering them, it would agree to only for a good environmental reason, which it argues has not been offered. The existing landfill permit and the draft Phase I expansion permit both contain language that the condition setting weekly and annual tonnage limits may be modified by the Department at any time, "to ensure proper operation of the facility." The County accepts this language, agreeing that it is up to the Department to determine how much waste can be handled in an environmentally proper manner, and that, below that limit, the actual rate of waste intake should be determined by the County as a matter of policy.

The Town and Village object to the tonnage limits as set in Department Staff's draft permit, arguing that they would result in the filling of Cell 6 within 18 months of its opening. According to the Town and Village, this is insufficient time for the County to obtain approvals for and construct the Phase II expansion or examine alternatives to that expansion. The petition filed by the Town and Village requests that draft permit be modified to "substantially" reduce the tonnage limit. At the issues conference, they offered two reasons for this proposal: (1) that it would allow more time for the County to decide whether and, if so, how it wants to further expand the landfill; and (2) that it would help the County better maintain compliance with operating standards, in light of existing problems with odor and litter control, which the Town and Village say are related to the rate at which the landfill receives waste.

SPECS also favors a large reduction in the landfill's tonnage limit. Initially, it would like to see the rate of disposal cut in half, to a maximum of 100,000 tons per year, with further progressive reductions in subsequent years so that the landfill is closed in an orderly manner. In the introduction to its petition, SPECS writes that the landfill's "accelerated" disposal rate, beyond what is needed for the county itself, has prevented the landfill from coming into compliance with the Department's Part 360 regulations, the consent order it entered into with the Department last October, and the applicable control requirements of the Clean Air Act. In summary, SPECS maintains that a 200,000 ton per year tonnage limit is unsustainable environmentally.

RULING: No issue exists with regard to the maximum tonnage limits of Department Staff's draft permit. It is up to the County to determine the extent to which it wants to operate below these limits to lengthen the useful life of Cell 6 and, therefore, allow itself more time for solid waste management planning. No intervenor has demonstrated, by a competent offer of proof, that a reduction of the weekly and annual limits proposed by Department Staff is necessary to address the odor problem now associated with the facility's operation. Before one could determine that further tonnage restrictions are necessary to address these problems, one would first need to conclude that this problem cannot be addressed by other means. Such a conclusion would, at this point, be premature, when a new plan to control odors has not yet been presented and evaluated.

The County represents that if it continues to pursue its Phase II expansion application, which still remains incomplete, it could be prudent for it to curb the landfill's waste acceptance rate to 100,000 tons per year, thereby helping to assure that it can begin operating the Phase II expansion without an interruption of service. On the other hand, the County indicates that if it withdraws the Phase II expansion application, there may be no financially sound reason to go forward with the Phase I expansion either, in which case it would make sense to fill the existing permitted cells quickly and then close the facility.

The County argues convincingly that, as long as it stays within the maximum waste acceptance limits set by Department Staff, the landfill should accept waste at whatever rate County officials deem appropriate. Under terms of the existing landfill permit and the proposed permit that would encompass the Phase I expansion, the Department asserts its legitimate authority to revisit these limits to assure the facility's proper operation, which is controlled by Part 360 standards. Facility management issues not tied to maintenance of these standards are for the County, not the Department, to address.

Recognizing they have no offer of expert proof, the Town and Village argue it is intuitive that if the rate of waste receipt were cut in half, it would be easier to control landfill odors. However, the recent odor problems are due to waste that was previously deposited at the landfill, and further restricting waste intake, or even closing the landfill, would not necessarily eliminate or even markedly reduce these problems. The parties agree that odor issues are affected by a number of factors including the types of waste that are accepted and the techniques that are employed to collect and manage landfill gases.

- - Receipt of Alternative Daily Cover

The Supervisors Association argues that, apart from the material received as waste by the Sullivan County landfill, as much as 100,000 tons of alternative daily cover has been entering the facility on an annual basis. The Association says that this is an extraordinarily high amount for a landfill of this sort - - more than it would need if it were using regular soil cover - - and represents a use of capacity and air space that may very well be inappropriate. The Association favors a permit condition imposing a reasonable limit on the amount of alternative daily cover as a means of preserving landfill capacity and thereby allowing more time for the County to complete and secure approval of its Phase II expansion application or, if it withdraws that application, to move some other waste management option such as transfer stations equipped for long-haul trucks that would take waste out of the county for disposal.

RULING: The Association's proposed basis for a permit condition restricting receipt of alternative daily cover - - to buy the County more planning time - - is a matter for County officials, not the Department, to consider. On the other hand, the Department could still impose such a restriction in connection with the environmental impacts of the landfill's operation. Whether there is an environmental basis for such a restriction cannot be determined on the existing record, and must await receipt of the County's new odor control plan, which is to evaluate, among other things, the extent to which various alternative daily covers have contributed to landfill odors.

Compliance with Local Laws

According to the Town of Thompson and Village of Monticello, the solid waste management facility permit should be modified to require compliance with relevant Town and Village laws, either by incorporating those laws as permit conditions or noting that the landfill is subject to compliance with those laws. According to their petition, the Town and Village have adopted laws regulating noxious odors and litter, and requiring local authorization of the landfill and the Phase I (Cell 6) expansion. The Village claims that its odor law is more stringent than Department regulation, because it prohibits all noxious odors that emanate across property lines. Also, it claims that its litter law is more specific and stringent than Department regulation, since it prohibits the deposit of litter at any place and from vehicles. Finally, the Town represents that it has moved in its own justice court to enforce its odor law against the landfill. The County responds that, in a motion to the Town justice, it has moved to dismiss, arguing that the landfill, as a County facility, is not subject to the Town law. According to Mr. Yasgur, the County attorney, the Town Justice Court matter has been adjourned due to the pendency of this issues conference.

RULING: There is no issue for adjudication. ECL Section 27-0711 provides that the state's solid waste laws and regulations do not supersede local laws which are not inconsistent with them. However, it is not for the Department to decide whether the landfill, as a County facility, is subject to Town and Village laws, or to determine which approvals other than its own are necessary for the landfill to operate. Department permits notify recipients that they are

responsible for obtaining any other permits or approvals that may be required to carry out the activities that are authorized by the Department. Identifying and securing those other permits and approvals is the permittee's duty, and permittees proceed without these other permits and approvals at their own peril.

With regard to odors and litter, the Department's landfill permit should reflect measures it deems necessary to meet its own regulations governing landfill operation. The Department has no jurisdiction to enforce local laws, and therefore the language of those laws does not belong in its permits. At any rate, the Town and Village did not present copies of their laws at the issues conference, though I said it would be helpful for them to do so.

Registration of Construction and Demolition Debris

The Town and Village argue that the County has not complied with provisions in the Department's solid waste management regulations which they allege require the registration of construction and demolition (C&D) debris that is received at the landfill.

RULING: This does not raise an issue for adjudication. As Department Staff points out, the regulations cited by the Town and Village (at Subpart 360-16) govern C&D debris processing facilities, not landfills where waste is buried rather than processed. Therefore, these regulations do not apply in this instance.

The Town and Village argue further that neither the landfill's existing permit nor Staff's draft permit authorize the landfill to receive C&D debris except as cover material. This is not true. As Department Staff points out, C&D debris fits under the heading of non-hazardous commercial wastes, which can be received under the existing landfill permit (Exhibit No. 15) under a special condition (No. 23) which Staff does not propose to modify. The County approximates that C&D debris constitutes 10 to 20 percent of the waste it receives, excluding the C&D debris that is taken in as alternative daily cover pursuant to special condition No. 30 of the landfill permit. The Town and Village, as well as SPECS, argue that the receipt of C&D debris as waste and cover material exacerbates the noxious odors emanating from the landfill, a problem Staff says can be addressed provided there is adequate collection and control of landfill gas. The measures necessary to adequately control landfill odors is a separate matter, one that will be revisited once the County's new odor control plan is submitted.

Re-Establishment of SEQRA Lead Agency and Submission of Supplemental EIS

According to the Town and Village, the Department should establish itself as lead agency for the purpose of reviewing this project under SEQRA, and require the submission of a Supplemental EIS addressing waste tonnage limits, odor, litter and all potential impacts associated with both the proposed Phase I and Phase II expansions, as well as alternatives to the Phase II expansion. As part of a coordinated SEQRA review, the County has been the lead agency to date, so the Department would have to take this role from the County to require any supplementation of the EIS. The County is unwilling to surrender lead agency status.

RULING: There is no need for the Department, as an involved agency, to take lead agency status or to require the submission of a Supplemental EIS. First, this hearing concerns only the Phase I expansion, so there is no basis now for requiring any further study with regard to the potential impacts of Phase II, or alternatives to Phase II. Even if the Phase I expansion goes forward, that does not commit the County to go forward with Phase II and it does not commit the Department to approve Phase II either.

After completing the EIS for the Phase I and II expansions, the County issued a decision with SEQRA findings (Exhibit No. 23) in March of 1998. At the Department's request, the County reviewed its SEQRA documentation and recertified its findings statement in a letter dated October 8, 2002. In that letter (Exhibit No. 24), the County confirmed that the description of the proposed action had not changed, no new alternatives to the project had become available, and no known changes had occurred in relation to baseline conditions that previously had been evaluated as the basis for determining potentially adverse impacts and mitigation measures. Finally, the County noted that since the Draft EIS was completed in 1997, a number of state and federal regulatory changes had occurred with respect to air quality, which it said would be addressed as part of the air permitting process for the expansion projects, adding that it was confident that the overall findings relative to air quality impacts and mitigation would not change. In conclusion, the County wrote that the 1998 SEQRA findings were still appropriate and valid and that a new or supplemental SEQRA review was not warranted. Department Staff, in a letter of December 3, 2002 (Exhibit No. 24-A), said it found the County's recertification letter generally acceptable, while requesting that the County address the need for an improved contingency plan for odor control.

As a basis for recertification of its March 1998 SEQRA findings, the County's consultants prepared a report dated August 2002 (Exhibit No. 25) that included a review of the environmental conditions at and around the landfill, to determine whether any significant changes had occurred which would require a Supplemental EIS. The report found no grounds for changing the conclusions previously reached in the Draft EIS and the Final EIS, and therefore no need for the preparation of a Supplemental EIS.

According to the Department's SEQRA regulations, a lead agency may require a Supplemental EIS limited to specific significant adverse environmental impacts not addressed or inadequately addressed in the initial EIS. These impacts may arise from changes proposed for the project, newly discovered information, or a change in circumstances related to the project [6 NYCRR 617.9(a)(7)(i)]. Apparently conceding that the project itself has not changed, the Town and Village argue that a Supplemental EIS should be done based on changed circumstances and newly discovered information bearing on odor and litter impacts. According to the Town and Village, these impacts were inadequately anticipated and addressed in the initial EIS, and were given short shrift in the August 2002 report.

The August 2002 report emphasized that the proposed Phase I (Cell 6) expansion would be constructed and operated in accordance with the requirements of 6 NYCRR Part 360, pursuant to controls used to mitigate potential adverse impacts. Nevertheless, in the period since

that report was written, the landfill has operated in violation of Part 360 standards, according to the Department's inspection reports. This is, admittedly, a serious concern, because if the existing facility has compliance problems, one can reasonably expect that these problems will extend to the expansion, unless there is some reconsideration of mitigation measures.

Does this reconsideration need to take the form of a Supplemental EIS? The Town and Village say it must, in order to assure public engagement. I disagree. As a practical matter, those affected by operational problems - - the Town and Village residents, and most particularly the landfill neighbors represented by SPECS - - are already part of this hearing. Odor, the most serious problem, has been identified as a potential hearing issue. Department Staff has requested a new litter control plan, with minimum substantive requirements. Within the context of this hearing, the public has had the ability to become engaged at least to the degree that would be possible in the development of a Supplemental EIS.

The decision whether to require a Supplemental EIS is discretionary, and belongs to the lead agency, which in this case is not the Department. Because the County would not voluntarily relinquish lead agency status to the Department, the Department would have to challenge the County for it. On the other hand, odor and litter control are not just SEQRA considerations, but matters under the Department's own permitting jurisdiction. They may be considered here because the Department is an involved agency with a permitting decision to make.

Suspension of Application Processing

SPECS argues in its petition that the daily offsite migration of landfill gas is making those living, working and attending school near the landfill sick. For that reason, rather than allow expansion of the landfill, SPECS contends that the Department should suspend its review and processing of the pending application and take appropriate enforcement measures against the County. SPECS calls particular attention to 6 NYCRR 621.3(f), which states that processing and review of an application may be suspended if an enforcement action has been or is commenced against the applicant for alleged violations of law related to the activity for which the permit is sought or for alleged violations of the ECL related to the facility or site. Such suspensions of processing and review may continue pending final resolution of the enforcement action.

RULING: Though this application has been referred to my office for a permit hearing, Department Staff retains discretion whether or not to take enforcement action for perceived violations of law, including violations of Part 360 operating standards and violations of the consent order that Staff and the County executed in October 2003. Repeating what I said at the issues conference, as an ALJ presiding over a permitting proceeding, I lack authority to direct Staff to initiate enforcement action. Likewise, I cannot direct the Department in its use of summary abatement powers, which can be invoked by the Commissioner to address conditions or activities that she finds, after investigation, to present an imminent danger to the health of the state's people. [See 6 NYCRR 620.2, concerning the Commissioner's summary abatement powers.]

Department Staff agrees with me on these points, and, in response to SPECS' arguments, points out that it has taken enforcement action in the past (resulting in the 2003 consent order) and will take enforcement action in the future "as conditions warrant." Staff represents that it will "keep close watch" on the landfill and that enforcement action will be taken if warranted in the professional opinion of its engineers.

Department Environmental Justice Policy

The area within a one-mile radius of the Sullivan County landfill has been designated an "environmental justice area" by Department Staff because a substantial percentage of the area's population is considered to be low-income (in other words, having an annual income that is less than the poverty threshold). On that basis, Staff directed the County to develop a public participation plan that would assure people living within that area have an opportunity to be involved in review of the expansion application. SPECS contends that, pursuant to this plan, the County has made no meaningful outreach efforts.

On March 19, 2003, the Department Commissioner issued a new policy governing environmental justice and permitting [Commissioner Policy No. 29 (CP-29), a copy of which is Exhibit No. 28]. Among other things, the policy provides guidance for incorporating environmental justice concerns into the Department's environmental permit review process and the Department's application of SEQRA. With respect to the permit review process, the policy

identifies potential environmental justice areas and enhances public participation requirements for proposed projects in those areas.

To ensure meaningful and effective public participation, the Department's environmental justice policy requires certain permit applicants - - including those seeking major modifications of certain permits - - to actively seek public participation throughout the permit review process. Where an environmental justice area has been identified, a written public participation plan is considered to be part of a complete application. At a minimum, the plan must demonstrate that the applicant will:

- - Identify stakeholders to the proposed action, including residents adjacent to the proposed action site, local elected officials, community-based organizations and community residents located in an environmental justice area;
- - Distribute and post written information on the proposed action and permit review process;
- - Hold public information meetings to keep the public informed about the proposed action and permit review process; and
- - Establish easily accessible document repositories in or near the environmental justice area to make available pertinent project information, including application materials.

In November 2003, the County provided Department Staff with a revised public participation plan, accompanied by a report summarizing its progress in implementing the plan, highlighting issues of public concern, and identifying plan components that had not yet been implemented. (A copy of the revised plan and report is Exhibit No. 29.) The County's plan indicates that it was prepared as part of its application to modify the landfill's Title V air permit, which the Department has reviewed as a major permit modification. The County represents that it prepared its public participation plan, first submitted in draft form in October 2003, based on a request made by Department Staff on September 3, 2003. Department Staff accepted the plan as part of its determination, in December of 2003, that the Phase I landfill expansion application was complete.

RULING: No issue exists about compliance with the Department's environmental justice policy, or the adequacy of the County's public participation plan. Sufficient efforts have been undertaken to reach out to and involve those people most affected by the landfill's operation in the review of the Phase I (Cell 6) expansion application, as explained in the following discussion, which addresses each of the points in SPECS' petition.

- - Opportunity to Review Title V Application

According to the public participation plan, notice of review opportunities for the application to modify the Title V air permit was to be provided formally through publication in the Department's Environmental Notice Bulletin, and informally to stakeholder groups, including SPECS, by mailings to those in the Monticello zip code and publication of notices in the Catskill Shopper, a free publication. SPECS contends that the County made no effort to

provide it with the application and supporting documents, or to inform it about Title V, the provisions of federal Clean Air Act programs that are potentially applicable to the proposed expansion, or Title V's procedures for federal Environmental Protection Agency (EPA) review, including the opportunity for citizens to petition that agency.

RULING: No issue exists with regard to public notice of the application to modify the Title V permit. Apart from the meetings discussed below which gave the public some opportunity to address this permit modification, County officials explained and responded to the public's questions about the application in a session held in the legislative chambers of the Sullivan County Government Center during the evening of February 10, 2004, immediately prior to the Department's own legislative hearing on the Phase I landfill expansion. A Department notice announcing this question and answer session and the accompanying legislative hearing appeared in the Department's Environmental Notice Bulletin on January 7, 2004, and also, at the County's expense, in the Catskill Shopper. Apart from that, the County sent letters announcing the meeting to SPECS, officials of the Town of Thompson and Village of Monticello, and every resident in the "12701" zip code, including the entire village of Monticello, thereby reaching all of the environmental justice area that had been identified by the Department.

The Department's hearing notice announcing the legislative hearing indicated that the Cell 6 expansion required a modification of the landfill's Title V air permit, that a draft modification of this permit had been prepared by Department Staff and was available for review, along with the County's application, at the Crawford Public Library in Monticello, and that the EPA has the authority to bar issuance of the Title V permit modification if it determines it is not in compliance with Part 201 of the Department's regulations. Furthermore, the notice explained the basis for the Department's tentative determination to approve the application to modify the Title V permit, while noting that the Department sought comments on the proposed permit modifications before making a final decision. The legislative public hearing provided the Department an opportunity to receive oral and written comments on the Title V air permit modification as well as all other issues bearing on the proposed Phase I expansion.

Though the County made no affirmative effort to provide SPECS with its own copy of the application and supporting documents, this is not required by the Commissioner's environmental justice policy. These materials (as identified in Exhibit No. 14) are voluminous, so rather than furnish identified stakeholders (such as SPECS) with their own copies, the County put a complete set of them on file in both the Crawford Public Library and the landfill office, so they would be reasonably accessible to those most affected by the proposal. Through regular coverage in the local press, the Department's notices announcing its legislative hearing and issues conference, and the County's own mailing announcing its question and answer session (held in conjunction with the legislative hearing), the public has been adequately apprised of the application to modify the Title V air permit and the process that governs its review. In the case of SPECS, this notice was adequate so it could prepare a petition for party status proposing various issues bearing on this aspect of the Phase I expansion, which are addressed elsewhere in these rulings.

- - Public Meetings

The report attached to the public participation plan identifies three public meetings on the proposed Phase I expansion: a public hearing on January 7, 2003, at which the public was afforded the opportunity to ask questions and offer comments on landfill-related issues; an informational meeting involving the County, SPECS, and selected legislative officials on March 18, 2003, at which the County's consultants discussed the causes of landfill gas emissions and the measures the County had and would be implementing to manage them; and another informational meeting on August 12, 2003, at which SPECS offered its views on the landfill expansion and the Department explained the permitting process, the status of the County's application, and the steps in the process that were yet to be taken. The plan itself says these meetings were held for the public to provide feedback to the County and the Department on Title-V related issues. However, according to SPECS, none of the meetings were held to apprise the public of the application to modify the Title V air permit, and two of the meetings were not even held by the County, but instead by the Department (the meeting of January 7, 2003, the primary purpose of which was to address corrective measures for groundwater contamination associated with the landfill) and the Town of Thompson (the meeting of August 12, 2003). Therefore, SPECS argues, the County did not meet an alleged commitment in its plan to hold three public meetings by November, 2003, to receive feedback on Title V related issues.

RULING: No issue exists with regard to the aforementioned meetings. Contrary to the assertion in SPECS' petition, the County did not prepare a plan that said it would hold three public meetings by November, 2003, to receive feedback on Title V related issues. The plan, which itself was completed in November 2003, said that a total of three public meetings had been held for the public to provide such feedback to the County and the Department. Those meetings are described, along with the issues that were raised in them, in the implementation report which is an appendix to the plan.

According to the Commissioner's environmental justice policy, an applicant's public participation plan must demonstrate that a permit applicant will hold public information meetings to keep the public informed about the proposed action and permit review process. These meetings are intended to be held throughout the permit review process at locations and times convenient to the project stakeholders.

Here, three meetings concerning the Phase I expansion were held before the Department even required development of the public participation plan, and before the County's permit applications were deemed complete. It was not inappropriate for the County to reference them as part of its plan implementation measures.

The County's plan, as revised in November 2003, said that apart from those meetings, the Department intended to announce a legislative public hearing on the various permits for the construction of Cell 6, including the modification of the Title V operating permit. The plan said the date and place of the hearing would be determined by the Department, and that the County

would publish a notice of the hearing in the local newspaper. Finally, the plan said that prior to the Department's legislative hearing, the County would hold a question and answer session.

The County has since fulfilled these commitments consistent with the plan as revised and approved by Department Staff. In that respect, it has demonstrated compliance with the Commissioner's policy.

- - Alleged Withholding of Application Documents

As noted above, the County put copies of its application materials on file at the Crawford Public Library in Monticello and also at the landfill office. Counsel for SPECS, Mr. Abraham, represents that on January 26, 2004, about two weeks before the Department's legislative hearing, he contacted County officials to obtain for himself a complete set of the 21 documents comprising the Cell 6 application (as identified in Exhibit No. 14), noting that this was necessary because he had just been retained by SPECS and his office is in western New York, 260 miles from the project site. He says that he faxed a Freedom of Information Law (FOIL) request to the County, asking that the documents be sent to a commercial copier to expedite processing. In follow-up calls, Mr. Abraham says he was told that the documents would not be released from the county building and that SPECS would be charged 25 cents per page for copies. According to Mr. Abraham, the County would make no promises as to when documents could be sent, so he then turned to Department Staff instead.

Mr. Abraham said in his petition that on February 2, 2004, the Department's Region 3 office agreed to allow its documents to be picked up by a commercial copier, copied, and the copies sent to Mr. Abraham by overnight courier. Mr. Abraham made several FOIL requests to the Department's Region 3 office, the most recent being on March 9, 2004. He reports that at the end of February and again on March 26, he received some of the documents he requested, at a cost to SPECS of about $400. However, in the SPECS petition, which was received here on April 5, Mr. Abraham writes that none of the items he requested on March 9 had been received and some of the responses to other requests were incomplete. Accordingly, he petitioned for an extension of time sufficient for him to receive and review all the records he requested, and the conversion of his outstanding FOIL requests to discovery demands which could then be addressed at this hearing.

On April 16, at the issues conference, Mr. Abraham said that, contrary to the County, the Department did everything it could to make the requested documents available, that he had no complaint with the Department's handling of his FOIL requests, and that to the extent any document collections were furnished incompletely it was due to the speed with which the process was undertaken. Nevertheless, he argued that it should not have been necessary for SPECS, as a stakeholder identified in the County's public participation plan, to use the Department's FOIL procedures for records necessary to meaningfully review this proposal, and that this circumvents the Department's environmental justice policy. As an appropriate remedy, Mr. Abraham requests a "technical assistance grant" from the County, which would defray SPECS' costs of representation and document discovery.

RULING: No issue is raised with regard to document access in this matter. The County's provision of the application documents in two different repositories - - the local library and the landfill office - - both of which are easily accessible to people living in the identified environmental justice area, adequately meets the requirements of the Department's environmental justice policy. To the extent this arrangement did not meet the needs of Mr. Abraham, whose office is far from Monticello, this was a hardship SPECS created for itself by retaining out-of-town counsel, and doing so at a point when the first Department hearing was just weeks away.

Whatever issues arose out of Mr. Abraham's attempts to secure his own copies of documents from the County, he writes in his petition that he abandoned those efforts when he concluded he could not obtain them before the February 10 legislative hearing. At the legislative hearing, he requested an extension of the written comment deadline, which was then set for February 20. That request was, in effect, granted by Department Staff when, on February 20, it referred this matter for an issues conference, the notice of which opened a new written comment period that extended through early April.

Mr. Abraham acknowledges that when he turned to the Department's Region 3 office with his FOIL requests, that office acted with due diligence to fulfill them. Though the documents were not furnished without charge, SPECS was not entitled to free copies. Mr. Abraham requests a technical assistance grant under a provision in the Department's environmental justice policy, which says such grants are "to assist the public in the permit review process." Consistent with the policy, the Department has drafted legislation to establish funding and criteria for such grants. However, such legislation has not yet been enacted. Furthermore, the policy intends that such grants would be funded by the state, not by permit applicants. In other words, the policy provides no basis for a requirement that the County underwrite SPECS' costs, including those for documents, legal counsel and other consultants it may want to retain.

Discovery Demand

At the issues conference on April 16, Mr. Abraham did in fact move for discovery of documents he had sought and not yet received pursuant to his FOIL requests. He said he did so in the hope that he would be able to obtain the documents at no cost. His request was directed primarily at the County, on his understanding that the documents were for the most part in the County's possession. However, Mr. Abraham said that he reserved the right to request discovery of the Department as well.

RULING: Mr. Abraham's discovery request was denied at the issues conference. Prior to an issues conference, discovery is generally limited to what is afforded under the Freedom of Information Law (FOIL), and, in the absence of extraordinary circumstances, an ALJ will not grant petitions for further discovery [6 NYCRR 624.7(a)]. Discovery normally occurs after issues have been identified, and this case presents no extraordinary circumstances warranting discovery before then. Pursuant to FOIL, there is no charge to inspect records, but copying fees

are authorized. Therefore, neither the County nor the Department are obliged to furnish free copies to SPECS or anyone else.

Generally speaking, the material Mr. Abraham was still seeking on April 16 related to the request in SPECS' petition that any new Title V air permit include a schedule of compliance addressing odors and gas emissions. The documents included reports the County would be obliged to file with the Department as well as reports of the Department's own on-site monitor. Department Staff counsel, Mr. Triebwasser, offered to do what he could so that Mr. Abraham could get a complete response to his FOIL request. Mr. Abraham also said that he would approach the County directly for the log of complaints to its odor hotline, since the Department had indicated, in response to one of his FOIL requests, that the log was not available to it.

While refusing to convert SPECS' FOIL requests to discovery demands, I said that I would entertain motions allowing SPECS more time to supplement its petition, if it could demonstrate good cause based on tardy responses to its FOIL requests. No such motions have been made, and SPECS' petition remains in the same form it had when initially filed.

Federal Environmental Justice Policy

SPECS contends that as recipients of federal grant money, the County and the Department are subject to federal environmental justice policy prohibiting conduct that has disparate impacts on low-income and minority communities. On the ground that both the federal EPA and the Army Corps of Engineers have jurisdiction over the proposed landfill expansion, SPECS says that the County should obtain these agencies' environmental justice plans and inform the local community and identifiable stakeholders about their contents.

RULING: No issue is raised. What SPECS proposes is not required by the Department's own environmental justice policy, and to the extent SPECS contends that the Department or the County has not complied with federal environmental justice requirements, its complaints should be made directly to the relevant federal agencies.

The Department's policy states that permits authorized by delegation for sources subject to the federal requirements of Prevention of Significant Deterioration (PSD) are subject to a review under federal regulations and will undergo an environmental justice analysis consistent with EPA policy and guidance. Based on emissions estimates, Department Staff determined that PSD requirements do not apply to the Phase I landfill expansion, as discussed elsewhere in these rulings. Staff also produced an Army Corps of Engineers letter (Exhibit No. 31) confirming that this expansion would not impact wetlands or waters of the United States, and therefore that no permit from that agency is required.

As a final point, SPECS is incorrect about the basis for the Department's own environmental justice review. SPECS' petition states that because of its relatively large minority population, the host community for the proposed landfill expansion has been designated an environmental justice area under the Department's environmental justice policy. In fact, the area

closest to the landfill was designated an environmental justice area due to the generally low incomes of the people living there, and for that reason alone.

Federal Title V Public Participation Requirements

According to SPECS, Title V of the federal Clean Air Act requires opportunities for public participation beyond those in the Department's permitting procedures. Federal regulation requires the Department, when noticing the proposed major modification of a Title V permit, to identify a person from whom interested persons may obtain supporting information, including all materials that are relevant to the agency's permitting decision [40 C.F.R. 70.7(h)(2)]. SPECS argues that the Department did not make this information available to the extent that it did not fulfill SPECS' FOIL requests in a timely manner prior to this permit hearing.

RULING: No issue exists. The Department's notice of complete application for the Title V air permit modification, and the notice announcing this Part 624 permit hearing, both identified a Department contact person, Lawrence Biegel of the Region 3 office in New Paltz, with whom one could arrange for review of the County's application materials and Department Staff's draft Title V air permit. These notices were prepared pursuant to and met the requirements of the Department's own regulations: 6 NYCRR 621.5(d), for notices of complete application; and 6 NYCRR 624.3(a) and (b), for notices announcing permit hearings. The Department's regulations provide the same opportunities for public participation as the federal regulations that are cited in SPECS' petition, with regard to both notice content and the amount of notice that is required (30 days) before a hearing or public comment deadline.

The public has had notice since early January of the opportunity to review all the application materials in this matter (including those for modification of the Title V air permit) as well as Department's Staff's draft Title V air permit. These materials were made available at locations in Monticello that would be convenient for the public, and also at the Department's Region 3 office.

Though the Department may not have responded to SPECS' FOIL requests as promptly as that statute anticipates, it should be noted that the first request was not made until February 2, about a month after the notice of complete application. Apart from the Title V permit modification application, SPECS sought a wide range of documents not relevant to the application or Staff's draft permit, though bearing generally on the facility's past and present operations. It was some of these other documents that SPECS claimed it had not yet received when the issues conference started.

Allowing that some of the documents could be relevant to issues proposed in SPECS' petition, I left the door open for SPECS to supplement its petition once its requests were completely satisfied, as noted above. This was meant to remedy any prejudice SPECS might demonstrate due to failure by the Department to provide requested information in a timely manner.

Notice of Draft Part 360 Permit

At the May 10 session of the issues conference, Mr. Abraham requested an opportunity to supplement SPECS' petition, to address Department Staff's proposed modifications of the landfill's Part 360 solid waste management facility permit. The first draft of these modifications was completed and mailed to the County and Mr. Abraham, among others, on March 29, 2004, shortly before the April 9 filing deadline for party status petitions. A revised draft of the litter control permit condition was presented on April 16, the second day of the issues conference.

The permit hearing notice, dated March 5, noted that Department Staff had developed modified SPDES and Title V air permits, but added that Staff had not yet made any determination with regard to the proposed modification of the solid waste management facility permit. SPECS argues that because Staff's modification of the Part 360 permit was never publicly noticed, the conference record should be left open, allowing for the supplementation of its petition.

RULING: Though the conference record was not held open, SPECS was advised that I would entertain applications to supplement its petition, provided it could show "good cause" why any new claim could not have been raised before the filing deadline which was set in the hearing notice. In the time since the conference concluded, no such application has been made.

On May 10, the last conference date, SPECS counsel, Mr. Abraham, said that nobody had any idea that the Part 360 permit would be modified until the conference began, which he said was "not right." In fact, Staff's initial draft of its modifications was released, and a copy of the draft mailed to Mr. Abraham, on March 29, two weeks before the first conference date. This was done to eliminate surprise and avoid requests for more time.

It is true that the conference notice did not announce availability of draft modifications to the Part 360 permit. That is because none were available to announce; when the notice was issued, Staff was still reviewing public comments and developing its position. This is not unusual. According to Department policy, draft permit conditions should be available for public review by the time of publication of the notice of hearing. However, if Staff withholds them until the start of the issues conference, that also is consistent with policy. [See Commissioner's Organization and Delegation Memorandum #85-06, "Development and Use of Permit Conditions in Permit Hearings," February 11, 1985]. As the policy notes, exceptions exist in the case of certain federally delegated permit programs, such as the SPDES, where the development and availability of draft permit conditions is required as part of an initial completeness determination. The different requirements of various permitting programs explains why Staff's proposed modifications of the SPDES and Title V air permits were drafted and noticed before its proposed modifications of the Part 360 solid waste management facility permit were released.

Segmentation and Fragmentation

SPECS contends that review of the landfill's expansion has been impermissibly "segmented" under SEQRA and impermissibly "fragmented" under Title V of the federal Clean Air Act. According to SPECS, the impacts of the proposed Phase I and Phase II expansions must be reviewed together on the understandings that the County has committed to a future course of action that includes both phases, and that Phase II is an integral part of the Phase I application now under review in this hearing.

RULING: No issue exists with regard to either segmentation under SEQRA or fragmentation under the federal Clean Air Act.

The Department's SEQRA regulations define "segmentation" as the division of the environmental review of an action such that various activities or stages are addressed as though they were independent, unrelated activities, needing individual determinations of significance [6 NYCRR 617.2(ag)]. Segmentation is frowned upon since it frustrates SEQRA's intent that projects be viewed in their entirety to determine their potential for significant environmental impacts.

Although this permit hearing concerns only Phase I of the landfill expansion, Phase I and Phase II were considered together in the County's SEQRA review, which is now finished. The County determined that the two-phased expansion of its landfill would have a significant effect on the environment; accordingly, it issued a Positive Declaration on April 17, 1997. A Draft EIS (dated December 1997) and a Final EIS (dated March 1998) have already been prepared. (They are Exhibits No. 21 and 22, respectively.)

Because the County, as lead agency, did not review Phase I in isolation from Phase II, it did not segment its SEQRA review. Even if it had, the issue is beyond the Department's jurisdiction, as the County points out. According to the Department's permit hearing regulations, when an agency other than the Department serves as lead agency, and that lead agency has required the preparation of a Draft EIS, no issue that is based solely on compliance with SEQRA and not otherwise subject to the Department's jurisdiction will be considered, with limited exceptions that are not applicable here [6 NYCRR 624.4(b)(6)(ii)(b)]. At the time the County performed its SEQRA review, the Department did not object to the two phases being considered together; in fact, at the issues conference, Staff said that it agreed with the County's approach.

The issue of segmentation pertains to SEQRA review and should not be confused with the separate review the Department performs in relation to its own permitting requirements. As Department Staff argues, the County, having done a non-segmented SEQRA review, can seek permits for the expansion one phase at a time, as it is doing in this instance. That actually makes sense in this case, because the County may still choose not to construct Phase II at all, regardless of its present intent.

Like segmentation under SEQRA, fragmentation under federal clean air regulations may involve the division of a project into multiple parts for the purpose of avoiding certain

requirements. [See 40 C.F.R. 63.4(c), addressing fragmentation for the purpose of avoiding new source review.] According to SPECS, Department Staff performed a fragmented review of air emissions, limiting that review to Phase I while failing to address increased emissions from Phase II. As a result, SPECS argues, Staff's draft Title V permit cannot be issued, as it would allow the County to circumvent a more rigorous preconstruction review that, in SPECS' judgment, would be required if both phases of the expansion had been looked at together.

At the issues conference, Robert Stanton, the Department's Region 3 air pollution engineer, said he agreed with SPECS that one cannot fragment a project to avoid Prevention of Significant Deterioration (PSD) regulations, which SPECS argues apply in this case. According to Mr. Stanton, the Department has looked at the Phase II emissions, and concluded that the landfill, with both the Phase I and Phase II expansions, would still fall below the emissions threshold for PSD review. For that reason, he said, it would not be fragmentation to consider each phase separately.

Looking to the claim as stated in its petition, SPECS is correct that the draft Title V permit does not address Phase II emissions. That is because the permit addresses only the Phase I (Cell 6) expansion. The Phase II expansion is not the subject of this hearing. It is an entirely separate project which is discussed in a separate permit application that has not yet been deemed complete by the Department. In fact, the Phase II expansion may never go forward, even if the Phase I expansion does. SPECS' claims about Phase II air emissions are premature and not relevant to this hearing. Its claims about air emissions more generally, which relate to factors used for emission estimates, are discussed below.

Clean Air Act Issues

SPECS seeks to raise various issues under the federal Clean Air Act, the key ones being whether the regulatory programs for New Source Review (NSR) and Prevention of Significant Deterioration (PSD) apply in this case. SPECS argues that these programs do apply, and that until their requirements are met, the Department cannot approve the modification of the Title V air permit, which addresses the collection and treatment of landfill gases.

The County has supplied an analysis demonstrating that these programs do not apply, and that analysis has been adopted by Department Staff. In summary, the County argues that PSD does not apply to the proposed Phase I expansion because the landfill does not meet the emissions threshold that would qualify it as a "major" facility. The County contends that NSR also does not apply because even with the emissions increase associated with the Phase I expansion, the landfill is not "major" from an emissions point of view. The County's full analysis is contained in its application for modification of its Title V operating permit, which is Application Document No. 15. [See Exhibit No. 14, which is a list of all the application documents that were made available for public review.] At the issues conference on May 10, 2004, the key points of that analysis were reviewed on the record with County consultants Joseph Barbagallo and Mary Hewett Daly.

As discussed further below, SPECS challenges the County's emissions estimates, which it says have been used to circumvent the requirements of the PSD and NSR programs. More particularly, SPECS challenges the County's use of an emissions factor for non-methane organic compounds (NMOCs) which it says understates the concentration of NMOCs in the landfill gas. According to SPECS, the County also erred by estimating emissions only for the material received as waste, while omitting daily and intermediate cover. Based on its review of County records supplied pursuant to a FOIL request, SPECS reports that in 2003, the landfill was receiving alternative daily cover at 45 percent of the waste disposal rate.

The Draft EIS reports that in 1995, the landfill began to accept "auto-fluff" - - pulverized auto parts and upholstery - - as daily cover. SPECS argues that because this material has a great potential to hold moisture - - a fact acknowledged in the EIS - - it raises the gas generation rate, as does the moist sewage sludge that is received as waste.

On the basis that the County's emissions estimates are flawed, SPECS says potential emissions of PSD-regulated pollutants must be recalculated upward, which could result in the landfill being classified as a "major" source under the PSD program, triggering more rigorous permitting requirements.

As part of the Phase I (Cell 6) application materials, the County's consultants, Malcolm Pirnie, submitted an application to modify the landfill's Title V air permit. That document (Application Document No. 15) acknowledges that from an air permitting perspective, in order to operate Cell 6, the County must demonstrate that PSD and NSR do not apply or have been sufficiently addressed.

PSD requirements pertain to major stationary sources located in areas which are in attainment of national ambient air quality standards (NAAQS) for specified pollutants. The County landfill is in an area designated as attainment for ozone and other regulated pollutants. However, because it is in the Northeast Ozone Transport Region, volatile organic compounds (VOCs) and nitrogen oxides (NO_x) - - both officially recognized ozone precursors - - are treated as non-attainment pollutants and are subject to NSR rather than PSD.

The regulations for PSD (40 C.F.R. 52.21) apply to proposed modifications that meet two applicability criteria. First, the modification must be to a major source, defined as any "category" source that has the potential to emit 100 tons per year (tpy) or more of an attainment-regulated pollutant, or a non-category source that has the potential to emit at least 250 tpy of an attainment-regulated pollutant. Second, net emissions of an attainment-regulated pollutant must be expected to increase significantly, based on thresholds that are set for each pollutant. If both criteria are met, the project is subject to PSD, and a special PSD permit must be issued before construction of the modification can begin. This preconstruction application must contain, for each affected pollutant:

- - a Best Available Control Technology (BACT) analysis (discussing various alternatives to reduce emissions),

- - an air quality analysis (generally involving dispersion modeling of proposed emissions, to demonstrate that there will be no exceedance of a NAAQS or an allowable PSD increment), and

- - an analysis of other environmental impacts.

Landfills are not one of 28 identified category sources, so to be a major source the Sullivan County landfill must have the potential to emit at least 250 tpy of an attainment-regulated pollutant. According to the County's analysis, even with the addition of Cell 6, the maximum emissions of all such pollutants would be well below the 250 tpy threshold, the highest potential emissions being for carbon monoxide (CO), which peaks at 82 tpy at the end of the expansion. [See the emission estimates in Table 3-1 of Application Document No. 15.] For that reason, the County submits, the landfill would remain a minor source, and a netting analysis is not necessary to determine that PSD does not apply.

Due to the landfill's location in the Northeast Ozone Transport Region, application of the state's NSR regulations (at 6 NYCRR Subpart 231-2) must be considered with regard to expected changes in VOCs and NO_x emissions. Emissions increases in attainment portions of the ozone transport region are reviewed pursuant to 6 NYCRR 231-2.2(a) to determine NSR applicability. This section states that any emission unit which emits any nonattainment contaminant is subject to Subpart 231-2 if, at an existing non-major facility, it is part of a proposed source project which, by itself, has a project emission potential of any such nonattainment contaminant equal to or greater than the corresponding major facility size threshold. For emissions of VOC and NO_x in the Northeast Transport Region, the major facility size thresholds are 50 and 100 tpy, respectively.

Assuming NSR applied to this project, the County would have to apply for a special preconstruction permit incorporating a Lowest Achievable Emission Rate (LAER) analysis for each regulated non-attainment pollutant. The County maintains that NSR does not apply because its analysis demonstrates that emissions from the entire landfill, even after the expansion and after waste has filled the expansion area, would remain well below the 50 and 100 tpy criteria for VOCs and NO_x. [See Table 3-2 of Application Document No. 15, projecting total facility VOC emissions as less than 4 tpy; and Table 3-1 of the same document, projecting NO_x emissions from the landfill flare as less than 5 tpy.]

According to the County, all that it needs in this case is a minor modification of its Title V facility permit, which is governed by 6 NYCRR Subpart 201-6 and administered by the Department with EPA approval. Pursuant to 6 NYCRR 201-6.7(c), minor permit modification procedures may be used for those modifications that do not exceed certain criteria which are identified in that regulation. Each of those five criteria are addressed in the County's application, including the fifth one, which addresses emissions directly. According to that provision, minor permit modification procedures may not be used for modifications under any provision of Title I of the Clean Air Act, including modifications resulting in significant net emission increases as defined and regulated under 6 NYCRR Part 231 (NSR) or the federal PSD program regulations (40 C.F.R. 52.21). [See 6 NYCRR 201-6.7(c)(5).]

The County contends that the proposed Phase I expansion would not result in a significant net emissions increase, noting that for VOCs and NO_x, which are regulated under NSR, the significant net emissions increase threshold is 40 tpy for both pollutants, according to Table 2 at 6 NYCRR 231-2.12. According to the County, the proposed addition of Cell 6 comprises a short-term expansion of only about 8 percent to the footprint of the current County landfill, or a 4 percent expansion when one includes the inactive former Village and County landfills. As a result, the County claims, the addition would result in a very small emissions increase, well below applicable thresholds.

The County asserts that the waste acceptance rate, the factor that most greatly affects emissions, would not increase once Cell 6 begins operating because the landfill is constrained by terms of its solid waste management facility permit concerning the amount of waste it can bring in on an annual basis. To be conservative in its emission calculations, and thereby ensure that maximum emission rates were estimated, the County assumed waste receipt at a rate of 230,500 tons per year, which is actually greater than the 200,000 ton annual limit that is imposed in Staff's draft permit, but equal to the rate achieved in the past, based on applicable weekly tonnage limits.

Department Staff agrees fully with the analysis set out in the County's application to modify its Title V operating permit. Its position was confirmed at the issues conference by Mr. Stanton, the regional air engineer. Staff agrees that the PSD and NSR programs do not apply and that, with reference to the Clean Air Act, what is proposed requires only a minor modification of the Title V permit under which the landfill operates. However, Staff says that, in terms of public interest, the County's application has been treated as a major modification, allowing for public notice and an opportunity for public participation. Had Staff treated the modification as a minor one, the changes could have been made administratively, without public notice, according to Mr. Stanton.

- - Emissions Factor

As part of its claim that the County has incorrectly calculated the landfill's potential emissions, SPECS challenges the emissions factor that the County used to estimate the concentration of non-methane organic compounds (NMOCs) in the landfill gas. According to EPA's Compilation of Air Emission Factors (known as AP-42, a copy of which is Exhibit No. 33), NMOCs, though only a small fraction of the gas, contain volatile organic compounds (VOCs), various organic hazardous air pollutants (HAPs), greenhouse gases, and compounds associated with stratospheric ozone depletion. The NMOC concentration in the landfill gas is a function of the types of refuse in the landfill and the extent of the reactions that produce various compounds from the anaerobic decomposition of refuse. Most of the NMOC emissions result from the volatilization of organic compounds contained in the landfilled waste, and small amounts may be created by biological processes and chemical reactions within the landfill.

NMOC concentrations vary over a wide range among landfills, which is why the AP-42 document states that for emission inventory purposes, site-specific information should be taken into account. Where, as in this case, no site-specific information exists, AP-42 provides that "a value of 2,420 parts per million by volume (ppmv) as hexane is suggested for landfills known to have co-disposal of municipal solid waste and non-residential waste. If the landfill is known to contain only municipal solid waste or have very little organic commercial/industrial wastes, then a total NMOC value of 595 ppmv as hexane should be used." [Exhibit No. 33, page 2.4-4.]

As part of its application to modify its Title V air permit, the County used the Landfill Gas Emissions Model (LandGEM) for estimating emissions of various air pollutants. As a model parameter, the County used the 595 ppmv value for total NMOCs. [See Application Document No. 15, Appendix 2, LandGEM Model Results.] SPECS argues that this is incorrect, and that the higher value of 2,420 ppmv should have been used instead. SPECS offers two reasons for this. First, it notes, the landfill's gas collection and control system encompasses not only the current facility, but also the old, now-closed county and village landfills. According to SPECS, one may presume from the age of the old village landfill (which operated from 1963 to 1982) that it accepted substantial quantities of non-residential wastes, including hazardous wastes, before it was illegal to do so.

As a second basis for the 2,420 ppmv value, SPECS argues that the existing, actively-operating landfill is, by itself, a co-disposal facility because it is permitted to accept substantial volumes of non-residential waste. As SPECS points out, under its current Part 360 permit, the landfill is authorized to accept not only municipal solid waste, but also non-hazardous commercial wastes, non-hazardous industrial wastes, ash wastes, and sewage sludge with at least 20 percent solids. Also, the landfill may use, as daily cover, uncontaminated soil, C&D screenings/residues from C&D processing facilities, ash waste from the Dutchess County Resource Recovery Agency, and non-hazardous petroleum-contaminated soils. [See special conditions No. 23, 24(f) and 30 of the Part 360 permit, which is Exhibit No. 15.]

In summary, SPECS argues that the landfill must be considered a co-disposal facility because it has accepted and continues to accept more than residential waste, and because non-residential waste is a substantial portion of the total volume of waste and cover material that are currently received. For such a facility, SPECS contends, the default value for calculating NMOC emissions should be 2,420 ppmv, not the 595 ppmv value used in the County's emissions estimates and accepted by the Department as a basis for its draft Title V air permit.

Also, SPECS claims that for NSR applicability, VOC emissions should be considered 85 percent by weight of the uncontrolled NMOCs (2,060 ppmv as hexane), not 39 percent (235 ppmv) as assumed in the County's emission estimates (as shown in Application Document No. 15, Table 3-2.) SPECS' preferred values for NMOC concentration and VOC content are set out in Table 2.4-2 of the AP-42 document (Exhibit No. 33), as appropriate for co-disposal landfills, and the County's values are identified as appropriate at landfills where co-disposal does not occur or is unknown. AP-42 states that extreme caution should be exercised in the use of the default VOC weight fractions as they are heavily influenced by the ethane content of the landfill gas, which varies over a wide range among landfills.

As a preliminary matter, the County and Department Staff object to SPECS' claims about emission factors and estimates, because they are not supported by an offer of expert testimony. SPECS has identified no proposed witnesses - - expert or fact - - with regard to any of its proposed issues, and its petition consists entirely of legal counsel's arguments, with citations to supporting documents. On the issue of emissions estimation, those arguments turn on the meaning of the term "co-disposal," and whether the County landfill should be considered a co-disposal facility.

The County acknowledges that it collects and flares gas from the old village landfill as well as from the former and current county landfills. However, it says that, due to the age of the waste in the old village landfill, that waste contributes very little to the emissions, particularly in comparison to waste dumped at the current landfill within the last five years. Also, the County says that, in the absence of evidence, one cannot infer from the age of the village landfill that it accepted hazardous waste. According to Department Staff, the old village landfill and the former county landfill were de-listed from the state's registry of inactive hazardous waste sites in 1992 or 1993, as there was no documentation that they had ever received hazardous waste. Likewise, the current landfill has never been authorized to receive regulated hazardous waste, and there is no evidence that such waste has been received there.

The County and Department Staff define "co-disposal" as the disposal of hazardous waste as well as other kinds of waste in a landfill, a practice that is no longer allowed in this country. That is how co-disposal is defined in the LandGEM software model the County used for estimating landfill gas emissions. According to EPA's current user's manual for that model (Exhibit No. 34), air pollutant concentrations in the landfill gas are slightly higher for landfills that have been used for disposal of hazardous waste than for those that have not. For that reason, the manual states, there is a choice in the model between "Codisposal" (i.e., landfills used for disposal of hazardous and non-hazardous waste) and "No Codisposal" (i.e., landfills that have

not been used for disposal of hazardous waste). The guide then states that landfills that have hazardous waste co-disposal or Superfund sites should use the co-disposal option for estimating air pollutant emissions, and that users of the model who do not know whether a landfill has ever been used for hazardous waste should use the co-disposal option. Finally, addressing NMOC modeling, the guide states that when using AP-42 defaults, as one would to estimate actual emissions in the absence of site-specific data, the default NMOC concentration as hexane for co-disposal is 2,420 ppmv, and for no co-disposal is 595 ppmv. [See Exhibit No. 34, pages 1-6 and 1-7, as well as the glossary definition of co-disposal at page xii.]

EPA correspondence produced by Department Staff (Exhibit No. 35) provides additional support for Staff's and the County's construction of the term "co-disposal." The correspondence, from an EPA environmental engineer to an engineering consulting firm, was generated in relation to another landfill application now pending before the Department, and was written with the intent of providing assistance on AP-42 emission factors. Two basic points are confirmed, the first being that the co-disposal term in AP-42 refers to conditions that were typical for Superfund landfills where it was common practice to co-dispose hazardous waste with municipal solid waste. The correspondence also confirms that with respect to AP-42 emission factors, the lower ones (i.e, 595 ppmv for NMOCs and 235 ppmv for VOCs, which the County used) should be employed for landfills that do not accept (i.e., co-dispose) hazardous wastes.

According to the County and Department Staff, the landfill is not a co-disposal facility because it and the earlier landfills from which it also collects gas have never been used for hazardous waste disposal. The County further points out that none of its alternative daily cover is hazardous, nor for that matter is it even considered waste once it has been used for its intended beneficial purpose. [See special condition No. 30 of the current landfill permit, Exhibit No. 15, which states that all approved alternative daily cover materials remain a waste until beneficially used.]

RULING: No issue is raised with regard to the County's emission estimates, including the emission factors which were employed to calculate emissions of NMOCs and VOCs. The County's use of the Landfill Gas Emissions Model (LandGEM) is consistent with the information from the user's guide that was produced at the issues conference, as well as with EPA correspondence meant to provide assistance concerning emission factors in the agency's AP-42 document. In particular, the County's construction of the word "co-disposal" is consistent with the definition of that term in the user guide glossary.

Though SPECS' petition states that the old village landfill accepted substantial quantities of non-residential wastes, including hazardous wastes, before it was illegal to do so, there is no offer of factual proof to substantiate this claim. In the petition, the claim is asserted on the basis of unspecified "information and belief," which is insufficient to raise an issue of fact.

More important, there is no offer of expert testimony to support SPECS' arguments about the misuse of emission factors and, therefore, the underestimation of landfill emissions. This is particularly troubling in a subject area where so much depends on the proper application of

engineering judgment. Engineers for both the County and Department Staff spoke at the issues conference on behalf of the County's emissions calculations. SPECS does not have an engineer of its own; it did not appear with one at the conference and did not identify one as a proposed witness, which indicates that any trial on its issues would be a one-sided affair.

SPECS intends to establish that the landfill's emissions have been improperly calculated, opening the possibility that, with correct calculations, the landfill may already be a major source, or may become a major source under the proposed expansion. As noted above, whether the landfill is or may be a major source affects whether certain regulatory programs - - PSD and NSR - - apply here. SPECS suggests but does not demonstrate that, using proper emission factors, these programs do in fact apply in this case. That would require some modeling of its own - -substituting SPECS' values for the County's - - and such modeling has not been performed.

Looking to the Department's standards for adjudicable issues, where, as here, the Department Staff has reviewed an application and finds that a component of the applicant's project, as proposed or as conditioned by the draft permits, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing any issue related to that component to demonstrate that it is both substantive and significant [6 NYCRR 624.4(c)(4)]. An issue is significant only 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 in addition to those proposed in the draft permit [6 NYCRR 624.4(c)(3)].

In its petition, SPECS argues correctly that if the landfill, on the basis of emissions, may be considered a major source, the draft Title V permit must be revised to include conditions reflecting that status. On the other hand, the petition contains no factual offer, or even argument for that matter, showing how, with revised emission factors, major source thresholds would be crossed. For that reason, no potential to affect the permitting decision has been demonstrated, and there is no showing that the issues actually proposed in the petition are significant.

Some other points are worth mentioning in relation to SPECS' petition:

- - EPA's AP-42 document, on which SPECS relies, and EPA's user's guide for the County's landfill gas emissions model use the term co-disposal in different contexts. In the AP-42 document, the term applies to the co-disposal of municipal solid waste and non-residential waste, and in the user's guide, it applies to the co-disposal of hazardous and non-hazardous waste. Based on the conference record, the reasons for this discrepancy are not entirely clear, though the EPA memorandum (Exhibit No. 35) suggests the proper usage by explaining that the co-disposal term in AP-42 is meant for old Superfund landfills where it was a common practice, now prohibited by law, to co-dispose hazardous waste with non-hazardous commercial, residential and industrial waste. This tends to support the County's and Department Staff's common interpretation of co-disposal for the purpose of emissions calculations. As the County points out, its landfill does not accept regulated hazardous waste, even as cover, and the wastes it

does accept are consistent with those waste types potentially accepted by municipal solid waste landfills, according to page 2.4-1 of the AP-42, as well as waste types that meet Part 360's definition of municipal solid waste, which according to 6 NYCRR 360-1.2(b)(106), means the "combined household, commercial and institutional waste materials generated in a given area."

- - At the issues conference, SPECS counsel, Mr. Abraham, argued that the old Village of Monticello landfill should be considered a co-disposal facility, based on his experience in another landfill permitting matter, this one involving the Chaffee landfill in western New York. In that matter, he said, EPA ordered the Department to recalculate emissions based on the presumption of co-disposal status, which he said was determined based on the age of the landfill and the fact that it had once been listed on the state's registry of inactive hazardous waste sites, though it was later de-listed. Mr. Abraham seeks to analogize the Chaffee and Monticello village landfills, yet he did not produce the order to which he made reference, so it is impossible to determine its relevance. Also, as Department Staff points out, the Monticello landfill, along with others from its era, was included on the registry in the first instance out of an excess of caution, until it could be determined whether the landfill actually contained hazardous waste, and not because the receipt of such waste had been confirmed.

- - As I noted at the issues conference, the Commissioner recently issued a decision in another matter involving the application of the Oneida-Herkimer Solid Waste Management Authority to build a landfill in Ava, New York. In her decision of March 19, 2004, approving that landfill proposal, the Commissioner adopted my hearing report addressing an air issue which also involved emissions estimation and the proper use of EPA's AP-42 default values. That hearing report said that these values were derived from analyses made on average 15 years ago, from older facilities with higher emissions than those one would expect from a modern landfill operation. In particular, it was noted that data obtained from nine municipal solid waste landfills operating in New York indicated that actual measured NMOCs were all less than 500 ppm, and on average 262 ppm, which is nearly 90 percent below the default value proposed in this case by SPECS. (Hearing report, page 152.)

The hearing report went on to cite a January 2001 report of the Waste Industry Air Coalition comparing recent landfill gas analyses with AP-42 values. In that report, the authors attributed a decline in landfill gas constituent levels over time to a variety of factors including:

- - Improvement of analytical methodologies that better identify and quantify trace constituents;

- - Federal introduction of waste management regulations that strictly regulate hazardous waste disposal;

- - Federal introduction of municipal solid waste landfill regulations that detect and prevent disposal of unacceptable hazardous wastes; and

- - Industry transition to processes and products requiring less or no hazardous materials. (Hearing report, pages 158 to 159.)

This information, though drawn from a different matter, tends to suggest that the NMOC concentration value used by the County (595 ppm) is more in line with what should be expected

at the County landfill than the much higher value proposed by SPECS. A portion of the Coalition report, titled "The Time is Now for Changes to the AP-42 Section on Landfills," was received in this matter as Exhibit No. 36. In an effort to bring about changes to AP-42, the Coalition compiled a database of recent analytical data on NMOCs in landfill gas. Based on its data, the Coalition concluded that the high AP-42 default concentration for co-disposal sites (2,420 ppmv) is not appropriate, given AP-42's broad definition of co-disposal sites, which includes municipal solid waste landfills that take in non-residential wastes, as most such landfills do. The Coalition recommended that the AP-42 default value for municipal solid waste landfills be replaced with the average value detected in its study (454 ppmv), and that the AP-42 default concentration for co-disposal sites either be eliminated, or the definition of co-disposal be revised to include only sites that accepted RCRA Subtitle C hazardous waste. (Exhibit No. 36, page 45.)
EPA has not made these changes, though, according to the County's consultants, that agency is making an effort to collect its own data to see whether the data developed by the Coalition can be substantiated.

- - Maximum Design Capacity

A separate sub-issue with regard to the County's emissions calculations concerns the appropriate value to be used for the landfill's maximum design capacity. The County's calculations are based on actual waste acceptance rates for past years of the landfill's operation, and 230,500 tons per year for the years 2004, 2005 and 2006, the projected time frame of the Phase I expansion. The 230,500 value represents the maximum amount of waste the landfill can receive in a year, figured on the basis of weekly tonnage limits in the existing landfill permit. As noted above, under terms of Staff's draft permit, the County has since accepted a 200,000 ton per year cap on waste that it accepts for disposal, which means that for the purpose of its emissions calculations, anticipated waste receipts have been moderately overstated.

In its petition, SPECS argues that the County incorrectly calculated the landfill's maximum design capacity because it defined waste in a way that excludes the significant amounts of alternative daily cover material that also comes into the facility. The record includes the landfill's annual reports that were filed with the Department for the years 2001 and 2003 (Exhibits No. 40 and 41, respectively). In 2001, the landfill disposed of about 208,000 tons of solid waste and took in an additional 87,000 tons of alternative daily cover consisting of "MSW/Wood Ash" (about 57,000 tons) and "C&D screenings" (about 30,000 tons). In 2003, the landfill disposed of about 205,000 tons of solid waste and took in an additional 102,000 tons of alternative daily cover again consisting of "MSW/Wood Ash" (about 45,000 tons), "C&D screenings" (about 56,000 tons) and some small amount of filter bed sands.

SPECS says that to properly calculate maximum design capacity, one must add the acceptance rate for alternative daily cover materials to the maximum permitted waste acceptance rate. The County disagrees, arguing that alternative daily cover does not fall within the definition of solid waste. The dispute turns on a definition in the federal regulations governing standards of performance for municipal solid waste landfills. Those regulations define "design

capacity" as "the maximum amount of solid waste a landfill can accept, as indicated in terms of volume or mass in the most recent permit issued by the state, local, or Tribal agency responsible for regulating the landfill, plus any in-place waste not accounted for in the most recent permit." [40 C.F.R. 60.751]. According to SPECS counsel, Mr. Abraham, the "in-place waste not accounted for in the most recent permit" includes alternative daily cover, which he says is not counted as waste under New York's regulations but is waste for purposes of the Clean Air Act. According to the County, it does not include cover, and means only that waste which has been taken in beyond a landfill's permitted capacity.

In a footnote to its petition, SPECS cites a letter interpreting this regulation, which was not provided as a conference exhibit but which I have subsequently located using the web-site citation that was provided. The letter, dated August 8, 2001, is from staff of California's Bay Area Air Quality Management District to Allied Waste Industries, concerning a draft permit for the Keller Canyon Landfill. In the letter, William deBoisblanc, director of the agency's permit services division, writes that in the draft permit, the term "Max. Design Capacity" was intended to be consistent with the federal definition of design capacity at 40 C.F.R. 60.751. The letter provides that the maximum design capacity was used to establish the applicability of various sections of Subpart WWW of the regulations (which govern performance standards for municipal solid waste landfills) . The letter then states that according to EPA, this design capacity "should include all solid waste and all cover materials except final cover materials." Finally, the letter provides, "Non-degradable wastes and cover materials may be excluded from the total mass for the purposes of NMOC emission rate calculations, but not from design capacity calculations."

Based on the County's own records which SPECS retrieved by a FOIL request to the Department, SPECS argues that the landfill's rate for acceptance of alternative daily cover materials should be estimated at 45 percent of the waste disposal rate. According to SPECS, this would add 1.23 million megagrams (Mg) of design capacity to the 2.74 million Mg design capacity calculated by the County on the basis of waste alone, bringing the maximum design capacity of the landfill to 3.97 million Mg. SPECS claims that since the maximum design capacity is greater than indicated in the draft air permit's facility description, emissions of regulated pollutants must be recalculated upward for both the existing landfill and the proposed expansion, to account for the receipt of alternative daily cover and the potential of that material to be toxic and chemically reactive.

At the issues conference, SPECS pointed out that in other permits issued or drafted by the Department, the amount of waste which can be used as alternative daily cover cannot exceed 20 percent of the annual waste receipts, and that any alternative daily cover in excess of 20 percent of the annual waste receipts must be counted as waste, even if it used as daily cover. [See Exhibit No. 39, draft permit for Integrated Waste Systems' proposed Farmersville landfill, special condition No. 44; and Exhibit No. 38, permit for the C.I.D. landfill in Chaffee, special condition No. 21.] These permits, SPECS argues, demonstrate that the Department characterizes alternative daily cover as a waste, and that the Department, at least in Region 9, has a 20 percent rule of thumb for the amount of cover material that a landfill needs. SPECS then argues that,

based on the County's own reports, its landfill far exceeds this threshold, implying that it takes in more cover than is environmentally necessary.

In summary, SPECS contends that the Clean Air Act did not contemplate the creation of a wide-open loophole for a landfill to take in waste under the guise of alternative daily cover, but beyond what is needed for cover purposes, and then not count that excess material in its emissions estimations.

RULING: No issue exists with regard to the County's determination of the landfill's maximum design capacity. The County's distinction between waste (which is considered in this determination) and cover (which is not) is consistent with the instructions in the user's manual for the LandGEM model which the County used to estimate emissions. The manual states that, to estimate emissions from a landfill, one needs to know, among other factors, the amount of refuse in place in the landfill, as well as the landfill's design capacity, which is defined in a glossary as the total amount of refuse that can be disposed of in the landfill. As the manual indicates, it is the anaerobic decomposition of this refuse that causes emissions of landfill gas.

The Department's regulations require that a minimum of six inches of compacted cover material be applied on all exposed surfaces of solid waste at the close of each operating day to control vectors, fires, odors, blowing litter and scavenging [6 NYCRR 360-2.17(c)], thereby erecting a distinction between waste (the decomposition of which causes odors and other problems) and cover (which is meant to address these problems). Cover material can be "soil or other suitable material, or a combination of same," which is acceptable to the Department. [6 NYCRR 360-1.2(b)(46).] Materials other than uncontaminated soil fall under the heading of "alternative daily cover" and may be used if approved by the Department, upon a demonstration that they will adequately control vectors, fires, odors, blowing litter and scavenging "without presenting a threat to human health and the environment" [6 NYCRR 360-2.17(c)]. In this case, the current landfill permit - - as well as the draft permit for the Phase I expansion - - allow for the use of the following alternative daily cover materials:

- - C&D screenings/residues from certain specified C&D processing facilities, in accordance with facility-specific Department approvals;

- - Ash waste from the Dutchess County Resource Recovery Agency, in accordance with a 1994 Department approval, and

- - Non-hazardous petroleum contaminated soils, as approved by the Department in 1999. [See Exhibit No. 15, Special Condition No. 30, and the revision to that condition presented in Exhibit No. 18.]

The County may use these materials as cover provided it complies with Department-approved procedures and testing requirements, and must cease using them immediately if the Department determines that they are not meeting the requirements of Part 360 or are resulting in other problems at the facility. [Exhibit No. 15, Special Condition No. 30.] All approved alternative daily cover materials remain a waste until beneficially used, according to the terms of the permit and consistent with the Department's regulations, which provide that "solid wastes which are approved in advance, in writing, by the department for use as daily cover material" are

not considered solid waste for the purposes of Part 360 when used for that purpose [6 NYCRR 360-1.15(b)(10)].

Because of how the regulations distinguish cover from waste, it does not make sense to equate the two for the purpose of emissions calculations, at least in the absence of scientific evidence. An offer of such evidence is missing from SPECS' petition. The only support SPECS claims for its position is an interpretation of 40 CFR 60.751, which by its plain language refers only to "waste" and contains no reference to cover whatsoever. The understanding of that regulation by the County and Department Staff - - that "in-place waste not accounted for in the most recent permit" refers to waste (not cover) that was received in excess of permit limits - - is consistent with an understanding that, from an emissions point of view, what matters is the amount of biodegradable refuse (or waste) that is actually present. Even the letter cited by SPECS addresses this point, where it states, "Non-degradable wastes and cover materials may be excluded from the total mass for the purposes of NMOC emission rate calculations, but not from design capacity calculations."

Finally, certain distinctions should be noted between the two Department permits cited by SPECS - - the existing permit for the C.I.D. Landfill in Chaffee, and the draft permit for the Integrated Waste Systems landfill in Farmersville - - and the current and draft permits for the Sullivan County landfill. These other permits allow for the possibility that, in addition to soil, the Department may yet approve on a case-by-case basis, the use of unspecified wastes and contaminated soils as alternative daily cover, whereas the County's permits identify specific alternative daily covers that have already been approved. Contrary to SPECS' assertion, these other permits also confirm the distinction between waste and cover, noting that alternative daily cover is not considered waste until it exceeds 20 percent of the annual waste receipts. As a last point, it should be noted that the permits for the County landfill impose no limit on the amount of alternative daily cover that can be received. This is consistent with the understanding in the Department's regulations that alternative daily cover does not present a threat to human health or the environment.

- - Moisture Content

According to SPECS, compared to other types of material accepted at the landfill, sewage sludge waste and auto-fluff used for alternative daily cover both contain substantial amounts of moisture, which substantially increases the landfill's gas generation rate. Arguing that because this landfill's moisture content can be expected to be greater than that of landfills that accept less sludge and no auto-fluff, SPECS says there is no basis for departing from AP-42's "relatively conservative" default NMOC values for a co-disposal landfill.

RULING: No issue exists for adjudication. As discussed above, this landfill is not a co-disposal landfill and, for that reason alone, there is no reason to treat it as one for emissions estimation purposes. Nor is there any evidence that, on the whole, the materials in the landfill are excessively moist. Sewage treatment plant sludge accounted for less than one percent of the waste tonnage received at the landfill in 2001 and 2003, the only years for which reports were

presented. According to the County, auto-fluff cover was received only for a few years in the mid-90s, until the beneficial use determination governing it was rescinded by the Department. This material has the potential to hold moisture, but is not of a moist nature itself, and the amount of it that was received during the period in which its use was authorized is unknown. Even if sludge waste and auto-fluff cover are comparatively moist in relation to other materials accepted at the landfill, it does not follow that the overall waste mass has a high moisture content.

EPA's AP-42 document accounts for landfill moisture, though not in the way suggested by SPECS. Because moisture content is related to the amount of precipitation at the landfill site, recommended AP-42 defaults include a higher methane generation rate constant for areas receiving 25 inches or more of rain per year than for drier areas which receive less than that [AP-42, Exhibit No. 33, page 2.4-4]. As the County points out, it used this higher constant when estimating emissions.

- - Estimation of Total Hazardous Air Pollutants

SPECS argues that the application contains no estimate of the total hazardous air pollutants (HAPs) emitted by the landfill, and no calculation of all PSD-regulated NAAQS pollutants. According to SPECS, until the County performs a comprehensive estimation of all speciated HAP, VOC and NAAQS pollutants, no review of its application can proceed.

RULING: No issue exists, and no further study is necessary. The County points out that in 2000, its consultants did study the total HAPs produced by the landfill and found that they were well below regulatory thresholds. According to the County, in 2003, when it applied for the Phase I Title V permit modification, both it and the Department determined that because the total HAPs had been so low, and the Phase I expansion was so incrementally small, another study of total HAPs was not required, and only toluene and benzene had to be studied because they are the landfill's major HAP constituents. In fact, the application reports that at the request of the Department, emissions of benzene and toluene were determined, using the AP-42 emission factor of 99.7 percent control of non-halogen VOCs by the flare. [Application Document No. 15, page 3-2.]

At the issues conference, Department Staff agreed that an estimate of total HAPs is unnecessary because earlier information indicated that the landfill, even with the Phase I expansion, would not cross the major source threshold under the federal National Emissions Standards for Hazardous Air Pollutants (NESHAP) program. As noted in SPECS' petition, a landfill would be a major source if it could emit in excess of 10 tons per year of any one HAP or 25 tons per year of total HAPs. [42 U.S.C. 7412(a)(1).]

SPECS counsel, Mr. Abraham, argues that since all odorous components of landfill gas are contained in the NMOC portion of the gas, a presumption should be applied that the presence of significant off-site odors indicates the presence of toxic HAPs in excess of levels expected to

be controlled under the NESHAP program. I find no basis for such a presumption, particularly in the absence of an offer of expert scientific opinion.

The projected emissions of toluene and benzene, the two HAPs that landfills produce in the highest concentrations, are reported in Table 3-2 of the application to modify the Title V air permit. These emissions are so negligible that an estimation of total HAPs is not required, as Department Staff argues. The application does not contain estimates for all speciated HAPs, but since the two main HAPs have been looked at, it is unclear what purpose would be served by formulating estimates for the others.

The County estimated total facility VOC emissions as well as emissions for various NAAQS criteria pollutants (with the exception of lead, which does not apply) to determine whether requirements of the PSD and NSR programs apply in this case, as discussed above. The County determined that they do not apply, and Department Staff agrees. SPECS has not demonstrated how further study would alter this conclusion.

- - Statement of Basis

SPECS contends that the draft Title V permit lacks a statement of basis showing how emissions were calculated. According to 40 C.F.R. 70.7(a)(5), such a statement should set forth the legal and factual basis for the permit conditions, including references to the applicable statutory or regulatory provisions. The permitting authority is required to send the statement of basis to EPA and to any other person who requests it. Citing an EPA administrator's order, SPECS contends that the statement should include a discussion of the decision-making that went into the permit's development and provide the permitting authority, the public, and EPA a record of the applicability and technical issues surrounding the permit's issuance.

RULING: No issue exists. Department Staff developed a "permit review report" for the Title V air permit that would govern the Phase I expansion. According to Staff, the 25-page report (Exhibit No. 42) was generated with the draft permit, before public notice of that permit's availability, and has been available on the Internet and through the Department's Region 3 office. Department Staff represents that it e-mailed a copy of the report to SPECS counsel, Mr. Abraham, on January 27, 2004. As Staff argues, the report contains information about the facility as well as the Clean Air Act, and is the functional equivalent of a statement of basis.

SPECS contends that there has been no estimation of total HAP, and no estimation of NAAQS pollutants. That is untrue. The report contains (on page 7) a facility emissions summary which indicates the approximate magnitude of facility-wide emissions for total HAPs and various NAAQS criteria pollutants. These estimates are set forth in a range under the heading "PTE" (which stands for "potential to emit"). According to the order cited by SPECS in its petition, a range of total HAP estimated by the Department in its Title V permit report is sufficient to satisfy the requirement of a statement of basis.

- - NESHAP Program Requirements

SPECS contends that pursuant to the federal National Emissions Standards for Hazardous Air Pollutants (NESHAP) program, the Department must add to the draft Title V permit certain "maximum achievable control technology" (MACT) requirements that are additional to or more stringent than New Source Performance Standards (NSPS) requirements, and require that compliance with these new conditions commence immediately. According to SPECS, a specific NESHAP for landfills was proposed in 2000 and finally promulgated in 2003.

RULING: The County has agreed to the addition of conditions to its Title V air permit that would be consistent with Conditions 2-10 and 2-11 in the Chaffee landfill permit. A copy of the conditions from the Chaffee permit was received as Exhibit No. 19-A. Department Staff proposed that these conditions be added to the permit to incorporate the federal NESHAP, adding that they were left out of the initial draft because of an oversight. With the addition of these conditions to the draft permit, SPECS has withdrawn this proposed issue.

Variance Requirements

In its application for modification of the landfill's Part 360 permit, the County indicated it was seeking a variance from the requirements of 6 NYCRR 360-2.13(j)(1)(i), which requires a 12-inch structural soil layer in the primary composite liner to assure adequate separation of the primary composite liner from the secondary leachate removal system. The variance request itself is Appendix B of the engineering report for the Phase I (Cell 6) expansion, dated August 2002. (The engineering report is Application Document No. 3.)

In its petition, SPECS points out that pursuant to 6 NYCRR 360-1.7(c)(1), no variance may be granted "which would authorize a municipal solid waste landfill to be designed, constructed or operated at standards less stringent than those defined in 40 C.F.R. Part 258, Criteria For Municipal Solid Waste Landfills." Those federal standards, which are embodied in the Department's regulations, require, among other things, that landfilled waste be covered adequately to control odors and blowing litter [40 C.F.R. 258.21(a) and (b)]. Because of the landfill's odor and litter problems, which are verified in the Department's inspection reports, SPECS claims that the variance to 6 NYCRR 360-2.13(j)(1)(i) should be denied.

RULING: No issue is raised, for the simple reason that this variance request has subsequently been withdrawn. On April 16, the second day of the issues conference, the County represented that the project had been redesigned to include the 12-inch structural soil layer, and therefore it had withdrawn the variance request. Based on that representation and the understanding that no other Part 360 variance was being sought, SPECS withdrew its proposed issue.

On May 10, the last day of the conference, Mr. Barbagallo, one of the County's consultants, said the County was seeking a "variance" from another Part 360 requirement, this one concerning the minimum separation of five feet that must be maintained between the base of the constructed liner system and the seasonal high groundwater elevation[6 NYCRR 360-

2.13(d)]. Hearing that statement, SPECS counsel, Mr. Abraham, sought to revive the proposed issue, but in relation to this other requirement.

As it turns out, the County is not seeking a variance from the groundwater separation requirement, but a waiver instead. This waiver and the reasons for it are discussed at Section 2.2.3 of the engineering report for the landfill expansion (pages 2-2 and 2-3 of Application Document No. 3). The standards for granting this waiver are in 6 NYCRR 360-2.13(d). As should be clear from reading them, these standards are concerned with groundwater protection. There is no nexus between the operational issues referenced in SPECS petition - - which concern odors and blowing litter - - and the construction issues that would bear on whether to grant a waiver to the groundwater separation requirement. Therefore, even if one reframes SPECS' claims in relation to the waiver, no issue exists in relation to the waiver standards.

Other Claims

All other claims of the prospective intervenors not explicitly addressed in these rulings have been considered and found not to raise issues for adjudication or to require the provision of additional information.

ISSUES RULINGS SUMMARY

In summary, the only issues that may require adjudication in this matter concern the County's plans to control odors and litter. All other proposed issues, as discussed above, are not substantive and significant, and therefore do not warrant an adjudicatory hearing. With the exception of a new plan to control odor, which it is the County's responsibility to develop, no additional information need be provided at this time.

RULINGS ON PARTY STATUS

According to 6 NYCRR 624.5(d)(1), to secure full party status, a prospective intervenor must:

(1) file an acceptable petition pursuant to 6 NYCRR 624.5(b)(1) and (2);
(2) raise a substantive and significant issue or be able to make a meaningful contribution to the record regarding a substantive and significant issue raised by another party; and
(3) demonstrate adequate environmental interest.

In this case, on the issue of odor control, those requirements are met by the Town of Thompson and the Village of Monticello, which filed jointly, and by SPECS, but not by the Supervisors Association. Though none of the petitioners were challenged as to their environmental interest, the Supervisors Association has no direct interest in the subjects of odor and litter control, which are the only possible issues for adjudication. These issues concern only the County as landfill operator, the Town and Village as host communities, as SPECS to the extent it represents the interests of people living closest to the facility.

The Supervisors Association represents the elected supervisors of the 15 towns within Sullivan County. But the Town of Thompson, where the landfill is located, is the only one that experiences the environmental impacts of the landfill operation. The Supervisors Association has an environmental interest in assuring that its member towns have a reliable means of waste disposal. However, the issues proposed in its petition - - which concern the limitation of waste imports to preserve the landfill's capacity for county residents - - are not properly matters for Department decision-making, as discussed above.

For these reasons, full party status is granted to the Town of Thompson, the Village of Monticello, and SPECS, to preserve their opportunity to raise issues with regard to the odor plan that is submitted by the County. The petition for party status that was filed on behalf of the Supervisors Association is hereby denied.

APPEALS

A ruling of the administrative law judge to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status may be appealed to the Commissioner on an expedited basis [6 NYCRR 624.8(d)(2)]. Ordinarily, such appeals must be filed in writing with the Commissioner within five days of the disputed ruling [6 NYCRR 624.6(e)(1)].

Allowing extra time due to the length of these rulings, any appeals of these rulings, and any request to stay proceedings while the appeals are entertained, must be received at the Office of Commissioner Erin M. Crotty, 625 Broadway, Albany, New York, 12233, no later than 4 p.m. on August 12, 2004. Any responses to appeals, and any response to a request for a stay of

proceedings, must be received before 4 p.m. on August 30, 2004. Any submittal to the Commissioner's office must include an original and two copies. In addition, one copy must be sent to me and all others on the service list at the same time and in the same manner as the submittal is sent to the Commissioner. Service of papers by facsimile transmission (FAX) is not permitted, and any such service will not be accepted.

Appeals should address my rulings directly, rather than merely restate a party's contentions. To the extent practicable, papers should include citations to transcript pages and exhibit numbers. A list of the issues conference exhibits is attached to these rulings. A list of proposed transcript corrections, developed during my preparation of these rulings, is being circulated to the service list.

ORDER OF DISPOSITION

The Department's permit hearing procedures state that there will be no adjournment of the hearing during appeal except by permission of the administrative law judge [6 NYCRR 624.8(d)(7)]. Recognizing the interest of the County in securing a timely decision on the Phase I expansion, and also recognizing the uncertainty about when any appeals will be decided, proceedings addressing odor control shall continue at such point that the County supplies its new odor control plan, and proceedings addressing litter control shall continue at such point that the County confirms its objection to revised special condition No. 10 of the draft Part 360 permit, unless any of the issues conference participants requests and receives a stay of proceedings from the Commissioner. In terms of measures to consider and evaluate, the odor control plan shall have the minimum scope of the one proposed in Staff's draft permit condition, and the County is encouraged to consult Staff during its development.

Though I am prepared to move the hearing forward as expeditiously as possible, I am also available to assist you in the negotiation of settlements that would make further litigation unnecessary.

/s/

Albany, New York
July 20, 2004

Edward Buhrmaster
Administrative Law Judge

EXHIBIT LIST

SULLIVAN COUNTY LANDFILL (PHASE I EXPANSION: CELL NO. 6)
Project Application No. 3-4846-00079/00021

1. Notice of issues conference and public comment period (3/5/04)
2. Affidavit of publication for issues conference notice, from the Catskill Shopper
3. Affidavit of publication for issues conference notice, from the Sullivan County Democrat
4. ALJ's letter transmitting hearing notice to county attorney (3/5/04)
5. ALJ's hearing notice distribution list
6. Combined notice of complete application and notice of 2/10/04 legislative hearing
7. Party status petition, Special Protection of the Environment of Sullivan County (SPECS)
8. Party status petition, Village of Monticello and Town of Thompson
9. Party status petition, Sullivan County Association of Supervisors, Inc.
10. Phase I and Phase II Site Plan Drawing (DEIS Figure 1-3)
11. Letter of Lawrence Biegel, DEC Region 3, to John Kehlenbeck, Sullivan County Division of Solid Waste, re: Phase II landfill expansion (3/16/04)
12. Letter of Daniel Briggs, Sullivan County Manager, to Lawrence Biegel, DEC Region 3 (3/31/04)
13. Letter of Michael Merriman, DEC Region 3, to John Kehlenbeck, Sullivan County Division of Solid Waste (3/3/98)
14. List of 21 Application Documents for Public Review
15. Sullivan County Landfill Part 360 Permit (expiration date: 8/25/05)
16. Sullivan County Landfill Air Title V Facility Permit (expiration date: 10/30/05)
17. Sullivan County Landfill SPDES Permit (expiration date: 7/10/08)
18. Draft Part 360 Permit Modification (3/29/04), under cover letter of Lawrence Biegel

18-A. Draft Part 360 Permit Modifications, as agreed to by Sullivan County and DEC Staff, addressing litter control (4/15/04)

19. Draft Air Title V Facility Permit

19-A. Conditions 2-10 and 2-11 of Air Title V Permit for Chaffee Landfill, to be used as a basis for additional draft conditions in air permit for Sullivan County landfill.

20. Draft revised permit pages for SPDES permit, under cover letter of Lawrence Biegel (7/17/03)
21. Draft Environmental Impact Statement for the Sullivan County landfill expansion (12/97)
22. Final Environmental Impact Statement for the Sullivan County landfill expansion (3/98)
23. Statement of SEQR Findings and Decision for the Sullivan County landfill expansion (3/98)
24. Letter of Anthony Russo, Malcolm Pirnie, to Lawrence Biegel (10/8/02), finding supplemental SEQRA review is unwarranted.

24-A. Letter of Lawrence Biegel, DEC Region 3, to John Kehlenbeck, Sullivan County Division of Solid Waste (12/3/02), accepting county's recertification of SEQRA findings.

25. Review of Environmental Conditions for Cell 6 Landfill Expansion (8/02)
26. DEC Order on Consent addressing alleged violations at Sullivan County Landfill, Case No. R3-20030417-37 (10/10/03)

27. Landfill Gas Evaluation Report (12/03) and Draft Landfill Gas & Odor Evaluation Report & Schedule (11/03), prepared by Malcolm Pirnie
28. DEC Commissioner's Policy, CP-29, addressing Environmental Justice and Permitting (3/19/03)
29. Public Participation Plan for Phase I landfill expansion (as revised 11/03)
30. Tips for Preparing a Public Participation Plan Pursuant to CP-29 (DEC Draft, 11/24/03)
31. Letter of Army Corps of Engineers to Joseph Gurda, Shaw EMCON/OWT (5/19/03), confirming no federally-regulated wetlands would be impacted by the Cell 6 expansion.
32. Letter of Cheryl McCausland, Deputy Sullivan County Attorney, to Thomas Frey, Thompson Town Assessor (2/18/03), confirming County's intent pursue Phase II landfill expansion on recently-purchased property.
33. EPA Compilation of Air Pollutant Emission Factors, AP-42, Fifth Edition, Volume 1: Stationary Point and Area Sources.
34. User's Manual for Landfill Gas Emissions Model (Version 2.0) (2/98)
35. Letter from Roy Huntley of EPA to Bob Healy re: AP-42 Emission Factor Assistance
36. Sullivan and Michels, "The Time is Now for Changes to the AP-42 Section on Landfills"
37. EMCON Initial Design Capacity Report, under 7/30/99 cover letter to DEC and EPA
38. C.I.D. Landfill permit, pages 1 to 7 (expiration date 12/31/99)
39. Integrated Waste Systems draft permit for Farmersville Landfill, pages 1 to 7
40. Sullivan County Landfill annual report for the 2001 operating year
41. Sullivan County Landfill annual report for the 2003 operating year
42. Title V Permit Review Report for the Sullivan County Landfill (25 pages)
43. Sullivan County Landfill inspection reports for period between 10/9/03 and 5/6/04

(This is the complete exhibit list for the issues conference, which was held April 15 and 16, and May 10, 2004.)

SERVICE LIST

SULLIVAN COUNTY LANDFILL (PHASE I EXPANSION: CELL NO. 6)
Project Application No. 3-4846-00079/00021

Applicant - Sullivan County Division of Solid Waste

Samuel S. Yasgur, Esq.
Sullivan County Attorney
County Government Center
100 North Street, P.O. Box 5012
Monticello, New York 12701
Phone: 845-794-3000 Ext. 3565
FAX: 845-794-4924

Department of Environmental Conservation Staff

Jonah Triebwasser, Esq.
New York State Department of Environmental Conservation
Region 3 Office
21 South Putt Corners Road
New Paltz, New York 12561-1620
Phone: 845-256-3030
FAX: 845-255-3042

Special Protection of the Environment of the County of Sullivan, Inc. ("SPECS")

Gary A. Abraham, Esq.
170 No. Second Street
Allegany, New York 14706
Phone: 716-372-1913
FAX: 716-372-1913

Village of Monticello and Town of Thompson

J. Benjamin Gailey, Esq.
Jacobowitz and Gubits, LLP
158 Orange Avenue, P.O. Box 367
Walden, New York 12586-0367
Phone: 845-778-2121
FAX: 845-778-5173

Sullivan County Association of Supervisors, Inc.

David A. Engel, Esq.
Tuczinski, Cavalier, Burstein & Collura, P.C.
54 State Street, Suite 803
Albany, New York 12207
Phone: 518-463-3990
FAX: 518-426-5067

Administrative Law Judge

Edward Buhrmaster, Esq.
New York State Department of Environmental Conservation
Office of Hearings and Mediation Services
625 Broadway, 1st Floor
Albany, New York 12233-1550
Phone: 518-402-9003
FAX: 518-402-9037

(List created 5/8/04)