STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application to Renew the Solid Waste Management Permit ("Part 360 Permit") for the Towpath Environmental & Recycling Center originally issued to Waste Management of NY, LLC ("WMNY"),

DEC Permit Application ID No. 8-3420-00019/00005

-by-

ALBION RECYCLING & RECOVERY, LLC,

Applicant.

RULINGS ON ISSUE OF LEGAL CAPACITY AND PARTY STATUS AND ORDER OF DISPOSITION

Albion Recycling & Recovery, LLC ("ARR" or "Applicant") has applied to renew a solid waste management facility permit that staff of the New York State Department of Environmental Conservation ("Department") issued to Waste Management of NY, LLC ("WMNY"), DEC Permit Application ID No. 8-3420-00019/00005 ("WMNY Permit"). The WMNY Permit, which was effective from November 20, 2003 until November 20, 2013, authorized WMNY to construct and operate a landfill to be known as the Towpath Environmental & Recycling Center ("Towpath landfill") on land that WMNY leased in the Town of Albion ("Albion" or "Town"), Orleans County, New York.

Although WMNY obtained a permit from the Department to construct and operate the Towpath landfill, it was unable to obtain related local permits and licenses from the Town. After the courts upheld the Town's denial of WMNY's application, WMNY terminated its lease for the property. The Towpath landfill was never constructed or operated.

The primary issue presented here is whether ARR has the legal capacity to apply for renewal of the WMNY Permit. ARR's legal capacity ultimately turns on whether WMNY executed an assignment of all of its right, title and interest in the WMNY Permit and any permit application after it terminated its lease for the property at which the landfill would have been located. ARR claims that WMNY did assign such right, title and interest in the WMNY Permit and any permit application, and that ARR subsequently obtained such right, title and interest. Staff contends that ARR has failed to establish its legal capacity to apply to renew the WMNY Permit.

As discussed in detail below, I hold that: (i) WMNY did execute an assignment of all of its right, title and interest in the WMNY Permit and any permit application; (ii) such assignment evinces the consent of WMNY to transfer its permit; and (iii) ARR possesses the legal capacity to apply to renew WMNY's permit. I also grant the petition for amicus party status of the

organization Stop Polluting Orleans County, Inc. ("SPOC"), with respect to the issue of ARR's legal capacity. I remand this matter to staff for further proceedings relating to ARR's application to renew the WMNY Permit.

I. FACTUAL BACKGROUND

To understand fully the current status of ARR's request to renew the WMNY Permit, it is necessary to recount the complex history of the ownership and uses of the properties at issue, the circumstances surrounding the issuance, and ultimate assignment, of the WMNY Permit, and ARR's efforts to secure Department approval of its application to renew the WMNY Permit. A brief summary is provided below.

A. Site History Leading to the Bankruptcy Proceeding[1]

John and Irene Smith created five companies ("Smith Companies") in the 1970s and 1980s relating to their business of hauling and disposing of solid waste in several counties in western New York. Three of the Smith Companies hauled the waste: J & I Disposal, Inc. ("J&I"), I & J Disposal of Western New York, Inc. ("I&J"), and Albion Disposal, Inc. ("Albion Disposal") (collectively, the "Hauling Companies"). A fourth company, Orleans Sanitary Landfill, Inc. ("OSL"), owned certain real property and, in October 1983, the Department granted to OSL a permit to construct and operate a sanitary landfill on that property. See Issues Conference ("IC") Exhibit ("Ex.") 4, Document ("Doc") 11.b, Chapter 11 Trustee's Joint Disclosure Statement Pursuant to § 1125 of the Bankruptcy Code ("Joint Disclosure Statement"), at 12-13.[2]

OSL operated the landfill on its property for several years. In 1987, OSL entered into a consent order with the Department to resolve OSL's violations resulting from exceeding for several years its annual waste volume limits. See id. at 14. In 1989, OSL applied to the Department for permits to expand its landfill, vertically on the existing landfill, and horizontally onto some of the adjacent properties. See id. at 15. In 1990, OSL and Mr. Smith entered into another consent order with the Department after it was determined that OSL and Smith had violated the 1987 consent order. Id. at 14. The 1990 consent order required, among other things, that OSL begin closure of the landfill under an accepted and approved closure plan. Id.

In February 1991, the Smith Companies signed a letter of intent with Browning-Ferris Industries of New York, Inc. ("BFI") relating to BFI's potential purchase of the Smith

[1] Much of this site history narrative is derived from documents filed in In re Albion Disposal, Inc.., Case Nos. 91-12805K, 91-12806K, 91-12807K , 91-12878K , 91-12889K (W.D.N.Y.), a Chapter 11 bankruptcy proceeding in which WMNY entered into the lease of the properties which were the subject of the WMNY Permit. Both ARR and Department staff have submitted in this proceeding several documents from the bankruptcy proceeding. See e.g. IC Ex. 4, Doc 11.b (Chapter 11 Trustee's Joint Disclosure Statement), Doc 11.c (Chapter 11 Trustee's Final Report of Substantial Consummation); see also IC Ex. 7, Affirmation of Lisa P. Schwartz, Esq. dated September 3, 2014 ("Schwartz Aff."), Exs. C-E.

[2] The fifth company at issue here, 11372 Main Street, Inc. ("Main Street"), was a holding company that owned the stock of OSL, Albion Disposal and J & I. See id. at 7-8.

Companies' assets, and the Smiths' real property (which, by that time, was owned solely by Irene Smith). See id. at 16. The sale to BFI was never completed and, on August 5, 1991, BFI filed involuntary petitions in bankruptcy against the Hauling Companies. The petitions were thereafter converted to cases under Chapter 11. See id. at 17. Shortly thereafter, OSL and Main Street each filed voluntary petitions in the Bankruptcy Court under Chapter 11. A later bankruptcy order resulted in the joint administration of all of the Smith Companies' bankruptcy proceedings. At the time of the bankruptcy filings, OSL's 1989 application to expand its landfill remained pending. See id. at 15.

B. Transactions During the Bankruptcy Proceeding

On December 3, 1991, the bankruptcy court ordered the appointment of Craig A. Slater as the Chapter 11 Trustee for the Smith Companies in bankruptcy ("Slater" or "Trustee"). See id. at 21-22; see also November 22, 2013 letter from C. Slater to R. Penfold ("Slater Letter"), IC Ex. 4, Doc 14. A later order of the bankruptcy court authorized the Trustee to finalize a transaction with WMNY resulting in the sale or lease of certain of the Smith Companies' assets, including the pending OSL application to expand the landfill, in accordance with a letter of intent prepared by WMNY in April 1992. See Joint Disclosure Statement, IC Ex. 4, Doc 11.b, at 24.[3]

1. The Amended Lease

On August 30, 1993, the Trustee, WMNY and Irene Smith entered into a lease agreement pursuant to which, among other things, WMNY would lease several parcels of land relating to expanding and operating the expanded landfill. See IC Ex. 4, Doc 11.d ("Amended Lease");[4] see also Chapter 11 Trustee's Final Report of Substantial Consummation, dated December 15, 2008 ("Trustee's Final Report"), IC Ex. 4, Doc 11.c, at 6-8. Under the Amended Lease, WMNY agreed to a 48-year lease of Parcels A, B, C, D2, and E2, with an option to expand the leased premises to include Parcels D1, E1 and F. See Amended Lease, IC Ex. 4, Doc 11.d, at 6, 11-12; see also Joint Disclosure Statement, IC Ex. 4, Doc 11.b, at 30.[5]

The underlying goal of this transaction was to generate, through operation of the expanded landfill, revenue sufficient to pay in full the creditors of the Smith Companies. See Trustee's Final Report, IC Ex. 4, Doc 11.c, at 3; see also Slater Letter, IC Ex. 4, Doc 14, at 1. WMNY, as the Tenant under the Amended Lease, committed in the Amended Lease to "proceed diligently to obtain all required permits from the applicable regulatory agencies to construct and operate the New Landfill." See Amended Lease, IC Ex. 4, Doc 11.d, at 34, Art. XI, § 11.1. To

[3] WMNY agreed in its letter of intent to perform all work necessary to effectuate a Department-approved closure plan for the existing OSL landfill. See id. at 25.

[4] The bankruptcy court authorized the Trustee to enter into the Amended Lease. See IC Ex. 7.d, Schwartz Affirmation, Ex. D, at 3-4.

[5] According to the Amended Lease, OSL owned Parcels A, E1 and E2 and, "at various times," John and Irene Smith owned Parcels B, C, D1, D2 and F. See IC Ex.4, Doc 11.d at 2. As part of a settlement of certain claims that the Trustee had asserted against the Smiths, John Smith conveyed to the Trustee all of his right, title and interest in Parcels B, C, D1, D2 and F. See id. at 4; see also IC Ex. 4, Doc 11.b, at 32.

effectuate that goal, OSL assigned to WMNY its pending Part 360 application to expand the landfill. See Joint Disclosure Statement, IC Ex. 4, Doc 11.b, at 24 (referring to order of bankruptcy court "authorizing the Trustee to consummate the sale or lease of specified assets, including the Expansion Application, of the Debtors to Waste Management"). The Amended Lease also provided, however, that WMNY could terminate the Amended Lease in the event it did not receive all permits necessary to construct and operate the landfill. See Amended Lease, IC Ex. 4, Doc 11.d, at 43, Art. XIII, § 13.10.

The Amended Lease was subsequently amended three times, and the third amendment, executed on December 1, 2004 by WMNY and the Trustee (as Trustee for the Smith Companies and as attorney-in-fact for Irene Smith), states in relevant part as follows:

> Section 3. A new Section 13.10(e)[6] shall be added as follows:
>
> (e)[7] If, within thirty (30) days of the filing of a final, nonappealable order confirming the denial of the Required Permits by either the Town of Albion or the DEC, Tenant exercises its right to terminate this Lease pursuant to Section 13.10(a)(ii), *Tenant shall*, within sixty (60) days of Tenant's Termination Notice, *unconditionally and irrevocably convey and assign to the Trustee, or its assignee, all of Tenant's right, title and interest in and to the Required Permits, any permit application*, and all of Tenant's right title and interest in the Town Settlement Agreement ….

Third Amendment to the Amendment to and Restatement of Lease ("Third Amendment"). IC Ex. 4, Doc 11.f, at 4 (emphasis added).

2. The WMNY Permit

In February 2003, then-DEC Commissioner Erin Crotty directed Department staff to issue to WMNY the requisite DEC permits to construct and operate the landfill. See Matter of Waste Management of New York, LLC, Decision of the Commissioner, February 10, 2003, at 1. On November 20, 2003, staff issued the permits, including the WMNY Permit, regarding "regulated activities associated with the expansion of the closed Orleans Sanitary Landfill" at the "Towpath Environmental & Recycling Center." Letter from P. Lent, Regional Permit Administrator, to WMNY, dated November 24, 2003, and second attachment thereto (the WMNY Permit), IC Ex. 4, Doc 7.b. The WMNY Permit was effective from November 20, 2003 to November 20, 2013. Id.

Special Condition No. 63 of the WMNY Permit addressed the issue of WMNY's possible transfer of its rights under existing or future options or leases, stating in relevant part as follows:

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[6] The version of this document that is in the record has a mark-through of "(e)," replaced by a handwritten "(f)" and handwritten initials "CAS" (presumably the initials of Craig A. Slater, the Trustee). See IC Ex. 4, Doc 11.f, at 4.

[7] This "(e)" is marked through and replaced with handwritten "(f)" and the initials "CAS." Id.

63. Should the Permittee propose to transfer or relinquish its rights under any existing or future options or leases for the OSL-Towpath site it will provide written notice to DEC's Region 8 office, and to the Town of Albion as follows:

(a) If the proposed transfer is to take place under an existing lease or other valid contractual authority, notice shall be provided at lease [sic] 60-days prior to the transfer taking place….

Id. at 23.

3. The Town's Denial of WMNY's Applications for Local Permits, and WMNY's Termination of the Lease

In May 2003, the Albion Town Board denied WMNY's applications for a landfill license, filling and grading license, and special use permit. See Trustee's Final Report, IC Ex. 4, Doc 11.c, at 14. WMNY's subsequent CPLR article 78 challenge to the Town's denial was rejected by the courts. See Waste Management of New York, LLC v. Town of Albion, 18 Misc.3d 1133(A), 2005 N.Y. Misc. LEXIS 8367 (Sup. Ct., Orleans County May 6, 2005), aff'd, 32 A.D.3d 1295 (4th Dep't 2006), lv. denied, 8 N.Y.3d 805 (2007). After losing its court challenge to the Town's denial of its permit applications, WMNY exercised its right to terminate the Amended Lease. See Letter from J. Zagraniczny to Craig Slater dated March 15, 2007, IC Ex. 4, Doc 13.b; see also Slater Letter, IC Ex. 4, Doc 14, at 1; Trustee's Final Report, IC Ex. 4, Doc 11.c, at 15.

4. WMNY's Assignment of its Permits and any Permit Application

Several documents submitted in this matter prior to the issues conference refer to an assignment by WMNY of its rights to the WMNY permit and any permit application. See, e.g. Trustee's Final Report, IC Ex. 4, Doc 11.c, at 15 ("in accordance with 13.10(f) in the Third Amendment, WMNY, on May 13, 2007, unconditionally and irrevocably conveyed and assigned to the Trustee all of its right, title and interest in and to the Required Permits, any permit application, and all of WMNY's right, title and interest in the Town's Settlement Agreement"); IC Ex. 4, Doc 13.l, Slater Letter, at 1 (stating that on May 13, 2007, WMNY assigned to OSL its right to the permit and supporting materials and, "[o]n June 5, 2007, a formal Assignment of the Part 360 permit and materials between WMNY, the Trustee for OSL, and Irene Smith was executed"); Legal Memorandum from A. Demerle to Craig Slater dated April 4, 2007, IC Ex. 4, Doc 2.d.v (discussing implications of WMNY's March 15, 2007 termination of the Amended Lease, including WMNY's assignment of permits pursuant to Section 13.10(f)); see also Affidavit of Craig A. Slater, Esq., sworn to on July 23, 2014, IC Ex. 5.c ("Slater Aff."), ¶ 14 (re-stating under oath the substance of the Slater Letter).

Notwithstanding that the Trustee's Final Report, the Slater Letter and the Slater Aff. all state that WMNY assigned its rights to the WMNY permit and any permit application, ARR did not, as part of its application to renew the WMNY permit, provide to Department staff a copy of the actual assignment document. Nor, prior to the issues conference in this proceeding, did ARR or WMNY submit a copy of the assignment document.

5. The Trustee's Final Report, Closure of Proceedings and Discharge of Trustee

By motion dated December 15, 2008, the Trustee requested that the bankruptcy court issue an order "authorizing the Trustee to transfer the real estate, by quit-claim deed, the parcels that were under the Trustee's dominion and control to Irene Smith or her designee." IC Ex. 4, Doc 11.c ("December 2008 Motion"). The December 2008 Motion also sought court approval of the Trustee's Final Report, authorization for the Trustee's proposed disposition of any remaining assets of the Debtors, discharge of the Trustee, and a final order closing the bankruptcy proceedings. See id. On January 20, 2009, the court issued an "Order Approving Chapter 11 Trustee's Final Report of Substantial Consummation and Authorizing the Trustee to Transfer Real Estate and Related Assets" ("January 2009 Order"). See id.

Although both the December 2008 Motion and the January 2009 Order expressly discussed the transfer to Irene Smith of the real estate relating to the proposed landfill,[8] neither document discussed the disposition of the WMNY Permit.

C. ENAM, ARR, the Trustee, OSL and the Smiths

According to the public records of the New York State Department of State, of which I take official notice, see 6 NYCRR § 624.9(a)(6), ARR was originally named ENAM Enterprises, LLC ("ENAM").[9] See also Certificate of Amendment of Articles of Organization of ARR, IC Ex. 4, Doc 11.j (stating that, when ARR was first organized, its name was ENAM Enterprises, LLC). ENAM first filed its articles of organization with the Department of State on August 30, 2007, approximately three months after WMNY purportedly assigned to the Trustee its rights to the WMNY Permit. See id.

When John Smith, Sr. died in May 2009, he left 75% of his interest in the Smith Companies to his wife Irene, and 25% of such interest to his son John Smith, Jr. See Will of John Smith, Sr. dated May 5, 2009, IC Ex. 4, Doc 11.l.

On or about October 28, 2009, Richard Penfold, "as Manager" of ENAM, entered into an option agreement ("Option Agreement") with John Smith, Jr. and Irene Smith (in both her individual capacity and as executor of the estate of John Smith, Sr.) pursuant to which ENAM agreed, among other things, to "attempt to build a consensus in the Town of Albion to reverse the Town's earlier decision to deny the Landfill a Town permit." Option Agreement, IC Ex. 4, Doc 2.d.vi. The goal was to obtain the necessary authorizations to construct and operate the Towpath landfill, and to share profits from such operation. See id.

[8] In that regard, ARR has also submitted a copy of a January 26, 2009 letter from Raymond Fink, Esq. to a William Lawson, Esq., referring to a deed signed by Craig Slater "in furtherance of the transfer of the 'expansion parcels' to Irene Smith." IC Ex. 4, Doc 13.j.

[9] See http://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=3576768&p_corpid=3562617&p_entity_name=enam&p_name_type=%25&p_search_type=CONTAINS&p_srch_results_page=0

An annual meeting of the stockholders of OSL was held on December 31, 2009. See Minutes of the Annual Meeting of Stockholders, IC Ex. 4, Doc 13.e. The minutes reflect that: (i) Irene Smith owned 75 shares of stock of OSL, and John Smith, Jr. owned 25 shares of OSL; (ii) the OSL stockholders elected Irene Smith and John Smith, Jr. to be the directors of OSL; and (iii) the OSL stockholders approved the Option Agreement with ENAM. See id. Later the same day, at the annual meeting of the directors of OSL, the directors: (i) elected officers of the corporation, electing John Smith, Jr. to be President, Secretary and Treasurer, and Irene Smith to be Vice President; and (ii) approved the Option Agreement. See id.

At a special meeting of the board of directors of OSL on March 1, 2012, directors Irene Smith and John Smith, Jr.:

> authorized the President to take all necessary steps to transfer, assign, sell, etc. all the right, title and interest in and to the Required permits, engineering reports, drawings, well logs, etc., any permit applications, any assets requested by ENAM, LLC to aid in the permitting of the landfill for one dollar and zero cents ($1.00)

IC Ex. 4, Doc 13.e.

ARR has submitted a copy of a March 4, 2012 Invoice from OSL to ARR reflecting the payment by ARR of $1.00 for:

> All the right, title and interest in and to the Required Permits, any permit application, all right, title and interest in the Town Settlement Agreement, and all the right, title and interest in the Lease

IC Ex. 4, Doc 2.d.vii.

D. ARR's Application to Renew the WMNY Permit

By letter dated May 21, 2013, ARR submitted to the Department a renewal application for a solid waste management facility permit for the Towpath landfill. See IC Ex. 4, Doc 2 and 2.a. Shortly before submitting the formal application, counsel for ARR had sent to the Department a cover letter, narrative and various documents relating to the issue of ownership of the permit and related materials. See Letter from A. Nosek, Esq. to L. Schwartz, Esq. dated May 9, 2013, with attachments, IC Ex. 4, Doc 2.d. The parties thereafter exchanged several letters and documents, discussed briefly below.

By letter dated June 24, 2013, Scott Sheeley, Region 8 Regional Permit Administrator, provided to ARR a Notice of Incomplete & Insufficient Application ("June 2013 NOIA") stating, among other things, that "additional information and items are required before the Department can make a final determination" on ARR's request to renew the WMNY Permit. See IC Ex. 4, Doc 7, at 2. In the first numbered paragraph, staff raised the two issues of greatest relevance to this proceeding, (i) whether ARR owned the rights to the WMNY Permit, and (ii) whether WMNY had requested or consented to the transfer of its permit.

Specifically, staff first stated that the application materials "are not sufficient to demonstrate that all right, interests, and obligations of the Part 360 permit have been conveyed from WMNY" ultimately to ARR. Id. ¶ 1. In addition, staff stated:

> *Further the Department has no record of receiving notice from WMNY under Special Condition No. 63 of the Part 360 Permit that it had transferred or relinquished its rights under any existing or future options or leases for the site.*

Id. (italics in original).

With respect to ownership of the rights to the WMNY Permit, staff requested that ARR provide a copy of "any document by which WMNY conveyed and assigned its rights, title and interest in the Part 360 permits to the Trustee." Id. ¶ 1(f). As to transfer, staff stated that transfer of a permit is not automatic, and that there was no record of a request to transfer the permit or Department approval of a transfer. See id. at 3, ¶ 4. Staff required that ARR obtain authorization from WMNY for the transfer of the permit and provide it to the Department. Id.[10]

ARR responded to the Department's June 2013 NOIA by letter dated September 24, 2013, providing a paragraph-by-paragraph responsive narrative and 15 additional documents. See IC Ex. 4, Docs 11, 11.a-11.o. Among other things, ARR stated that it did not have a copy of a document by which WMNY conveyed and assigned its rights, but did provide a copy of the Trustee's Final Report, and referred staff to the language at page 15 of that document in which the Trustee stated that WMNY terminated the lease and assigned its rights to the WMNY Permit to the Trustee. See id., Doc 11, at 2, ¶¶ 1(f), 1(b); see also Trustee's Final Report, IC Ex. 4, Doc 11.c, at 15. With respect to the issue of transfer, ARR requested guidance from the Department, stating as follows: "Please advise if the DEC is going to have ARR submit an Application for Permit Transfer." IC Ex. 4, Doc 11, at 2, ¶ 4.

By letter dated October 11, 2013 ("October 2013 NOIA"), staff again determined that ARR's application was incomplete and insufficient. See IC Ex. 4, Doc 12. Staff again raised the lack of documents relating to: (i) WMNY's compliance with Special Condition No. 63 regarding notice to the Department that it had transferred its rights to the lease to the site, see October 2013 NOIA, Letter at 1, ¶ 1; and (ii) ARR's failure to provide a document reflecting WMNY's conveyance and assignment of the WMNY Permit to the Trustee. See id. at 2, ¶ 1(f). With respect to ARR's question regarding whether to submit an application for permit transfer, staff stated as follows:

> While it is clear that at this time there is insufficient information to demonstrate that another format may be used, it is not clear whether the ARR may still be able to submit such information in response to this letter.

Id. at 4, ¶ 4.

ARR's November 18, 2013 response again included a paragraph-by-paragraph narrative and submission of 14 additional documents. See IC Ex. 4, Docs 13, 13.a-13.n. ARR again

[10] Staff also requested that ARR provide additional documents to support its application. See id. at 2-5, ¶¶ 1-10.

referred to and quoted the Trustee's Final Report with respect to the Trustee's statement that WMNY assigned to the Trustee its rights in the WMNY Permit, see Doc 13 at 4, 8, but did not provide a copy of an assignment document. ARR simply said "OK" in response to staff's statement regarding an application for permit transfer. Id. at 10, ¶ 4. A few days later, ARR submitted to the Department a copy of the November 22, 2013 Slater Letter. See IC Ex. 4, Doc 14.

By letter dated December 20, 2013 ("December 2013 NOIA"), staff again determined that ARR's application was incomplete and insufficient. See IC Ex. 4, Doc 18. Staff stated that ARR had still not submitted a document reflecting conveyance of WMNY's rights in the WMNY Permit, and that this item "remains integral to our analysis." Id., Letter at 2, ¶ 1(f). Staff also requested copies of the May 13, 2007 and June 5, 2007 assignment documents referred to in the Slater Letter. See id. The letter retained the same language with respect to an application for permit transfer as in the October 2013 NOIA. See id. at 3, ¶ 4.

Following a February 10, 2014 meeting of the parties and their counsel at the Region 8 offices, staff sent another letter reiterating its position that the application remained incomplete and insufficient. See February 24, 2014 letter from S. Sheeley to R. Penfold ("February 2014 NOIA"), IC Ex. 4, Doc 22. In the February 2014 NOIA, staff stated that "as we have discussed, the legal capacity of ARR to apply for a renewal of the permit is of particular concern to the Department." Id. Staff followed up with another letter, dated March 17, 2014, stating again that legal capacity was "of particular concern to the Department." IC Ex. 4, Doc 27.

Finally, Department staff sent to ARR a Notice of Permit Denial dated April 9, 2014, denying ARR's application for renewal of the WMNY Permit. Staff's Notice of Permit Denial stated, in relevant part, as follows:

> Based on our review, the additional ARR submissions, and all prior ARR submissions, do not demonstrate that ARR has the legal capacity to apply for a renewal of the [WMNY Permit]…. Specifically, the application materials provided were not sufficient to demonstrate that all right, interests and obligations of the Part 360 Permit had been conveyed from WMNY to the Trustee, then to the bankrupt entities and Irene Smith, and then to ARR. Further, the Department has no record of receiving notice from WMNY under Special Condition No. 63 of the Part 360 Permit that it had transferred or relinquished its rights under any existing or future options or leases for the site.
>
> Based on the foregoing, your application for renewal of the above-referenced permit is denied. In addition, as noted in our prior correspondence, the Part 360 Permit expired on November 20, 2013, and is no longer in effect.
>
> * * *
>
> Your application is being denied solely on the issue of legal capacity. During the course of our previous communications, a number of other issues have been identified that are either pertinent to the substance of your request to renew or

> within the realm of the Department's discretion, including its discretion on procedural matters. None of those issues are deemed resolved by the issuance of this letter. However, it is unnecessary to address them at this time in light of the lack of legal capacity. Within the context of a sufficient renewal application, all of those issues would be material to processing the request, as well as any other issues that emerged during the course of the review, and are not waived.

IC Ex. 4, Doc 32, at 1-2.

By letter dated April 29, 2014, ARR requested a hearing regarding staff's denial of its permit application. See IC Ex. 4, Doc 33.

E. The Current Proceeding

After staff referred the matter to the Office of Hearings and Mediation Services on May 1, 2014, the matter was assigned to me on May 7, 2014, with Chief Administrative Law Judge James T. McClymonds serving as a co-Judge on the matter.

A Notice of a Legislative Hearing and Issues Conference ("Notice") was published in the *Environmental Notice Bulletin* on July 9, 2014, see IC Ex. 2a, and in *The Daily News* published in Batavia, New York, on July 15, 2014. See IC Ex. 3. The Notice set forth a schedule for: (i) the filing of petitions for party status, and responses to any such petitions; and (ii) the filing of briefs by the parties to address the issue whether ARR has or lacks the legal capacity to apply for renewal of the WMNY Permit, and how the matter should proceed upon the determination of the legal capacity issue. See IC Ex. 2a. The Notice also scheduled a legislative public comment hearing and an issues conference for September 16 and 17, 2014, respectively, both to occur at Hickory Ridge Golf & CC, located at 15816 Lynch Road, Holley, New York. See id.

Pursuant to the Notice, ARR filed papers styled as a motion for summary judgment, comprised of the following documents: (i) Notice of Motion for Summary Judgment, dated August 6, 2014; (ii) Affidavit of Anthony M. Nosek, Esq., sworn to on August 6, 2014; (iii) Affidavit of Craig A. Slater, Esq., sworn to on July 23, 2014; (iv) Affidavit of Richard C. Penfold, sworn to on August 6, 2014, attaching two exhibits; and (v) Memorandum of Law, dated August 6, 2014 ("ARR Mem."). See IC Ex. 5. Stop Polluting Orleans County, Inc. ("SPOC") filed a Petition for Amicus Party Status dated August 8, 2014, attaching one exhibit ("SPOC Pet."). See IC Ex. 6.

In response to ARR's motion, Department staff filed the following documents: (i) Affidavit of Edward D. Kieda, sworn to on September 3, 2014, attaching three exhibits; (ii) Affidavit of Scott J. Foti, sworn to on September 2, 2014; (iii) Affidavit of Scott E. Sheeley, sworn to on September 3, 2014, attaching five exhibits; (iv) Affirmation of Lisa P. Schwartz, Esq. dated September 3, 2014 ("Schwartz Aff."), attaching six exhibits; and (v) Department Staff Memorandum of Law dated September 3, 2004 ("Staff Mem."). See IC Ex. 7. SPOC did not submit a written response to ARR's submissions, and relied instead on the attachment to its petition. See IC Ex. 8, at 2. Neither ARR nor staff filed papers in response to SPOC's petition for amicus party status.

A legislative public comment hearing was held on September 16, 2014, at which eleven members of the public spoke. Written public comments were also accepted through September 16, 2014. On September 17, 2014, an issues conference was conducted at the same location as the legislative hearing. Anthony M. Nosek, Esq. appeared on behalf of ARR, accompanied by Richard C. Penfold, described by Mr. Nosek as the manager of ARR. Lisa P. Schwartz, Esq. appeared on behalf of Department staff, accompanied by Scott Sheeley, Regional Permit Administrator, Scott Foti, Division of Materials Management Engineer, Mark Domagala, Division of Materials Management Geologist, and Edward Kieda, Solid Waste Engineer. Gary A. Abraham, Esq. appeared on behalf of SPOC.

The primary issues addressed in the parties' papers, and during the issues conference, were the absence from the record of: (i) a copy of an actual assignment document reflecting that WMNY assigned its rights to the WMNY Permit and any permit application; and (ii) evidence reflecting notice by WMNY to the Department of the transfer of its permit, or an application by ARR to transfer WMNY's permit. During the issues conference, counsel for ARR decided to serve a document subpoena on WMNY seeking to obtain from WMNY a copy of the assignment document. The issues conference was held open pending ARR's service of the subpoena and receipt of a response from WMNY.

Counsel for ARR served the subpoena on WMNY, see IC Ex. 9a, and, in response, WMNY produced: (i) a letter dated May 22, 2007 from counsel for WMNY to Craig Slater stating that it enclosed an original and a copy of "the Assignment of certain rights by Waste Management of New York, LLC pursuant to" the Amended Lease and its three amendments; (ii) a document entitled "Assignment," attaching a copy of the WMNY Permit; and (iii) UPS receipts reflecting delivery of the materials to Mr. Slater's law firm on May 23, 2007. See IC Ex. 9b.

After receiving copies of the documents produced by WMNY in response to ARR's subpoena, proposed amicus SPOC and Department staff each filed and served responses dated November 5, 2014. See IC Exs. 10 and 11, respectively. After ARR filed and served its Supplemental Memorandum of Law dated November 12, 2014, the issues conference record was closed on November 13, 2014.

II. RULINGS ON PARTY STATUS

A. SPOC's Petition for Amicus Party Status

Among the purposes of the issues conference and issues ruling is to determine which persons shall be granted party status. See 6 NYCRR § 624.4(b)(2)(i), (5)(i). ARR and staff are automatically full parties to this proceeding. See 6 NYCRR § 624.5(a).

SPOC, seeking amicus party status, must satisfy 6 NYCRR § 624.5(b)(1) and (b)(3). SPOC is a New York not-for-profit corporation and has been granted 501(c)(3) status by the Internal Revenue Service. SPOC's mission is "to educate the people of Orleans County on the dangers of pollution in their water and air, primarily from existing leaking landfills and new

expansions of landfills." SPOC Pet., at 1. All members of SPOC live in Orleans County, including "a number of people who live near the Towpath Landfill site." Id. at 1-2.

SPOC has identified its environmental interest as including "ensuring a healthy environment in Orleans County." Id. at 2. SPOC's environmental interest regarding the Towpath landfill was established in past proceedings. See, e.g., Matter of Waste Management of New York, LLC, Rulings of the Administrative Law Judge on Party Status and Issues, December 31, 1999, at 66-67 (granting SPOC party status and finding that SPOC has an adequate environmental interest "because of its history of activism concerning the site, and the fact that it draws its membership from people who live in the surrounding community").[11] SPOC has also identified an interest relating to the relevant statutes, has stated that it opposes the proposed permit renewal and supports staff's denial of the renewal, and has identified the precise grounds for its opposition. See SPOC Pet. at 2-3.

SPOC has briefed the only legal issue currently before me, that is, whether ARR has the legal capacity to apply for renewal of the WMNY Permit. In addition, SPOC states that it is in a special position with respect to that issue "because it participated as a full party in the matter of WMNY's application for a Part 360 permit, challenged the terms and conditions of the permit in court," see Stop Polluting Orleans County, Inc. v. Crotty, 3 Misc.3d 1111(A), 2004 N.Y. Misc. LEXIS 811 (May 17, 2004), and "has maintained its corporate status and mission ever since." SPOC Pet. at 4-5.

Neither staff nor ARR filed any papers opposing SPOC's petition. At the issues conference, counsel for staff stated that it did not oppose SPOC's petition. See Transcript of September 17, 2014 Issues Conference ("IC Tr.") at 7:23-8:6. ARR's counsel appeared to argue at the issues conference that SPOC's participation would not add anything regarding the issue of legal capacity. See id. 6:22-7:21.[12]

SPOC's petition for amicus party status is granted with respect to the issue of legal capacity. I find that SPOC has (i) filed an acceptable petition; (ii) addressed the legal issue currently requiring resolution; and (iii) has a sufficient interest in the resolution of that issue, and brings a unique perspective that may contribute materially to the record. See 6 NYCRR § 624.5(d)(2). Indeed, SPOC provided the first in-depth discussion regarding whether ARR had demonstrated that WMNY transferred its permit in accordance with the requirements of 6 NYCRR § 621.11(c). See SPOC Pet. at 3-5. Moreover, SPOC's long-standing participation representing citizens of Orleans County and neighbors of the proposed landfill warrants the grant of its motion with respect to the issue currently before me.

[11] The ALJ's grant of SPOC's request for party status in the Waste Management proceeding was ultimately reversed, not because of a failure to demonstrate that it had an environmental interest, but on the ground that the only issue it proposed for adjudication in the proceeding was determined to be not adjudicable. See Matter of Waste Management of New York, LLC, Interim Decision of the Commissioner, May 15, 2000, at 12. In this proceeding, SPOC is not seeking full party status and is not proposing any issues for adjudication.

[12] The transcript incorrectly identifies the undersigned as the speaker of the text at IC Tr. at 6:22-7:21. The speaker was Mr. Nosek, counsel for ARR. The transcript is hereby corrected to so reflect.

III. RULINGS ON ISSUES

Among the other purposes of the issues conference and issues ruling are: (1) to determine whether disputed issues of fact exist that require adjudication; and (2) to hear argument and rule on the merits of legal issues that do not depend on the resolution of disputed fact issues. See 6 NYCRR §§ 624.4(b)(2)(iii), (2)(iv), (5)(ii), (5)(iii). The parties have not identified any disputed issues of fact that require adjudication in this proceeding. Accordingly, this issues ruling addresses the legal issues raised by the parties.

A. The Assignment

In denying ARR's application, staff concluded that "the application materials provided were not sufficient to demonstrate that all right, interests, and obligations of the Part 360 Permit had been conveyed from WMNY to the Trustee, then to the bankrupt entities and Irene Smith, and then to ARR." Notice of Permit Denial, IC Ex. 4, Doc 32.

During the course of staff's review of ARR's application between May 2013 and April 2014, ARR produced several documents referring to the assignment, including the Third Amendment, the Trustee's Final Report, the Slater Letter, and an internal legal memorandum to Craig Slater discussing the implications of WMNY's termination of the lease. In addition, landfill-related files transferred from the Trustee to OSL were reviewed, and ARR's principal and its counsel contacted representatives of WMNY and of the Trustee requesting a copy of the assignment and related documents. See e.g. IC Ex. 4, Docs 13 and 13.d (review of Trustee's files relating to the landfill); March 10, 2014 letter from A. Nosek, Esq. to J. Zagraniczny, Esq., IC Ex. 4, Doc 25 (requesting a copy of a letter of transmittal that allegedly accompanied the assignment); August 28, 2013 email from Trustee's former law firm, IC Ex. 4, Doc 11.a (reflecting request of WMNY's counsel for copies of documents "where the Part 360 permit was reconveyed to Slater/OSL …"); March 21, 2014 letter from ARR counsel to staff, IC Ex. 4, Doc 28 (recounting contacts with counsel for Trustee).

The record reflects that, prior to the commencement of this proceeding, ARR attempted to obtain a copy of the assignment, and WMNY did not at that time produce the assignment. Upon commencement of this proceeding, however, ARR's counsel acquired the authority to compel WMNY to search for and produce a copy of the assignment. See 6 NYCRR § 624.7(f) ("Consistent with the CPLR, any attorney of record in a proceeding has the power to issue subpoenas"); CPLR 2302(a) ("Subpoenas may be issued without a court order by … an attorney of record for a party to … an administrative proceeding").

ARR's counsel did not initially seek leave in this proceeding to serve a subpoena on WMNY, see 6 NYCRR § 624.7(c) (party may obtain discovery prior to the issues conference with permission of the Administrative Law Judge ("ALJ")), and took the position in briefing prior to the issues conference that secondary evidence of the assignment – that is, the Trustee's Final Report, the Slater Letter and Slater's sworn affidavit – was sufficient under New York law to establish the existence and contents of the assignment. See ARR Mem., at 1-4. ARR's counsel also initially refused at the issues conference to serve a subpoena on WMNY, claiming that the record was adequate, see IC Tr. at 61:1-6, but thereafter stated that he would issue a

subpoena. See id. at 61:18-20.[13] At the issues conference, the ALJs granted ARR leave to issue the subpoena. See id. at 74:21-75:8.

As set forth above, WMNY produced several documents in response to ARR's subpoena. The document entitled "Assignment" refers to WMNY's March 15, 2007 termination of the Amended Lease, and states in relevant part as follows:

> Pursuant to Section 13.10(e) of the Lease, which requires assignment of certain documents within 60 days of a notice of termination, WMNY hereby assigns without warranty, representation or covenant of any kind, all of its right, title and interest in the following:
>
> 1) Permit Under the Environmental Conservation Law to Construct and Operate a Solid Waste Management Facility dated November 20, 2003 (the "Permit"), to the extent that said Permit is still effective (copy attached);
>
> 2) Application for a Permit Under the Environmental Conservation Law to Construct and Operate a Solid Waste Management Facility, which is contained in its entirety in the Record on Appeal submitted to the Fourth Department in Waste Management of New York, LLC, et al. v. Town of Orleans, et. al., Index No. 2003-28877 (to the extent that the Application is still effective);
>
> 3) Town Settlement Agreement, which is also contained in the Record on Appeal submitted to the Fourth Department in Waste Management of New York, LLC, et al. v. Town of Orleans, et al., Index No. 2003-28877, to the extent that said agreement is still effective.

IC Ex. 9b, at fifth un-numbered page. The assignment contains two signature blocks: (i) one for WMNY; and (ii) after the phrase "Acknowledged and Accepted," a signature block for Mr. Slater as Trustee. Although the copy of the assignment produced by WMNY contains a signature on behalf of WMNY, the signature block for Mr. Slater as Trustee contains no signature. See IC Ex. 9b, at fifth and sixth un-numbered pages.

Notwithstanding that staff now possesses a copy of the assignment signed by a representative of WMNY, staff continues to dispute ARR's position that the assignment was effective, arguing: (i) the "purported assignment does not clearly state to whom rights are assigned thereunder;" (ii) because WMNY's signature is undated, the assignment may not have been executed within the 60-day period required by section 13.10(f) of the lease; (iii) the

[13] Had ARR failed to issue a subpoena to WMNY, ARR would not have satisfied the requirements for the introduction of secondary evidence regarding the assignment. See, e.g., Kearney v. Mayor, 92 N.Y. 617, 621 (1883) ("the party alleging the loss of a material paper, where such proof is necessary for the purpose of giving secondary evidence of its contents, *must show that he has in good faith exhausted, to a reasonable degree, all* the sources of information and *means of discovery which the nature of the case would naturally suggest, and which were accessible to him*") (emphasis added). Indeed, once ARR availed itself of the available discovery device, a subpoena, ARR obtained the allegedly "missing" document, thereby mooting the issue of whether ARR had produced secondary evidence sufficient to establish the existence and contents of the "missing" assignment.

assignment refers to section "13.10(e)" rather than "13.10(f)" of the lease; (iv) because the assignment is not signed by the Trustee, "it seems possible the Bankruptcy Trustee may have rejected the purported assignment as ineffective, untimely, unclear, and even because it failed to assign the other permits acquired by WMNY;" and (v) even if the assignment was effective as to the Trustee, the "subpoenaed documents do not support that the Bankruptcy Trustee effectively transferred those rights to Orleans Sanitary Landfill, Inc." Department Staff Response to Subpoenaed Documents dated November 5, 2014 ("Staff Resp."), at 1-6.

Notwithstanding its argument that ARR has failed to meet its burden on the motion to demonstrate there are no genuine issues of material fact, staff does not seek an adjudicatory hearing with respect to any of these issues. Accordingly, I address below each of staff's arguments as legal issues.

1. The Trustee Was the Intended Assignee, and
He Acknowledged and Accepted the Assignment

Staff argues that the assignment is invalid because it does not clearly state to whom rights are being assigned. Although true that the assignment does not contain a sentence expressly stating "these rights, title and interest are being assigned to the Trustee," the assignment makes clear that WMNY intended to assign its rights to the Trustee. The document contains only two signature blocks, one for WMNY and one for the Trustee. Immediately above the Trustee's signature block is the phrase "Acknowledged and Accepted." There is no other party to this document, and the document does not mention any other person or entity. Moreover, the language of the assignment tracks exactly the language in section 13.10(f) of the Third Amendment, the parties to which were WMNY and the Trustee (on behalf of the Smith Companies and as attorney-in-fact for Irene Smith). Indeed, the Amended Lease *required* that upon its termination of the Amended Lease, WMNY assign its rights in the permit application to the Trustee, or the Trustee's assignee. See IC Ex. 4, Doc 11.f, at 4.

Although the copy of the assignment produced in this proceeding does not contain the Trustee's signature, the record clearly establishes that the Trustee "acknowledged and accepted" the assignment. For example, in the Trustee's Final Report, Mr. Slater represented to the bankruptcy court that WMNY had assigned all of its right, title and interest in the WMNY Permit to the Trustee. See Trustee's Final Report, IC Ex. 4, Doc 11.c, at 15. In addition, Mr. Slater's November 22, 2013 letter states that WMNY assigned all of its right, title and interest in the WMNY Permit. See Slater Letter, IC Ex. 4, Doc 14. Finally, Mr. Slater has submitted a sworn affidavit in this proceeding stating that the November 22, 2013 letter "accurately documents the Ownership of the Towpath permit and the related materials, and by this affidavit [I] re-state the substance of my letter under oath." Slater Aff., IC Ex. 5, ¶ 14.

I hold that the Trustee was the intended assignee, and that the absence of the Trustee's signature on the copy of the assignment produced in this proceeding does not establish that the Trustee did not acknowledge or accept the assignment. Rather, the record provides a plethora of evidence that the Trustee acknowledged and accepted the assignment, including his written

representations to the bankruptcy court as an officer of the court and a fiduciary of the parties to the bankruptcy, and his submission of a sworn affidavit in this proceeding.[14]

2. The Absence of a Date on the Assignment Does Not Invalidate It

The Third Amendment required WMNY, within 60 days of terminating the lease, to execute an assignment. See IC Ex. 4, Doc 11.f, at 4-5. Staff argues both that it is not clear when WMNY executed the assignment, and that the assignment was executed after the 60 day limit set forth in the Amended Lease. Compare Staff Resp. at 2 (the assignment "*may not have been executed … within the 60 days* required under Section 13.10(f) of the Lease") with Staff Resp. at 2, Point Heading I (the assignment "*was untimely made*") (emphasis added). Staff cannot have it both ways.[15]

For purposes of addressing staff's argument, however, whether the date is clear or absent does not matter. Even assuming, *arguendo*, that the assignment was executed by WMNY after the 60-day period set forth in the Third Amendment, staff lacks standing to assert this as a basis to invalidate the assignment. Staff is not a party to the Third Amendment, and has not asserted, much less established, that it is a third-party beneficiary thereof. See, e.g., State of California Public Employees' Retirement System v. Shearman & Sterling, 95 N.Y.2d 427, 434-435 (2000) (party asserting rights as a third-party beneficiary must establish, among other things, that the contract was intended for the third-party's benefit).

Only the Trustee, the other party to the Third Amendment, could argue that the failure to date the assignment rendered it invalid. The record before me contains no evidence that the Trustee claims WMNY violated the 60-day requirement, or that such violation invalidates the assignment. To the contrary, the record is replete with evidence that the Trustee considered the assignment to be effective.[16]

I therefore hold that the absence of a date on the assignment document does not render it invalid.

3. The Reference to "13.10(e)" in the Assignment is a Typographical Error

Staff argues that the assignment refers to section 13.10(e) of the Amended Lease, but purports to assign rights not addressed by that section of the Amended Lease. See Staff Resp. at

[14] I note that staff has not requested an opportunity to subpoena and examine Mr. Slater at an adjudicatory hearing with respect to whether, as Trustee, he acknowledged and accepted the assignment from WMNY. Nor has staff sought an opportunity to subpoena and examine a witness from WMNY with respect to the identity of the person or entity to whom the assignment was intended to be effective.

[15] Again, staff has not requested an opportunity to examine WMNY with respect to when it executed the assignment.

[16] I note that the footer on both pages of the assignment contains a date of May 11, 2007, which is within 60 days of WMNY's March 15, 2007 termination of the Lease. See IC Ex. 9b; IC Ex. 4, Doc 13.b.

2. The citation to "Section 13.10(e)" in the assignment, however, is clearly a typographical error. Section 13.10(e), which was added to the Amended Lease as part of the Second Amendment to the Amended Lease, relates to a potential assignment to the Trustee of the Amended Lease, not the assignment of any permits. See IC Ex. 4, Doc 11.e, at 9-10. Section 13.10(e) does not "require assignment of certain documents within 60 days of a notice of termination;" indeed, it does not mention a time frame at all.

The language in the assignment does, however, specifically track the language of Section 13.10(f), which relates to the assignment of rights to the WMNY Permit, any permit application, and the Town Settlement Agreement. See Third Amendment, IC Ex. 4, Doc 11.f, at 4. Section 13.10(f) also refers to a 60-day time frame. Id.[17]

I therefore hold that the reference to section "13.10(e)" in the copy of the assignment produced in this proceeding was merely a typographical error, not an error affecting the substance or effectiveness of the assignment.

4. OSL Was the Relevant Debtor Regarding Permit Rights, and Such Rights Were Abandoned to OSL at the Close of the Bankruptcy Proceeding

Staff argues that, even if the assignment was effective as to the Trustee, the "subpoenaed documents do not support that the Bankruptcy Trustee effectively transferred those rights to Orleans Sanitary Landfill, Inc." Staff Resp., at 1-6. As discussed below, however, the record establishes that OSL was the relevant debtor with respect to: (i) the pre-bankruptcy landfill permit, application and operation, (ii) the terms and purpose of the Amended Lease, and (iii) the Joint Plan approved by the bankruptcy court. Moreover, the record of the bankruptcy proceeding fully supports ARR's position that the Trustee-as-assignee accepted the assignment by WMNY on behalf of OSL only and that such rights were abandoned to OSL at the close of the bankruptcy proceeding.

a. OSL Was the Relevant Debtor

OSL was the initial permittee and operator of the landfill at the site. None of the other Smith Companies operated that or any other landfill. Prior to filing its voluntary petition in bankruptcy, OSL applied for a permit to expand the landfill, both vertically on the existing site and horizontally on adjacent land. That permit application remained pending at the time of the bankruptcy. None of the other Smith Companies was a co-applicant for such permit.

b. OSL's Interest in the Permit Application and Landfill Expansion Was Key to the Structure of the Bankruptcy Plan

The primary goal of the Trustee in the bankruptcy proceeding was to generate, through operation of an expanded landfill, revenue sufficient to pay in full the creditors of the Smith

[17] The typographical error may have resulted from reviewing a copy of the Third Amendment that had not been corrected to change "13.10(e)" to "13.10(f)." See discussion above at Section I.B.1, and notes 6 and 7.

Companies. See Trustee's Final Report, IC Ex. 4, Doc 11.c, at 3; see also Slater Letter, IC Ex. 4, Doc 14, at 1. In this regard, OSL's interest in the Part 360 Permit application was a key element in the Trustee's plan for the creditors.

The first step in that process was to enter into an agreement with WMNY, pursuant to which WMNY would seek permits to expand and operate the landfill. All assets of OSL, including its pending permit application, were conveyed to WMNY as part of the bankruptcy. See Joint Disclosure Statement, IC Ex. 4, Doc 11.b, at 45, and Exhibit C thereto (Closing Statement regarding sale of OSL assets to WMNY); see also Chapter 11 Trustee's Joint Plan Pursuant to § 1123 of the Bankruptcy Code ("Joint Plan"), IC Ex. 4, Doc 11.b, at 11, ¶ 2.25 (defining "Expansion Application or Expansion Permit" as "the Part 360 … application for the horizontal and lateral expansion of the Existing Landfill initially sought by Orleans Sanitary Landfill *and which was assigned and transferred to Waste Management of New York, Inc.*") (emphasis added); id. at 13, ¶ 2.34 (definition of "Expansion Landfill" refers to "a Part 360 permit application *originally filed by OSL and thereafter assigned to Waste Management of New York*") (emphasis added).

In addition to conveying OSL assets to WMNY, the Trustee and WMNY entered into the Amended Lease, which was specifically approved by the bankruptcy court. See Joint Disclosure Statement, IC Ex. 4, Doc 11.b, at 29 (referring to a September 21, 1993 court order approving, among other agreements, the Amended Lease). WMNY promised in the Amended Lease to "proceed diligently to obtain all required permits from the regulatory agencies to construct and operate the New Landfill." IC Ex. 4, Doc 2.d(ii), at 34, Art. XI, § 11.1. Prior to the bankruptcy, pursuit of such permits was made by OSL.

The Amended Lease also contemplated that, should WMNY obtain the Expansion Permit, "Waste Management must pay to *OSL* the sum of $5,500,000." Joint Disclosure Statement, IC Ex. 4, Doc 11.b, at 31 (emphasis added); see also Trustee's Final Report IC Ex. 4, Doc 11.c, at 8. WMNY also "paid to *OSL* the sum of $3,223,000 as prepaid rent pursuant to the Amended Lease." Id. (emphasis added); see also Trustee's Final Report, IC Ex. 4, Doc 11.c, at 8. The Amended Lease also required that all notices to the Landlord were to be sent to "Orleans Sanitary Landfill, Inc., Craig A. Slater, Trustee." Id. at 42, Art. XIII, § 13.4(b).

Thus the language of the relevant bankruptcy documents, including the Joint Disclosure Statement, the Joint Plan, the Amended Lease, and the Trustee's Final Report, clearly support ARR's position that the Trustee was acting on behalf of OSL with respect to the transactions with WMNY, and that OSL's permit application was a key asset well-known to the Trustee, the bankruptcy court, and creditors of the Smith Companies. Staff has offered no evidence to contradict the evidence submitted by ARR, and has not sought an adjudicatory hearing to subpoena and examine any of the relevant witnesses – the former Trustee, Irene Smith, or WMNY – on this issue.

c. OSL's Interests Were Not Merged With the Other Debtors

The Smith Companies' bankruptcy cases were "administratively consolidated," not "substantively consolidated." See, e.g., IC Ex. 4, Doc 11.b, p. 53, Joint Plan Cover Sheet ("Chapter 11 (Administratively Consolidated)"); see id., p. 104, Caption of Order Confirming Joint Plans ("Chapter 11 (Administratively Consolidated)"); IC Ex. 4, Doc 11.c, p. 31, Order Approving Trustee's Final Report (same); Schwartz Aff., Ex. E, Order Approving Second Amendment to Amended Lease (same); see also In re Albion Disposal, Inc., Case Nos. 91-12805K, 91-12806K, 91-12807K , 91-12878K , 91-12889K (W.D.N.Y.), at Docket No. 58 (Order granting motion for joint administration of debtors' estates).

"Administrative consolidation," also referred to as "procedural consolidation," does not merge the debtors' individual estates into one estate. See In re Deltacorp, Inc., 179 B.R. 773, 777 (Bankr. S.D.N.Y. 1995). In contrast, "substantive consolidation" of estates in bankruptcy "effects the combination of the assets and the liabilities of distinct, bankrupt entities and their treatment as if they belonged to a single entity." Federal Deposit Ins. Corp. v. Colonial Realty Co., 966 F.2d 57, 58 (2d Cir. 1992); see also In re Deltacorp, Inc., 179 B.R. at 777.

The Trustee expressly stated that he did not propose a substantive consolidation of the Smith Companies' bankruptcy estates. See Joint Plan, IC Ex. 4, Doc 11.b, at 17; see also id. at 26; Joint Disclosure Statement, IC Ex. 4, Doc 11.b, at 41-42. Although the Smith Companies were "hopelessly and inextricably intertwined," the Trustee proposed instead a distribution and allocation of funds among the five debtors' bankruptcy estates "[a]s an equitable solution to the legal and factual complications of substantive consolidation." Joint Disclosure Statement, IC Ex. 4, Doc 11.b, at 41-42. Under the proposal, OSL was allocated 80%. Id. The Trustee explained his rationale for the proposed allocation as follows:

> The rationale for allocating 80% to OSL is that the funds on hand, together with any future amounts, are essentially derived from the lease of the Existing Landfill and Expanded Landfill, together with *the assignment of OSL's rights under the Part 360 Permit Application*.

Id. at 42 (emphasis added); see also Joint Plan at 17 (setting forth distribution allocation among the five debtors).

Thus, the administrative consolidation of the Smith Companies' bankruptcy cases did not merge OSL's interest in the pending application to expand and operate the landfill, and the Amended Lease, into a collective estate owned by all of the Smith Companies.

d. The Trustee-As-Assignee Accepted the Assignment On Behalf of OSL Only

WMNY's assignment effectuated a transfer of the permit rights to the Trustee. The record supports the view that the Trustee accepted the assignment on behalf of OSL. Mr. Slater's November 22, 2013 letter, incorporated by reference into the sworn affidavit he has

submitted in this proceeding, provides additional support for ARR's position that the WMNY Permit was assigned only to OSL, and not "in whole or in part" to the other four Smith Companies for whom Mr. Slater was also Trustee (that is, Albion Disposal, J&I, I&J and Main Street). Slater provided the following explanation regarding why the Assignment was to OSL and none of the other debtors:

> The WMNY Part 360 permit and materials were assigned to OSL only and for several good reasons: OSL was in title to the main landfill property;[18] was the original Part 360 permit holder; was the historic operator of the landfill; and was the original party to the host fee agreement with the Town. None of the other debtors has operated this or any other landfill nor had an interest in the landfill or landfill permit. It was always anticipated, expected, and contemplated that OSL would be the assignment recipient of the Part 360 permit and materials in the event WMNY terminated as the only entity which could proceed with the Part 360 permit.

IC Ex. 4, Doc 14, at 1-2.

e. The Permit Application was Abandoned to OSL by Operation of Law at the Close of the Bankruptcy

Staff argues that, even assuming WMNY assigned its permit rights to the Trustee, such rights were not transferred to OSL, through formal abandonment proceedings pursuant to 11 U.S.C. § 554(a) or (b), by operation of law pursuant to 11 U.S.C. § 554(c), or by court order, and therefore remained part of the bankruptcy estate at the close of the bankruptcy proceeding, pursuant to 11 U.S.C. § 554(d). See Staff Resp. at 3-5. As discussed below, I hold that the evidence submitted by ARR establishes, for purposes of this proceeding, that the Trustee abandoned such permit rights to OSL by operation of law under 11 U.S.C. § 554(c).

> Section 554(c) states in relevant part:
>
> Unless the court orders otherwise, any property scheduled under section 521(a)(1)[19] of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor ….

Staff argues that ARR has not provided proof that OSL scheduled the permit rights in the bankruptcy proceeding, and that, "[t]herefore, abandonment of the purportedly assigned Permit rights to [OSL] is not authorized under 11 U.S.C. Section 554(c)." Staff Resp. at 5.

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[18] The "existing landfill," i.e., the closed OSL landfill, was located on Parcels E1 and D1. According to a "Site Ownership Map" submitted by staff, Parcel E1 is 42.4 acres; Parcel D1 is 2.4 acres. See IC Ex. 7, Schwartz Aff., Ex. F. OSL owned Parcel E1, see IC Ex. 4, Doc 11.d, at 2, and thus the "main landfill property." John and Irene Smith, "at various times" were record owners of Parcel D1, see id., and John Smith conveyed all of his right, title and interest in that parcel to the Trustee. See id. at 4. Thus, OSL, the Trustee and Irene Smith owned all of the relevant real property.

[19] Under section 521(a), unless the bankruptcy court orders otherwise, a bankruptcy debtor is required to file with the court a schedule of assets and liabilities, current income and expenditures, and a statement of financial affairs.

In his November 22, 2013 letter regarding the ownership of the permit rights, however, the former Trustee states that the permit rights were abandoned by operation of law:

> In sum, the WMNY Part 360 permit and all supporting materials were transferred to and are now property of OSL. *These assets then, devolved by law in title to OSL and thereby OSL shareholders, upon termination of the bankruptcy estate (and my role as Trustee).*

Slater Letter, IC Ex. 4, Doc 14, at 2 (emphasis added). Thus, the former Trustee has represented that, upon the close of the bankruptcy proceeding, the permit rights did not remain part of the bankruptcy estate, but were owned by OSL. Staff offers no facts to contradict the former Trustee's statement, and has not sought an adjudicatory hearing at which to examine Mr. Slater to test the validity of such statement. The former Trustee's statement, which was incorporated by reference into his sworn affidavit submitted in this proceeding, is sufficient to establish in this proceeding that OSL owned the permit rights after the close of the bankruptcy proceeding.

The debtor has a broad obligation to disclose all of his interests at the commencement of a case, and undisclosed assets automatically remain property of the estate after the case is closed. See Chartschlaa v. Nationwide Mutual Ins. Co., 538 F.3d 116, 122 (2d Cir. 2008). The filing and disclosure requirements are intended to ensure that the Trustee has sufficient information regarding an asset to enable the Trustee to determine the value of the asset to the estate and, thus, to creditors. See, e.g., Lee v. Forster & Garbus LLP, 926 F.Supp.2d 482, 489-90 (E.D.N.Y. 2013). The requirements are also designed to prevent fraud by the debtor. See, e.g., Chartschlaa, 538 F.3d at 122 ("'A debtor may not conceal assets and then, upon termination of the bankruptcy case, utilize the assets for [his] own benefit'") (quoting Kunica v. St. Jean Fin., Inc., 233 B.R. 46, 53 (S.D.N.Y. 1999)).

Many of the cases regarding this issue arise when a debtor pursues a cause of action that the debtor did not disclose in the bankruptcy. In such circumstances, courts have refused to allow the debtor to pursue such claim. See, e.g., Jeffrey v. Desmond, 70 F.3d 183 (1st Cir. 1995) (affirming district court's decision upholding bankruptcy court approval of compromise by Trustee of a state court action that debtors had failed to schedule); Pease v. Production Workers Union of Chicago and Vicinity Local 707, 386 F.3d 819 (7th Cir. 2004); Coffaro v. Crespo, 721 F.Supp.2d 141 (E.D.N.Y. 2010) (applying judicial estoppel to prevent former debtor from asserting ownership of a painting that he had not listed as an asset in bankruptcy). These cases do not present facts remotely similar to the facts of this case, and are therefore inapposite here.

Even though ARR has not submitted a copy of OSL's schedule of assets from the bankruptcy proceeding, there can be no credible claim that OSL attempted to hide its permit rights from the Trustee, creditors in the bankruptcy proceeding, or the bankruptcy court. Indeed, as discussed above, such permit rights were a key component of the Trustee's plan to secure additional revenues to pay creditors, and it cannot be disputed that the Trustee, creditors and court were fully aware of such rights and their importance to the bankruptcy estate. The court specifically approved each of the documents (submitted here by ARR) involving the permit

rights, including the Joint Disclosure Statement, the Joint Plan, the Amended Lease, and the Trustee's Final Report.

Based upon my review of the parties' submissions, and the analysis contained herein, I grant ARR's motion and hold that ARR possesses the legal capacity to apply for a renewal of the WMNY Permit.

B. Permit Transfer

Department regulations provide that applications for the transfer to a different permittee or applicant of existing permits or pending permit applications "must be submitted on a form prescribed by the department," and must meet certain other conditions. 6 NYCRR § 621.11(c)(1)-(6). In addition, permits for solid waste management facilities are transferable "only upon prior written approval of the department." 6 NYCRR § 360-1.11(b). The Department has discretion to determine whether "continuing permitted activities under a new legally responsible party is protective of the environment and the public's health, safety and welfare." DEC Policy DEP-01-1, Transfers of Permits and Pending Applications (August 4, 2008) ("DEP-01-1"), at 3.

DEP 01-1 requires evidence that the transferor consents to the transfer of its permit:

> Permit transfers require the consent of the Transferor by way of the application form *or other documentation in acquisition or facility/property use agreements signifying conveyance of rights to permits held by the Transferor.*

Id. (emphasis added).

Staff and amicus SPOC correctly point out that neither ARR nor WMNY has submitted to the Department an application form to transfer the WMNY Permit to ARR, and the Department has not otherwise exercised its discretion to approve such transfer. See Staff Mem. at 5-14; SPOC Pet., IC Ex. 6, at 4-5; see also SPOC's Brief in Opposition dated November 5, 2014, IC Ex. 10. Staff also raised this issue in its first Notice of Incomplete Application, and the issue was never resolved. See June 2013 NOIA; see also Notice of Permit Denial, IC Ex. 4, Doc 32, at 1. Although staff also argued that the secondary evidence of the WMNY assignment was insufficient to demonstrate WMNY's consent to the transfer, the actual assignment document produced by WMNY after the issues conference clearly evinces WMNY's intent to "assign[] without warranty, representation or covenant of any kind, all of its right, title and interest in" the WMNY Permit, the permit application and the Town Settlement Agreement. This is sufficient to demonstrate that WMNY consented to the transfer of the permit.[20]

[20] The WMNY Permit also required WMNY to provide advance written notice to the Department's Region 8 office of a proposed transfer of permit rights. See IC Ex. 4, Doc 7.b, at 23 (Special Condition No. 63). Failure by WMNY to give such notice, however, does not preclude ARR from seeking, or Department staff approving, ARR's request for a transfer of the WMNY Permit.

As set forth above, in its response to staff's first NOIA, ARR asked whether it would be required to submit an application for permit transfer. See IC Ex. 4, Doc 11, at 2, ¶ 4. Staff's response was as follows:

> While it is clear that at this time there is insufficient information to demonstrate that another format may be used, it is not clear whether the ARR may still be able to submit such information in response to this letter.

October 2013 NOIA, IC Ex. 4, Doc 12, at 4, ¶ 4. Staff did not explain the meaning of this sentence, and repeated it in the next NOIA. See December 2013 NOIA, IC Ex. 4, Doc 18, at 3, ¶ 4. As pointed out at the issues conference by counsel for ARR, "[w]hat is really not clear is what the foregoing response from the DEC means." IC Tr. at 22:22-23:10.

Nothing in the record of this proceeding supports the view that ARR would refuse to apply for a transfer of the WMNY permit, if staff clearly stated that an application for permit transfer would be required. Consistent with DEP 01-1, staff has acknowledged that a transfer may be effectuated in ways other than through the prescribed form. See IC Tr. at 72:6-19. Staff of course retains its discretion with respect to whether to approve the transfer. Because this issue is not resolved, however, it must be addressed by staff and Applicant upon remand.

IV. NEXT STEPS

The parties were directed to address how the matter should proceed following a determination of the issue of legal capacity. See ENB Notice, IC Ex. 2A. ARR states that the Department should "issue a Renewal Permit for the construction and operation of Towpath to ARR with permit conditions as stated in the NOIA." ARR Mem. at 11. Department staff states that its denial of ARR's application to renew the WMNY Permit should be upheld, and that "[t]he Department need do nothing further on the Application upon such a denial." Staff Mem. at 25.

Staff also states that, should it be determined that ARR has the requisite legal capacity, the matter should be remanded back to staff "to complete permit application processing in accordance with the procedures set out under 6 NYCRR Part 621 for an application awaiting a DEC completeness determination." Id. at 20.[21] Staff states further that, if the matter is remanded, it would be appropriate to continue processing the renewal application despite the permit's expiration in November 2013, and that staff would determine: (i) whether to treat the application as a new application; (ii) the SEQR status of the application (that is, whether the application is a Type II action or instead requires an SEIS); and (iii) what, if any, further information is required to complete the application. See id. at 20-21.

Although ARR provides no argument or case law on the issue, its initial brief alludes to a concern that, notwithstanding staff's denial of ARR's application solely on the issue of legal

[21] As staff notes, it has the authority to appeal to the Commissioner my ruling that ARR does have the requisite legal capacity. See id. at 17.

capacity,[22] staff may now seek to deny the application on one or more other grounds. See ARR Mem. at 11 ("If DEC can revisit the current denial made on the 'sole' ground and later deny on a new ground, can they deny on a new 'sole' ground again and again?").

Staff asserts that it notified ARR of other issues throughout the review process and in its many notices of incomplete application, and has not waived any unresolved issues. See, e.g., Staff Mem. at 14 ("at no time did Staff concede that the remainder of the items in the NOIAs would be eradicated by" submission of the WMNY assignment); id. at 24 ("In the permit processing prior to this proceeding, staff appropriately and timely provided notices of its requests for information and other concerns to the applicant. As a result, these concerns were not resolved nor waived by staff's denial letter"). Staff's denial letter expressly reserved its rights regarding issues, other than legal capacity, raised by ARR's application:

> Your application is being denied solely on the issue of legal capacity. During the course of our previous communications, a number of other issues have been identified that are either pertinent to the substance of your request to renew or within the realm of the Department's discretion, including its discretion on procedural matters. None of those issues are deemed resolved by the issuance of this letter. However, it is unnecessary to address them at this time in light of the lack of legal capacity. Within the context of a sufficient renewal application, all of those issues would be material to processing the request, as well as any other issues that emerged during the course of the review, and are not waived.

Notice of Permit Denial, dated April 9, 2014, IC Ex. 4, Doc 32, at 1-2.

In Matter of Haley, staff's notice of denial letter identified freshwater wetlands standards that the application failed to satisfy, but made no mention of whether the proposed project complied with the tidal wetlands law. At the issues conference, staff indicated for the first time that the project did not satisfy tidal wetlands requirements, but staff failed to identify any specific tidal wetlands provisions that were not met or any specific tidal wetlands deficiencies in the application. The ALJ nevertheless ruled that the issue of whether the project complied with tidal wetlands provisions would be adjudicated. See Matter of Haley, Issues Ruling, September 18, 2008, at 8.

On appeal, the Commissioner held that there would be no adjudication of tidal wetlands issues. Matter of Haley, Interim Decision of the Commissioner, June 22, 2009, at 5. The Commissioner held that "[a]n applicant is entitled to know the grounds upon which its permit application is denied so that, if it seeks a hearing on the denial, it is able to prepare its case," id. at 4, and that "[a] reading of the notice of permit denial in this matter provided no indication that applicable tidal wetlands standards were not met." Id. at 3. In such circumstances, "it was reasonable for applicant to assume that Department staff had no objections to the issuance of a tidal wetlands permit for this project." Id.; see also id. at 4 n.1 (same).

[22] See Notice of Permit Denial dated April 9, 2014, IC Ex. 4, Doc 32, at 1 ("Your application is being denied solely on the issue of legal capacity").

Matter of Haley is distinguishable on multiple grounds. First, in Haley, Department staff denied the permit application after the application was deemed complete. Here, applicant has not submitted a complete application, and staff has not made a completeness determination.

Second, unlike Matter of Haley, staff in this case identified in its many notices of incomplete application other issues in addition to legal capacity that needed to be resolved before the application could be considered complete or sufficient. See, e.g., June 2013 NOIA, IC Ex. 4, Doc 7; October 2013 NOIA, IC Ex. 4, Doc 12; December 2013 NOIA, IC Ex. 4, Doc 18; February 2014 NOIA, IC Ex. 4, Doc 22. In addition, as quoted above, staff's notice of permit denial letter reiterated that issues remained outstanding and would need to be resolved. See Notice of Permit Denial, dated April 9, 2014, IC Ex. 4, Doc 32, at 1-2.

Thus, unlike in Matter of Haley, it would *not* be reasonable for applicant here to assume that Department staff had no possible objections to issuance of a permit other than ARR's legal capacity. The record makes clear that staff viewed legal capacity as a threshold issue; that is, if ARR lacked legal capacity to apply to renew the WMNY Permit, it would be a waste of resources to address the other issues identified in the notices of incomplete application.

As discussed above, staff has not yet determined: (i) whether to approve transfer of the WMNY Permit to ARR; (ii) whether to treat ARR's application as a new application;[23] (iii) the status of the application under SEQRA; or (iv) that ARR's application is complete.[24] In addition, staff retains the ability to request additional information from an applicant "with regard to any matter contained in the application … when such additional information is necessary for the department to make any findings or determinations required by law." ECL § 70-0117(2).

Because I hold that ARR has the legal capacity to apply to renew the WMNY Permit, I remand the matter to staff for further proceedings relating to ARR's application.

V. RULING AND ORDER OF DISPOSITION

SPOC's request for amicus party status is granted with respect to the issue of ARR's legal capacity, and therefore with respect to any appeal from this ruling.

ARR has established that it has the legal capacity to apply to renew the WMNY permit. In addition, no factual issues are presented requiring adjudication. Accordingly, this matter is remanded to staff for further proceedings regarding ARR's application.

[23] Staff may determine that any application for renewal will be treated as a new application if, for example, "there is newly discovered material information or there has been a material change in environmental conditions, relevant technology or applicable law or regulations since the issuance of the existing permit." 6 NYCRR § 621.11(h)(2).

[24] Staff has also pointed out that conditions in the WMNY Permit may be modified based upon changes in requirements. See, e.g., June 2013 NOIA, IC Ex. 4, Doc 7, at 5 (referring to Special Condition No. 12 relating to independent environmental monitors).

VI. APPEALS

A ruling of an ALJ (i) to include or exclude any issue for adjudication; (ii) on the merits of any legal issue made as part of an issues ruling; or (iii) affecting party status, may be appealed to the Commissioner on an expedited basis. See 6 NYCRR § 624.8(d)(2)(i)-(iii). Expedited appeals must be filed in writing within five days of the disputed ruling. See 6 NYCRR § 624.6(e)(1). Notice of any appeal and a copy of all briefs must be filed with the undersigned ALJ and served on all parties. See 6 NYCRR § 624.6(e)(3).

Appeals will be due by 4:00 PM on Friday, **April 17, 2015**. Replies are authorized, and will be due by 4:00 PM on Friday, **May 1, 2015**.

The original and two copies of each appeal and reply thereto must be filed with Commissioner Joseph Martens (Attention: Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services), at the New York State Department of Environmental Conservation, 625 Broadway (14th Floor), Albany, New York 12233-1010. The copies received will be forwarded to Chief Administrative Law Judge James T. McClymonds and me. In addition, one copy of each submittal must be sent to all others on the service list (as of May 21, 2014) at the same time and in the same manner as the submittals are sent to the Commissioner. Service of papers by facsimile transmission (FAX) or by electronic mail is not permitted, and any such service will not be accepted.

/s/

D. Scott Bassinson
Administrative Law Judge

Dated: March 26, 2015
Albany, New York

Attachment: Issues Conference Exhibit List

ISSUES CONFERENCE EXHIBITS

1. Referral E-mail to Office of Hearings and Mediation Services

2. a. ENB Notice
   b. Notice of Permit Hearing Distribution List

3. Affidavit of Publication

4. Document List (Revised July 9, 2014), and the Documents 1-33 Identified Therein

5. August 6, 2014 Submissions by Applicant
   a. Notice of Motion for Summary Judgment
   b. Affidavit of Anthony M. Nosek, Esq.
   c. Affidavit of Craig A Slater, Esq.
   d. Affidavit of Richard C. Penfold, attaching Exhibits 1 and 2
   e. Memorandum of Law

6. August 8, 2014 Submissions by Proposed Amicus Stop Polluting Orleans County, Inc. ("SPOC")
   a. Petition for Amicus Party Status, attaching Exhibit

7. September 3, 2014 Submissions by Department Staff
   a. Affidavit of Edward D. Kieda, attaching Exhibits A-C
   b. Affidavit of Scott J. Foti
   c. Affidavit of Scott E. Sheeley, attaching Exhibits A-E
   d. Affirmation of Lisa P. Schwartz, attaching Exhibits A-F
   e. Department Staff Memorandum of Law

8. September 4, 2014 Letter from Gary A. Abraham, Esq., attaching e-mail

9. a. Subpoena Duces Tecum to Waste Management of New York, L.L.C., with attachment
   b. October 17, 2014 Letter from Kathleen M. Bennett, Bond Schoeneck & King, with attachments

10. November 5, 2014 Cover Letter, attaching SPOC's Brief in Opposition to Albion Recycling & Recovery LLC Application to Renew Part 360 Application

11. November 5, 2014 Cover Letter, attaching Department Staff Response to Subpoenaed Documents, with attachments

12. November 12, 2014 Cover Letter, attaching ARR's Supplemental Memorandum of Law

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