STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application of CUSTOM COMPOST, INC., for a renewal of its permit issued pursuant to title 7 of article 27 of the Environmental Conservation Law (ECL) and part 360 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) to continue to operate a Yardwaste Compost Facility in the Town of Marlborough, Ulster County, New York.	**RULING ON ISSUES AND PARTY STATUS** **DEC Application No. 3-5136-00058/00001** **March 25, 2004**

SUMMARY OF RULINGS

This ruling identifies the parties and the potential issues for adjudication in the matter of the application by Custom Compost, Inc., for a renewal of its part 360 permit to continue to operate a Yardwaste Compost facility processing up to 68,000 cubic yards per year of leaves, grass and brush on approximately 17 acres of its 28.5 acre site, and to incorporate the existing wood chipping operation on the site, previously regulated as a registered activity, into this part 360 permit renewal. The parties to this proceeding are the Applicant, the Department Staff and the Town of Marlborough. Upon due consideration of the Petition filed by the Town of Marlborough, as well as other documents and exhibits entered into the record in this matter, and after an issues conference conducted herein pursuant to 6 NYCRR part 624, I find that no substantive and significant issue has been raised requiring adjudication, nor has the Town identified a legal or policy issue which needs to be resolved by a hearing pursuant to part 624.
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BACKGROUND

Project Description and Location

The Applicant has applied for a renewal of its part 360 permit to continue to operate a Yardwaste Compost facility for up to 68,000 cubic yards per year of leaves, grass and brush on approximately 17 acres of its 28.5 acre site. The existing wood chipping operation on the site (previously regulated as a registered activity) will now be incorporated into this part 360 permit renewal and will now be subject to all the terms and conditions of this permit. The facility is located at 168 Milton Turnpike in the Town of Marlborough, Ulster County, New York.

Permits Required

The permit requiring renewal is one to operate a solid waste management facility, issued pursuant to title 7 of article 27 of the Environmental Conservation Law (ECL) and part 360 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR part 360).

SEQRA Status and Determination of Completeness

The renewal of the permit is a Type II action pursuant to 6 NYCRR 617.5(c)(26) because there would be no material change in permit conditions or the scope of permitted activities. Because the renewal is a Type II action, no environmental assessments or determinations of significance are required, and no environmental impact statement has been prepared.

On September 19, 2001, a Notice of Complete Application was published by the Department in the *Environmental Notice Bulletin*.

LEGISLATIVE PUBLIC HEARING

A Notice of Public Hearing and issues conference, dated August 28, 2002, was published on that date in the *Environmental Notice Bulletin* (*ENB*) and, that same date, as a legal notice in the *Southern Ulster Pioneer*, a newspaper of general circulation in the area of the proposed project. The notice provided, *inter alia*, that a legislative public hearing, pursuant to 6 NYCRR parts 621 and 624 would be convened at 7:30 P.M. on Tuesday, October 1, 2002, at the Town of Marlborough Town Hall, Route 9W, Milton, New York, to receive unsworn statements from the public concerning the permit application.

The legislative public hearing went forward as announced and was presided over by Administrative Law Judge (ALJ) Richard R. Wissler, the undersigned. Approximately 15 persons attended the hearing. Seven individuals spoke and some submitted written comments, as well. The concerns expressed focused primarily on traffic, noise, and air impacts, as well as the use, design and adequacy of earthen berms located at the site.

ISSUES CONFERENCE

Conference Participants

Pursuant to the above referenced published notice of August 28, 2002, a pre-adjudicatory hearing issues conference was held at 10:00 A.M. on October 2, 2002, at the aforementioned Town of Marlborough Town Hall to determine what issues, if any, within the scope of the Department's regulatory purview, required adjudication and to consider all timely filed applications for party status to participate in any adjudicatory hearing which might be convened in this matter. The participants at the conference were the Applicant, Department Staff and the Town of Marlborough.

The Applicant was represented by Edmund V. Caplicki, Jr., Esq., of the law firm of Hankin, Hanig, Stall, Caplicki, Redl & Curtin, LLP, 319 Main Mall Rear, P.O. Box 911, Poughkeepsie, New York 12602.

The Department Staff was represented by Jonah Triebwasser, Deputy Regional Attorney, from the Department's Region 3 office, 21 South Putt Corners Road, New Paltz, New York 12561-1696.

The Town of Marlborough was represented by John G. Rusk, Esq., of the law firm of Rusk, Wadlin, Heppner & Martuscello, LLP, 255 Fair Street, P.O. Box 3356, Kingston, New York 12402.

Conference Proceedings

The issues conference began with the identification of the various documents constituting the application and the draft permit.

In accordance with the notice of August 28, 2002, petitions requesting full party or amicus status pursuant to 6 NYCRR 624.5(b) were to be filed by September 23, 2002. One petition for full party status, or in the alternative, amicus status, on behalf of the Town of Marlborough was timely received on September 20, 2002. No other petitions were received. The mandatory parties, the Applicant and Department Staff, were asked to indicate what, if any, objection they had as to the standing of the Town of Marlborough (Town) as a party to this proceeding. Both the Applicant and Department Staff indicated they had no objection with respect to the Town's environmental interest in the matter and agreed that the Town's petition comported with the requirements of 6 NYCRR 624.5(b)(1).

Thereafter, the conference focused on the various issues asserted by the Town to be both substantive and significant and therefore appropriate for adjudication pursuant to 6 NYCRR 624.4(c). The Town's petition identified several areas of concern, including noise impacts, dust, odors, the location and adequacy of earthen berms, traffic impacts and failure of the Applicant to operate the facility in accordance with certain parameters which, the Town argued, were imposed by its Planning Board upon granting the Applicant a special permit for the facility in 1994.

As part of the issues conference on October 2, 2002, a site visit was conducted. As a result of discussions during the issues conference, and particularly during the site visit, the parties agreed to keep the record of the issues conference open and to meet to discuss the possible resolution of certain issues, particularly the placement of various vegetative barriers and berms. These negotiations failed to resolve these matters, however, and following a conference call with the parties on September 16, 2003, the parties were permitted until October 3, 2003, to file final arguments in the matter prior to the issuance of this ruling.

RULINGS ON PARTY STATUS

Full Party Status

The Applicant and the Department Staff are automatically full parties to the proceeding pursuant to 6 NYCRR 624.5(a).

With respect to the Petitioner Town of Marlborough, as provided in 6 NYCRR 624.5(d) and as applicable to this matter, to be entitled to full party status a determination must be made that the Town has:

1. Filed an acceptable petition pursuant to 6 NYCRR 624.5(b)(1) and (2);

2. Raised a substantive and significant issue; and

3. Demonstrated an adequate environmental interest.

The Town of Marlborough is a municipality in Ulster County, New York, and the Applicant's composting facility lies upon lands located within its incorporated borders. Moreover, the facility adjoins a residential area of the Town comprised of several single family homes. The Town has in interest in safeguarding the public health, safety and welfare of its residents from any adverse undue environmental impacts occasioned by the Applicant's facility, such as unreasonable traffic and noise impacts, and dust and odors. At the issues conference, the Applicant and Department Staff indicated that they had no opposition to the Town's statement of environmental interest and agreed that its petition for full party status comported with the requirements of 6 NYCRR 624.5(b)(1).

However, as will be discussed hereinafter, the Town has not raised an issue that is substantive and significant and, thus, has failed to file a petition which comports with the requirements of 6 NYCRR 624.5(b)(2). Accordingly, the Town of Marlborough is denied full party status in this proceeding.

Amicus Status

With respect to the Petitioner Town of Marlborough's application for amicus status, as provided in 6 NYCRR 624.5(d) and as applicable to this matter, to be entitled to such status a determination must be made that the Town has:

1. Filed an acceptable petition pursuant to 6 NYCRR 624.5(b)(1) and (3);

2. Identified a legal or policy issue which needs to be resolved by a hearing convened pursuant to part 624; and

3. Shown that it has a sufficient interest in the resolution of such issue and through expertise, special knowledge or unique perspective may contribute materially to the record on such issue.

While it is clear that the Town has filed a petition which comports with the requirements of 6 NYCRR 624.5(b)(1), as will be discussed hereinafter, the Town has not identified a legal or policy issue which needs to be resolved by a hearing convened pursuant to part 624 and, thus, has failed to file a petition which comports with the requirements of 6 NYCRR 624.5(b)(3). Accordingly, the Town of Marlborough is denied amicus status in this proceeding.

STANDARDS FOR ADJUDICABLE ISSUES

In accordance with the standards articulated in 6 NYCRR 624.4(c), an issue is adjudicable only if it relates to a dispute between Department Staff and the Applicant over a substantial term or condition of a proposed draft permit, relates to a matter cited by Department Staff as a basis to deny the proposed permit and such matter is contested by the Applicant, or is proposed by a potential party and is both substantive and significant.

An issue is substantive if there is sufficient doubt about the Applicant's ability to meet statutory or regulatory criteria applicable to the proposed project, such that a reasonable person would require further inquiry. (6 NYCRR 624.4[c][2]) In determining whether such sufficient doubt exists, the ALJ will consider the issue in light of the permit application and related documents, the proposed draft permit, the contents of any petition filed for party status, the record of the issues conference, and any subsequent written arguments or submissions authorized by the ALJ. (*id*.)

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

Pursuant to 6 NYCRR 624.4(c)(4), where the Department Staff has reviewed a permit application and finds that the Applicant's project, as proposed or as conditioned by the draft permit, conforms to all applicable statutory and regulatory requirements, the burden of persuasion is on the potential party proposing any issue related to the project to demonstrate that that issue is both substantive and significant. This burden of persuasion is met by an appropriate offer of proof. As stated by the Commissioner, "the offer of proof can take the form of proposed testimony, usually that of an expert, or the identification of some defect or omission in the application. Where the proposed testimony is competent and runs counter to the Applicant's assertions an issue is raised. Where the intervenor proposes to demonstrate a defect in the application through cross-examination of the Applicant's witnesses, an intervenor must make a credible showing that such a defect is present and likely to affect permit issuance in a substantial way. In all such instances a conclusory statement without a factual foundation is not sufficient to raise issues." *Matter of Halfmoon Water Improvement Area No. 1*, 1982 WL 25856 (N.Y. Dept. Env. Conserv., Decision of the Commissioner, 1982).

In the present proceeding, the Department Staff has determined that, in light of the special conditions contained therein, there are no statutory or regulatory prohibitions or

restrictions which would preclude renewal of the Applicant's part 360 permit. Thus, it is the Town's burden to demonstrate that the issues it has raised are adjudicable.

ISSUES PROPOSED FOR ADJUDICATION

The Town has articulated certain issues it deems to be adjudicable in this proceeding, including noise and traffic impacts, as well as the effects of dust and noxious odors emanating from activities at the Applicant's site. In addition, the Town asserts that it has identified a legal or policy issue which needs to be resolved by a hearing brought pursuant to part 624. The legal and policy issue, argues the Town, arises from its claim that its Planning Board restricted the Applicant's composting activities to only 4 to 5 acres of its total site. The original grant of a permit by the Department allowing, under its regulatory authority, composting on approximately 17 acres of the Applicant's site, is at variance with the Town Planning Board's restriction. As such, the Town argues, this action by the Department is contrary to ECL 27-0711 which provides in substance that no local law, ordinance, or regulation not inconsistent with title 7 of ECL article 27 or its implementing regulations shall be superceded by the ECL. Accordingly, the Town asserts, the Applicant's composting activities at its facility should be restricted to 4 to 5 acres and the Department's permit should comport with this restriction. (See, "Petition for Party Status and/or Amicus Status," dated September 18, 2002, and submitted by the Town of Marlborough at 1-5, Exhibit 7.)

Noise Impacts

Positions of the Parties

With respect to the issue of noise impacts, the Town proffered no expert witness but rather indicated that owners of properties neighboring the facility would be called to testify as to the volume level of the noises generated by the Applicant's activities. (Transcript of issues conference of October 2, 2002, page 29, hereinafter abbreviated "I.C." and page number.) In addition, the Town asserted that vegetated berms and other vegetative barriers which would mitigate noise impacts, as well as visual impacts (although these impacts were not separately raised as an issue by the Town), had either not been constructed as agreed by the Applicant or had not been properly maintained. (I.C. at 22-23.) In particular, the Town pointed out that berms had been placed in the southeast corner of the property in response to complaints by the neighboring property owner, but that they had not been fully constructed as promised, or had been inadequately maintained. (I.C. at 66-67.) Moreover, the Town urged that the construction of a berm along the entire southern border of the property would mitigate both noise and visual impacts to the neighboring properties located there. (I.C. at 62-63.) The Town further indicated that it had not conducted any noise impact studies at the site and, moreover, that the Town does not have a local law or ordinance regulating noise levels. (I.C. at` 35-36.)

The Applicant asserted that since its operation began, the facility had complied with every applicable Department requirement and regulation concerning noise impacts. (I.C. at 36.)

In addition, the Applicant argued that the facility had maintained a list of complaints it received regarding noise and that each such complaint had been addressed by either the Applicant or the Department, with the result that there had never been a finding that the Applicant had exceeded any applicable noise level requirement or regulation. (I.C. at 37.)

Department Staff argued that the proposed permit fully addressed the Town's concerns regarding noise inasmuch as the permit must comport with all applicable part 360 regulations and, thus, specifically incorporates by reference the noise level parameters articulated in 6 NYCRR 360-1.14(p).

Site Visit

As part of the proceedings of the issues conference on October 2, 2002, a site visit of the facility was conducted with the parties. A vegetated berm was observed along portions of the southern and eastern portions of the facility. (I.C. at 156.) However, it was noted that soils from this berm had been removed and, as the Applicant conceded, had been used in the composting operations of the facility. (I.C. at 160.) Moreover, at the southern end of the site, along the boundary between the facility and neighboring residences, a single row of pine and Lombardy poplar trees of approximately 450 feet in length was observed. The pine trees, comprising perhaps a third of the row, were 6 to 8 feet in height, but some of them had obviously failed to survive. (I.C. at 150.) The remainder of the row was comprised of Lombardy poplars ranging in height from approximately 15 to 30 feet. (*id*.) During the site visit, facility equipment was placed in operation to audibly observe noise levels emanating therefrom and included a truck as well as the wood chipper which is proposed to be incorporated into this permit. (I.C. at 165.)

Discussion

Noise levels resulting from equipment or operations at the facility must comport with the requirements of 6 NYCRR 360-1.14(p). As relevant to this matter, this regulation mandates that these noise levels, in a rural setting, such as is the case here, be controlled to ensure that at the facility's property line bordering a residential area, the A-weighted equivalent steady-state sound level (Leq) of such noise does not exceed 57 decibels, unless the existing background residual sound level at the site is higher, in which case, noise levels resulting from equipment or operations must not produce an Leq exceeding that background level. The Town offered no proof to suggest that this regulatory requirement had been exceeded. Indeed, the Town conceded that it had not conducted any noise impact studies at the site. (I.C. at 35.) Moreover, the Town has not adopted any local law controlling noise. (I.C. at 36.)

When originally issued by the Department in May 1995, the permit for the facility (Exhibit 10) directed, pursuant to Special Condition 8(d), that the facility be operated in conformance with the engineering report, dated July 8, 1994, prepared by William E. French, P.E. (Exhibit 11) This requirement is reiterated in the present proposed draft renewal permit (Exhibit 4) in Special Condition 6(c) which provides that:

> "The facility shall be operated in conformance with the Site Plan of the Permit Application prepared by Mr. William E. French, P.E. dated 6/26/94 (revised 7/8/94) and in accordance with the engineering report dated 7/8/94 and submitted under the same signature, and in accordance with the Part 360 Permit Renewal Application dated November 25, 1997, submitted by Craig Marti, P.E."

The Site Plan referred to in Special Condition 8(d) of the original permit and Special Condition 6(c) of the draft renewal permit, above, was identified as Exhibit 9 during the issues conference. Vegetative barriers are depicted on this site plan running more or less continuously along the entire southern end of the facility's property and particularly where the property borders a residential use. A vegetative barrier is also depicted at the northeast corner of the site. As the engineering report directs:

> "A coniferous vegetative sound and visual barrier will be planted on the northern and southern property lines as detailed in the attached Site Plan. White Pine or similar spicies [*sic.*] will be established as a barrier." (Exhibit 11at 4, referring to Exhibit 9, the Site Plan.)

During the site visit, although it was apparent that the pine trees planted along the southern border had struggled to survive, the Lombardy poplars had thrived. Indeed, the viability of this latter species was acknowledged by Department Staff who agreed that the establishment of the vegetative barrier could be revisited. (I.C. at 166.) While Department Staff offered to discuss the matter of the vegetative barrier further with the parties, no resolution of the issue was ultimately reached. (I.C. at 170-171.)

At the outset, it is clear that the requirement in the engineering report of a vegetative barrier along the southern and northern borders of the facility, as depicted in the Site Plan, remains a condition of the permit. Moreover, it is clear that some species of coniferous and deciduous trees will survive at the site. At present, the trees as planted comprise only a single row, each, at best, spreading only a few feet at its base. While minimally consistent with the language of the engineering report, such a single row of trees cannot be said to comprise the "vegetative sound and visual barrier" contemplated by the report. Indeed, as depicted on the Site Plan, the footprint of the proposed vegetative barriers are approximately twenty feet or more in width, far wider than is actually provided by the extant trees. The language of the permit should be modified to provide a clearer understanding of the meaning the phrase "vegetative sound and visual barrier," as well as specific direction as to the nature and design of a planting plan which would comport with this understanding. Pursuant to 6 NYCRR 624.4(b)(2)(ii), inasmuch as one of the primary functions of the issues conference is "to narrow or resolve disputed issues of fact without resort to taking testimony," I would recommend that the following special condition be made part of the renewed permit and added as a second paragraph to Special Condition 23 of the draft permit:

> "Within 90 days of the effective date of this permit (exclusive of the period from November 1st to May 1st), and in amplification of the operational requirements of

> the engineering report of 7/8/94 and the Site Plan of 6/26/94, revised 7/8/94, referenced in Special Condition 6(c) herein, a vegetative sound and visual barrier will be planted on the northern and southern property lines as detailed in the Site Plan. This barrier shall consist of two staggered rows of white pine (*Pinus strobus*) or Lombardy poplar (*Populus, 'Italica'*) or similar tree species having a mature height of at least 50 feet and a mature spread of at least 15 feet, and shall incorporate the existing and thriving pine and poplar trees, to the extent reasonably possible. At the time of initial planting, all new trees shall be a minimum of 4 feet in height and shall be spaced 15 feet on center. All trees are to be adequately maintained during the life of the facility's operation and shall be immediately replaced if they do not survive."

The original permit contained no provision with respect to berms. However, in response to visual and noise concerns raised by neighbors, berms were constructed at the southeast corner of the site along each leg of the perpendicular formed by the common border of the neighboring property and the facility, and most adjacent to the storage and staging areas as depicted on the Site Plan. The berms so constructed were not joined at the corner of the property border. During the site visit, it was apparent that the soils of these berms had been removed and utilized in the composting operation. According to Department Staff, and as articulated in Special Condition 7 of the draft permit, the importation and temporary stockpiling of soils for blending purposes in the compost operation is authorized and is not a violation of the present permit. (I.C. at 159-160; Exhibit 4 at 4 of 7.) Moreover, the berms were not covered with vegetative growth. The Applicant conceded that the berms were inadequate and would need to be made permanent and properly vegetated. (I.C. at 158-159 and 161-162.) To address these concerns, Department Staff has proposed Special Condition 23, which provides:

> "VISUAL/NOISE: Within 90 days of the effective date of this permit renewal (exclusive of the period from November 1st to May 1st), the existing berm near the southeast corner of the site shall be extended and connected to the other berm in the same corner. The height of the berm must be such that the compost windrows and wood chipping area are not visible from the second floor windows on the north and west sides of the house immediately adjacent to this corner of the facility. The berm shall be seeded with grass and/or wildflowers and such vegetative growth shall be maintained as long as the facility is used for the processing of waste."

This permit condition adequately defines the dimensions and maintenance of the berm and ensures its permanency. Moreover, the addition to this permit condition of the second paragraph proposed above concerning vegetative barriers addresses the concerns raised by the Town with respect to noise and visual impacts.

In the context of this proceeding, and pursuant to 6 NYCRR 624.4(c)(2), the offer of proof made by the Town with respect to noise impacts and, indeed, visual impacts, is inadequate and does not cast 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 particular, no showing has been made by the Town that the Applicant's facility is not in compliance with the requirements of 6 NYCRR 360-1.14(p) or that the requirements of the draft permit are inadequate. Thus, the Town has not raised an issue with respect to noise or visual impacts that is substantive. Moreover, pursuant to 6 NYCRR 624.4(c)(3), the offer of proof made by the Town with respect to noise impacts and visual impacts has not raised an issue that is significant inasmuch as the offer does not suggest the potential to result in a denial of the permit, a major modification to the Applicant's facility, or the imposition of significant permit conditions in addition to those proposed in the draft permit.

Ruling Number 1: No substantive or significant issue has been raised by the Petitioner with respect to noise impacts, or visual impacts, requiring adjudication. The Petitioner's offer of proof does not demonstrate that noise levels resulting from equipment or operations at the facility are not in compliance with the requirements of 6 NYCRR 360-1.14(p), nor that the provisions of the draft permit, in particular Special Condition 23, are inadequate to the circumstances.

Dust

Positions of the Parties

The Town argued that dust was a significant problem at the Applicant's site and was caused primarily by the turning and positioning of windrows during composting operations, but was also caused by the movement of truck traffic into and on the site, as well as by on-site machinery. These dust conditions were particularly exacerbated during periods of dry weather, the Town maintained. (I.C. at 40-41.) However, the Town conceded that, if followed, the provisions in the draft permit addressing dust control were adequate. (I.C. at 42 and 49.)

The Applicant argued that it had taken a series of steps to control dust, including watering, the relocation of aspects of its operations to areas of its site more remote from neighboring residential uses, the paving of portions of the roads on the site and agreeing to a special condition in the draft permit specifically addressing dust control. (I.C. at 45.) In addition, the Applicant asserted that all complaints concerning dust had been investigated and addressed. (I.C. at 47-48.)

Department Staff pointed out that the Town was not challenging the adequacy of the proposed draft permit conditions regarding the control of dust, but was rather raising solely an enforcement issue. (I.C. at 48-49.)

Discussion

In accordance with 6 NYCRR 360-1.14(k), dust must be effectively controlled at the facility so as not to constitute a nuisance or hazard to health, safety, or property, and in so doing the Applicant must undertake all such measures as may be directed by the Department. In this regard, the Applicant has taken steps to ensure effective dust control, including watering, the relocation of aspects of its operations to areas of its site more remote from neighboring residential uses, the paving of portions of the roads on the site and agreeing to a special condition in the draft permit specifically addressing dust control. This permit condition is Special Condition 24, which provides as follows:

> "DUST/MUD: Within 90 days of the effective date of this permit renewal (exclusive of the period from November 1st to May 1st), the permittee shall pave the portion of the existing access road from the public road to just beyond the gate. The remaining portion of the existing access road shall be covered with a layer of shale, stone and/or other materials acceptable to the NYS DEC from the end of the paved section back to the beginning of the windrow area. A dust suppression contingency plan, such as use of a watering truck and/or the placement of additional stone/shale, shall be undertaken as necessary to prevent nuisance dust problems off the site. The permittee shall install "speed bumps" in the access road to reduce dust from fast moving vehicles."

In addition, Special Condition 28(B) requires that, if possible, the turning of windrows is to be avoided on extremely windy days and that wind direction and intensity are to be monitored with dust suppression measures instituted if the compost material becomes too dry and has the potential to cause off-site dust problems due to windy conditions.

Moreover, as indicated above, the Town agrees that the draft permit requirements as to dust control are adequate, if enforced. The mandate of 6 NYCRR 360-1.14(k) as well as the specific requirements with respect to dust control contained in Special Conditions 24 and 28(B) provide reasonable guidance for the effective control of dust at the site and a clear standard pursuant to which enforcement may be initiated, as appropriate to the circumstances.

In the context of this proceeding, and pursuant to 6 NYCRR 624.4(c)(2), the offer of proof made by the Town with respect to dust impacts is inadequate and does not cast 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 particular, no showing has been made by the Town that the Applicant's facility is not in compliance with the requirements of 6 NYCRR 360-1.14(k) or that the requirements of the draft permit are inadequate. Thus, the Town has not raised an issue with respect to dust impacts that is substantive. Moreover, pursuant to 6 NYCRR 624.4(c)(3), the offer of proof made by the Town with respect to dust impacts has not raised an issue that is significant inasmuch as the offer does not suggest the potential to result in a denial of the permit, a major modification to the Applicant's facility, or the imposition of significant permit conditions in addition to those proposed in the draft permit.

Ruling Number 2: **No issue that is substantive or significant requiring adjudication has been raised by the Petitioner with respect to dust impacts. The concerns expressed by the Town are matters for enforcement. Dust emanating from the facility's operations must be effectively controlled pursuant to 6 NYCRR 360-1.14(k). Moreover, Special Conditions 24 and 28(B) articulate specific enforceable actions to be undertaken by the Applicant to control dust.**

Odors

Positions of the Parties

The Town proffered no expert opinion with respect to the impacts of odors emanating from the site, but asserted that adjoining property owners had filed odor complaints with the facility. (I.C. at 52.) Of particular concern were odors caused by the composting of grass and other organic materials such as processed fruit by-products. Although these latter fruit materials were no longer being received by the facility, the odors from the processing of grass loads remained a concern. (I.C. at 51 and 67.) A berm along the southern boundary of the site could help mitigate odor impacts, the Town argued. (I.C. at 66 and 90.)

Department Staff pointed out that pursuant to Special Condition 23, the two sections of berm located in the southern corner of the property would be joined and vegetated. (I.C. at 85-88.) With respect to a berm along the entire southern end of the property, Department Staff demonstrated by use of the elevation contours depicted on the Site Plan, Exhibit 9, that the grade of the residences to the south was approximately 25 feet above the floor of the composting facility. (I.C. at 92-93.) Any berm effectively screening the site would have to be 30 feet or more in height, Department Staff asserted, and would create its own visual impacts. (I.C. at 94.) A berm is effective for the neighboring property in the southeast corner because it is at or below the grade of the facility. (I.C. at 100.)

With respect to berms, Sally Rowland, Ph. D., an Environmental Engineer III in the Department's Albany office and a professional engineer, suggested that they were primarily effective in mitigating noise and visual impacts. (I.C. at 101.) Odor impacts, as well as dust and noise impacts, are primarily controlled through the effective and efficient operation of the facility, which would include operational criteria and procedures to ensure the correct size of compost windrows, the correct compost mix, proper regulation of the moisture content of the compost and the appropriate and reasonable restriction of the facility's operating hours. (I.C. at 103.)

The Applicant pointed out that some of the operations of the facility have been relocated away from neighboring residences to mitigate odor. (I.C. at 108.)

Discussion

Section 360-1.14(m) of 6 NYCRR requires that odors be controlled so as not to be nuisances or hazards to health, safety or property. The Town proffered no expert opinion that this regulatory mandate was not being met by the facility. Moreover, Special Condition 21 of the draft permit embraces the requirements of section 360-1.14(m) and articulates specific actions to be undertaken by the facility to ensure compliance with this regulation, and provides as follows:

> "The permittee shall conduct all processing and handling operations at the facility in such a manner as not to cause offensive odors, which are detectable by Department staff, beyond the property lines of the premises. In the event that any complaint is received regarding odors emanating from the premises, the applicant shall take immediate action to eliminate the cause of the complaint. The applicant shall document all complaints received including the date and time, address of the complainant, nature of the complaint, and remedial actions taken. Odor complaint documentation shall be included in the facility's annual report in accordance with Special Condition #4(g) of this operating permit. Malodorous material shall be treated or removed in accordance with the contingency plan. If this Department determines that there are continuing odor problems at this facility, the Department may modify this permit to require further odor controls, or suspend or revoke this permit in accordance with Part 621."

From the discussion at the issues conference, the odors emanating from grass clippings are of particular concern. However, this concern is addressed in the draft permit. In the first instance, as noted, the provisions of the engineers report of July 8, 1994, are still incorporated in the proposed renewal permit as Special Condition 6(c). Pursuant to this report, grass clippings should only comprise 10% of the yardwaste processed at the facility. (Exhibit 11 at 5, Paragraph 7.) Moreover, as Dr. Rowland pointed out, rather than berms or vegetative barriers, odors are more effectively controlled through the implementation of appropriate operational criteria to ensure the correct size of compost windrows and the compost mix, the proper moisture content of the compost and reasonable restriction of the facility's operating hours. (I.C. at 103.) Finally, Special Condition 26 of the draft permit prohibits the facility from accepting grass-only loads and articulates specific protocols and procedures to be followed when the facility receives loads of leaves containing grass. Special Condition 26 provides as follows:

> "GRASS:
> (A) The facility is prohibited from accepting grass-only loads.
> (B) Any loads of leaves containing grass shall be managed as follows:
> 1. The permittee or his staff must inspect every load containing any grass for odors and reject loads that have already become anaerobic.
> 2. Any leaves containing grass must be formed into windrows by the end of the first operating day.

3. The windrows containing grass must be turned in the first 24 hours after receipt.
4. The windrows containing grass must be inspected daily for odor problems and managed accordingly.
5. Windrows containing grass which are determined to be uncompostable [*sic.*] for composting or are a potential odor problem must be removed from the site within 24 hours of such determination."

In addition, Special Condition 28 of the draft permit requires that the dewpoint and wind direction be monitored on a daily basis and that the turning of windrows be delayed until low dewpoint conditions are present, in order to mitigate odors.

Pursuant to 6 NYCRR 624.4(c)(2), the offer of proof made by the Town with respect to odor impacts is inadequate and does not cast 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 particular, no showing has been made by the Town that the Applicant's facility is not in compliance with the requirements of 6 NYCRR 360-1.14(m) or that the requirements of the draft permit are inadequate. Thus, the Town has not raised an issue with respect to odor impacts that is substantive. Moreover, pursuant to 6 NYCRR 624.4(c)(3), the offer of proof made by the Town with respect to odor impacts has not raised an issue that is significant inasmuch as the offer does not suggest the potential to result in a denial of the permit, a major modification to the Applicant's facility, or the imposition of significant permit conditions in addition to those proposed in the draft permit.

Ruling Number 3: No issue requiring adjudication has been raised by the Petitioner with respect to odor impacts that is either substantive or significant. Odors emanating from the facility's operations must be effectively controlled pursuant to 6 NYCRR 360-1.14(m). Moreover, Special Conditions 21, 26 and 28 articulate specific enforceable actions to be undertaken by the Applicant to control odors, especially odors caused by grass.

Traffic

Positions of the Parties

The Town offered no expert opinion with respect to traffic impacts but indicated that neighbors would testify as to the type and amount of traffic that enters and exits the site. (I.C. at 117.) The Town asserted that when the permit was originally issued there was no indication by the Applicant that tractor trailers would be delivering yardwaste to the site, but that such deliveries would be by automobile. Moreover, trucks arrive at the facility before it opens in the morning and sit and idle to the annoyance and detriment of the neighboring property owners. (*id.*) The Town noted that it had not done any traffic studies with respect to this section of Milton Turnpike, nor was it aware of any such studies by NYSDOT or anyone else. (I.C. at 118.)

Department Staff argued that the Applicant was required to comply with all applicable laws and regulations, including both the ECL and the Vehicle and Traffic Law (VTL) and that these matters were adequately addressed in the draft permit. (I.C. at 119-120.)

Discussion

The Town proffered no expert opinion nor study with respect to traffic impacts. The draft permit, however, requires that the permittee strictly comply with the ECL, all applicable regulations and all general and special conditions specified in the permit. (Exhibit 4 at 1 of 7.) As noted above, the engineering report of July 8, 1994, Exhibit 11, is incorporated by reference into the present permit. Page 6 of this report states that "anticipated maximum traffic during peak periods is 3 vehicles per hour, with typical capacities of 20 to 40 cubic yards each." Since only trucks would have a capacity of 20 to 40 cubic yards each, it is apparent that at the time the permit was originally issued it was understood that deliveries of yardwaste would be made by trucks and not solely automobiles, contrary to the position taken by the Town.

With respect to the standing and idling of trucks at the site, the provisions of 6 NYCRR sections 217-3 and 450, dealing with idling and noise, respectively, would apply to both the Applicant and the owners and operators of the vehicles affected by those provisions. Moreover, the provisions of VTL 386 addressing motor vehicle sound level limits would also apply, as appropriate, to the Applicant as well as the owners and operators of vehicles accessing the facility from Milton Turnpike. The application of these laws, however, is a matter of enforcement and not strictly within the purview of this permit proceeding. The language of the permit, as well as the engineering report of July 8, 1994, incorporated therein, make clear that trucks, and not automobiles only, will access the facility with loads of yardwaste.

Pursuant to 6 NYCRR 624.4(c)(2), the offer of proof made by the Town with respect to traffic impacts is inadequate and does not cast 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 particular, no showing has been made by the Town that the Applicant's facility is not in compliance with applicable statutory and regulatory requirements or that the requirements of the draft permit are inadequate. Accordingly, the Town has not raised an issue with respect to traffic impacts that is substantive. Moreover, pursuant to 6 NYCRR 624.4(c)(3), the offer of proof made by the Town with respect to traffic impacts has not raised an issue that is significant inasmuch as the offer does not suggest the potential to result in a denial of the permit, a major modification to the Applicant's facility, or the imposition of significant permit conditions in addition to those proposed in the draft permit.

<u>Ruling Number 4:</u> No substantive or significant issue requiring adjudication has been raised by the Petitioner Town with respect to traffic impacts. The language of the permit, as well as the engineering report of July 8, 1994, incorporated therein, make clear that trucks, and not automobiles only, will access the facility with loads of yardwaste. Moreover, issues concerning the idling and noise levels of trucks accessing the facility are

enforcement matters dealt with under 6 NYCRR sections 217-3 and 450, and VTL section 386, and do not occasion any change in the language of the proposed permit.

Interpretation of the Town of Marlborough Planning Board Resolution of 1994 and the Applicability of ECL 27-0711

Positions of the Parties

The authority to operate a composting facility, such as that owned by the Applicant, in the Town of Marlborough, is contingent upon approval by the Town's Planning Board, and by resolution of that Board dated April 4, 1994, this approval was obtained by the Applicant's predecessor in interest, Geoffrey Dina. (Exhibit 7, Petition for Party Status and Exhibit C annexed thereto.) While the actual Planning Board resolution granting such approval is silent on the point, the Town asserts that representations made to the Planning Board by Dina in 1994 show that the scope of the composting operation was to be initially limited to no more than 5 acres of the total 28.5 acre site, and that it was upon this assumption that the Planning Board's approval was granted. (I.C. at 121.) Moreover, the Applicant's right to extend its composting activity beyond this 5 acre maximum would require further review and approval by the Planning Board, the Town maintained. (I.C. at 133.) However, the original permit granted by the Department in 1995, pursuant to 6 NYCRR part 360, authorized the operation of a composting facility on 17.8 acres of the 28.5 acre site. (Exhibit 10.) The Applicant has relied upon the DEC permit "to ignore their requirement to come back before the Planning Board to get approval to operate beyond four to five acres," the Town argued. (I.C. at 133.) Citing ECL 27-0711, the Town asserted that the ECL does not supercede local regulation in this matter. (*id.*) Moreover, the Town argued that the general conditions of the present DEC permit require that the Applicant comply with local rules and regulations, and that this permit direction has not been adhered to by the Applicant. (I.C. at 122.) Accordingly, upon a finding of such noncompliance with local law, the Department, pursuant to the general conditions of the permit, has the right to modify, suspend or revoke the Applicant's permit. (*id.*) The DEC permit, the Town argues, should thus be modified to limit the composting operation at the Applicant's site to no more than 5 acres, to comport with local regulation. (Exhibit 7at 2.)

Department Staff argued that the Department's original approval of a permit authorizing the annual processing of up to 68,000 cubic yards of yardwaste on approximately 17 acres of the Applicant's 28 acre site was, in fact, consistent with local regulation. Because, pursuant to Item C, at Page 2 of 7 of the Draft Permit (Exhibit 4), the Applicant is expressly required to obtain any other permits or approvals required for the operation of the project, it follows that if approval by the Town Planning Board is one such requirement, that the failure to so obtain that approval will mean that the facility cannot operate. Thus, the Department's issuance of a permit herein is not inconsistent with local approvals or regulation. (I.C. at 138-140.) Moreover, Department Staff argued that the interpretation of any resolution of the Town Planning Board, in the context of this case, was not an inquiry appropriate to this forum. (*id*.)

Agreeing with the position taken by Department Staff, the Applicant pointed out that the interpretation of the Town's resolution and the extent of its approval in this matter were the subject of ongoing litigation in the Supreme Court, the proper forum for this inquiry, the Applicant argued. (I.C. at 140-142.)

Discussion

As is clear from the express language of ECL 27-0711, the local laws, ordinances or regulations of a municipality which are consistent with the provisions of title 7 of ECL article 27, as well as its implementing regulations, governing the operation and management of solid waste management and resource recovery facilities, are not superceded by those same State laws and regulations. Moreover, as stated in this section of the ECL, such consistency is deemed to exist provided the municipality's local enactment complies "with at least the minimum applicable requirements set forth in any rule or regulation promulgated pursuant to" title 7 of ECL article 27. Accordingly, a local enactment can be more restrictive than the threshold set by title 7 of ECL article 27, but it cannot less restrictive. However, while such a more restrictive local enactment may create an additional regulatory requirement for an applicant to meet or, in fact, may prohibit the very activity in which the applicant seeks to engage, the Department's permit review of a project is not so circumscribed. Indeed, it is entirely possible that the Department may grant a permit for an activity which is ultimately forbidden by local regulation, local regulation that is consistent with State law and regulation within the meaning of ECL 27-0711. *Al Turi Landfill, Inc. v. Town of Goshen*, 556 F.Supp. 231 (D.C.N.Y., 1982); *affirmed*, 697 F.2d 287 (C.A.2, 1982); see *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 51 N.Y.2d 679 (1980).

But the mere fact that the Department grants a permit for an activity whose scope, though fully authorized under the DEC permit, is restricted by local regulation consistent with the ECL does not mean that that local regulation is thus superceded, to any degree, by the Department's action. Indeed, this principle is embodied in the express terms of the draft permit under review here, Exhibit 4. At Page 2 of 7 of the draft permit are enumerated various items under the heading "Notification Of Other Permittee Obligations." Item C, therein, states as follows: "The permittee is responsible for obtaining any other permits, approvals, lands, easements and rights-of-way that may be required for this project." Thus, within the context of title 7 of ECL article 27, the granting of a permit by the Department does not obviate the need for the applicant to also comply with consistent local requirements, nor does such Departmental action imply that such consistent local requirements are thereby superceded.

Finally, the interpretation of local laws and regulations, as well as their enforcement, is solely within the purview of the local municipality having jurisdiction in the matter, subject to judicial review in the courts, and is beyond the ambit of the Department's responsibility. *Matter of Town of Poughkeepsie v. Flacke*, 84 A.D.2d 1 (N.Y.A.D. 2 Dept., 1981), *lv. denied*, 57 N.Y.2d 602 (1982); *Matter of 4-C's Development Corporation*, 1996 WL 566235 (N.Y. Dept. Env. Conserv., Interim Decision of the Commissioner, 1996). Moreover, the interpretation and enforcement of the resolutions of any board duly created and constituted pursuant to local law

and regulation would similarly be solely within the purview of the local municipality having jurisdiction in the matter, subject to judicial review in the courts.

In view of the foregoing, in the context of this matter, it is unnecessary, and indeed inappropriate, to review the Town Planing Board's resolution of April 4, 1994, and the extent to which it authorized the use of the Applicant's site as a composting facility. These are matters for review in the courts and, in fact, such review has been sought in the New York State Supreme Court of Ulster County. Moreover, even if the courts were to agree with the position taken by the petitioner herein that the Applicant's composting activities should be limited to no more than 5 acres of its site without further Planning Board approval, such a finding would not affect the validity and scope of the permit originally granted by the Department in 1995 and the subject of the present renewal application. The Department, in the exercise of its authority under 6 NYCRR part 360, issued a permit allowing approximately 17 acres of the Applicant's 28.5 acre site to be utilized for composting activities. However, how much of that total 17 acres authorized by the DEC for composting activities can actually be used for composting activities is subject to local approval, as Item C at Page 2 of 7 of the draft permit makes clear.

Ruling Number 5: The Petitioner has not raised an issue that is substantive and significant nor identified a legal or policy issue with respect to the interpretation of the Town of Marlborough Planning Board resolution of 1994 and the applicability of ECL 27-0711 requiring an adjudicatory hearing.

SUMMARY AND CONCLUSION

In summary, I find that no substantive and significant issue has been raised by the Town of Marlborough requiring adjudication. Moreover, I also find that the Town has not identified a legal or policy issue which needs to be resolved by a hearing pursuant to part 624. In view of the foregoing, the Town has not met the requirements of 6 NYCRR 624.5(b) for either full party or amicus status and, as noted above, its Petition for either such status is denied. Accordingly, I would recommend the renewal of this permit with the additional special conditions proposed by Department Staff and discussed above.

APPEALS

As provided in 6 NYCRR 624.8(d)(2), during the course of a hearing, a ruling by 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. While such appeals are to be filed with the Commissioner in writing within five days of the disputed ruling as required by 6 NYCRR 624.6(e)(1), this time frame may be modified by the ALJ, in accordance with 6 NYCRR 624.6(g), to avoid prejudice to any party.

Accordingly, any appeals in this matter must be received at the office of Commissioner Erin M. Crotty, 625 Broadway, Albany, New York 12233, no later than the close of business on April 30, 2004. Moreover, responses to the initial appeals will be allowed and such responses must be received as above no later than the close of business on May 14, 2004.

The appeals and any responses sent to the Commissioner's Office must include an original and two copies. In addition, one copy of all appeal and response papers must be sent to me and to all other persons on the enclosed Service List at the same time and in the same manner as to the Commissioner. Service of any appeal or response thereto by facsimile transmission (FAX) is not permitted and any such service will not be accepted.

Appeals and any responses thereto should address the ALJ's rulings directly, rather than merely restate a party's contentions and should include appropriate citations to the record and any exhibits introduced therein.

Dated: Albany, New York
March 25, 2004

New York State Department of Environmental Conservation

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Richard R. Wissler
Administrative Law Judge

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