

In the Matter of the Application of the
City of New York Department of Sanitation for
a Solid Waste Management Permit pursuant to
Environmental Conservation Law article 27
(Spring Creek Yard Waste Composting Facility)

RULING ON ISSUES
AND PARTY STATUS

August 30, 2004

DEC Application No. 2-6105-00666/00001

Summary

The application is for a solid waste management facility permit for construction and operation of a yard waste composting facility within Spring Creek Park, in southeastern Brooklyn. As discussed below, the parties to this hearing are the Applicant, DEC Staff, New York/New Jersey Baykeeper, a consolidated party consisting of the Concerned Homeowners Association and Ronald J. Dillon, and a consolidated amicus party consisting of the Municipal Art Society of New York and New Yorkers for Parks. The request for party status by Brooklyn Community Board No. 5 is denied.

The issues identified for adjudication concern alienation of parkland, control of odor, litter, dust and vector impacts, variances from setback requirements in the DEC regulation concerning yard waste composting facilities, and consistency with New York City's Waterfront Revitalization Program.

Proposed issues that will not be adjudicated concern compliance with zoning, environmental justice, traffic, inactive hazardous waste sites, and various issues related to the review procedure and the site's history. The Applicant is required to submit additional information concerning noise impacts, and an intervenor is allowed to submit additional information concerning alleged waste dumping by the Applicant's trucks. No issue is identified at present regarding the latter two subjects.

Background

The City of New York Department of Sanitation (the Applicant) applied to the New York State Department of Environmental Conservation (the Department or DEC) for a permit pursuant to Environmental Conservation Law (ECL) article 27 and part 360 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR part 360) for a yard waste composting facility at 12720-B Flatlands Avenue, Brooklyn. The application includes requests for three variances from setback requirements specified in part 360. The application was received by the DEC Region 2 Office in the fall of 2001 and the Department determined that the application was complete on December 20, 2002. A notice of complete application was published in the New York Daily News on December 27, 2002 and in the Department's Environmental Notice Bulletin on December 25, 2002.

The Applicant proposes to operate a composting facility on a 19.6 acre site southeast of the intersection of Fountain and Flatlands Avenues, Brooklyn. The site is located within the Brooklyn portion of Spring Creek Park. The park includes land in both Brooklyn and Queens. Much of the facility is already in existence and the facility has already operated, although the facility does not have a DEC permit.¹ The composting activities would occur on an 18" thick pad of recycled asphalt millings that covers most of the site. The site occupies a substantial portion of the Brooklyn section of the park.

The facility would receive approximately 15,000 tons per year² of leaves, small brush, stumps, wood chips, grass, discarded Christmas trees and, starting in the third year, the throughput would include up to 1,700 cubic yards of horse manure per year. According to the engineering report for the project, the waste would be brought in by the Department of Sanitation, private landscapers and private horse stables. The facility would accept material from all portions of the City, but the overwhelming majority of the material would be produced by the residential areas of Brooklyn and Queens (Engineering Report, at 3-1 to 3-5, 4-1 to 4-9). Composting would take place within outdoor windrows. The compost would be made available to the New York City Department of Parks and Recreation for use in parks, and would be distributed to residents and public greening projects.

The park is an undeveloped park, on land that was acquired as parkland or assigned to the New York City Department of Parks and Recreation on various dates starting in 1938 (see, record map of Spring Creek Park, submitted with Applicant's April 26, 2004 letter). In past decades, portions of the park were used for landfilling solid wastes. A large portion of the park area is tidal wetlands, although the project is not located in tidal wetlands.

The Applicant is lead agency for review of the project under the State Environmental Quality Review Act (ECL article 8 [SEQRA]). In its July 31, 2002 notice of incomplete application, DEC Staff had requested that DEC be the lead agency for the SEQRA review of the project. The Applicant notified DEC Region 2 on December 3, 2002 that the Applicant intended to serve as lead agency, and on December 5, 2002 DEC Staff acknowledged this lead agency designation. On December 17, 2002, the Applicant issued a negative declaration finding that the project would not have a significant environmental impact.

The DEC Region 2 Office referred the application to the DEC Office of Hearings and Mediation Services (OHMS) on January 7, 2004 to schedule a hearing. The notice of hearing was published in the Department's Environmental Notice Bulletin on February 18, 2004 and in

¹ According to the Engineering Report for the project, the majority of facility construction was completed as of November 2002, and additional minor construction activities would take place in the eastern portion of the site (Engineering Report, at 4-27). DEC Staff stated it exercised its discretion in deciding to encourage the Applicant to pursue a permit application rather than taking enforcement action.

² Approximately 69,400 cubic yards per year (Engineering Report, at 4-2).

the Daily News on February 17, 2004. The notice was also mailed on or about February 12, 2004 to the mayor and city clerk of the City of New York, the Clerks of Kings County and Queens County, the Borough Presidents of Brooklyn and Queens, Brooklyn Community Board No. 5, Queens Community Board No. 10, to the persons who had submitted letters in response to the notice of complete application, and to addresses on a list provided by DEC Region 2 of persons interested in solid waste issues in Brooklyn.

Between the date of the notice and the date scheduled for the hearing (March 30, 2004), requests for postponement of the legislative hearing and the issues conference, or postponement of only the issues conference, were made by the Municipal Art Society of New York, Queens Community Board No. 10, the Concerned Homeowners Association, Ronald J. Dillon, Assembly Member Audrey I. Pheffer, and the Brooklyn Solid Waste Advisory Board. The legislative hearing and issues conference were not postponed, but in letters sent on dates between March 18 and March 26, 2004, Assistant Commissioner Louis A. Alexander and I notified the persons who had requested postponements that requests for additional time to submit information related to petitions for party status could be discussed at the issues conference. In addition, DEC Region 2 arranged for copies of the application and related background materials to be provided directly to Brooklyn Community Board No. 5, Queens Community Board No. 10 and the Municipal Art Society of New York. A letter dated March 19, 2004 from New York State Senator John L. Sampson, requesting a postponement, was sent to me by fax on March 30, 2004 but the mailed copy of this letter never arrived at the Office of Hearings and Mediation Services.

The deadline for petitions for party status, as announced in the notice of hearing, was close of business on March 26, 2004. Timely petitions for full party status were received from the Concerned Homeowners Association, Ronald J. Dillon and New York/New Jersey Baykeeper. A timely petition for amicus status on behalf of both the Municipal Art Society of New York, Inc. and New Yorkers for Parks, participating together, was also received.

A legislative hearing for public comments took place on the evening of March 30, 2004 at the Brooklyn Sports Club, 1540 Van Siclen Avenue, Brooklyn, New York before Susan J. DuBois, Administrative Law Judge. An issues conference took place at the same location on March 31, 2004, followed by a site visit.

At the issues conference and in subsequent correspondence, the Applicant was represented by Michael Burger, Esq. and Christopher G. King, Esq., of the New York City Law Department. DEC Staff was represented by John Nehila, Esq., Assistant Regional Attorney, DEC Region 2. The Concerned Homeowners Association was represented by its President, Ronald J. Dillon, who also requested party status as an individual. Mr. Dillon and the Concerned Homeowners Association submitted separate, but nearly identical, petitions for party status. Recent correspondence from Mr. Dillon has been signed by him both in his capacity as president of the organization and as an individual, on the same letter. New York/New Jersey Baykeeper is represented in this hearing by the Pace Environmental Litigation Clinic, through its director, Karl Coplan, Esq. and Legal Interns Natara Feller and Erin R. Flanagan. The Municipal Art Society of New York and New Yorkers for Parks were represented at the issues conference and in subsequent correspondence by Christopher Rizzo, Esq. and currently by Amanda Hiller, Esq.,

of the Municipal Art Society. The Brooklyn Solid Waste Advisory Board was represented by its Chair, Kenneth Diamondstone. Neither Brooklyn Community Board No. 5 nor Senator Sampson appeared at the issues conference.

On March 30, 2004, I received by fax a March 19, 2004 letter from Senator Sampson, requesting party status. At the legislative hearing that evening, Mr. Diamondstone stated that the Brooklyn Solid Waste Advisory Board intended to request party status. At the issues conference, I was given a letter dated March 30, 2004 from Earl L. Williams, Chairman of Brooklyn Community Board No. 5, requesting party status on behalf of the Community Board.

On April 14, 2004, I sent a memorandum to the persons and organizations that had requested party status, discussing several subjects that arose at or shortly before the issues conference. Among other things, this memorandum required the Applicant to publish a supplemental notice of hearing, due to a reference in the original notice to a prior version of part 360 that was cited regarding the requested variances. This notice extended the deadline for petitions for party status to May 12, 2004. The April 14, 2004 memorandum also allowed for supplemental information in support of the existing petitions for party status to be submitted by May 21, 2004, with June 9, 2004 as the deadline for receipt of the Applicant's written response to the petitions. I also requested additional information concerning the site in response to questions that arose at the issues conference.

The Applicant, in a letter dated April 15, 2004 that crossed in the mail with the April 14, 2004 memorandum, objected to publishing any further notice and argued that the hearing record should be closed because, in the Applicant's opinion, none of the proposed issues required adjudication. The Applicant did, however, publish the supplemental notice in the New York Daily News on April 20, 2004. The affidavit of publication for this notice identifies this publication as having been in the "Island Edition" of the Daily News. On May 11, 2004, I spoke with Elizabeth Pasuko, of the Daily News, who clarified that the "Island Edition" is the edition distributed in Brooklyn, Queens, Long Island and Staten Island. The supplemental notice of hearing was also published in the April 21, 2004 edition of the Environmental Notice Bulletin. It was mailed to the same addresses as the original notice of hearing, to the Assembly Member in whose district the site is located and to the City Council members representing the three districts closest to the site.

On April 26, 2004, the Applicant requested that the due date for submission of supplements to the petitions be moved back from May 21 to May 12, 2004, and that I make an issues ruling by May 28, 2004. On April 29, 2004, I denied the request for a change in the May 21 date and did not set any date on which I would make an issues ruling.

In a letter dated May 17, 2004, the Concerned Homeowners Association requested that the May 21 deadline be postponed to June 11, 2004. On May 20, 2004, I denied this request. New York/New Jersey Baykeeper, the Concerned Homeowners Association and Mr. Dillon submitted supplemental information in support of their petitions, which arrived at the Office of Hearings and Mediation Services on May 21, 2004. The Municipal Art Society of New York

and New Yorkers for Parks submitted a brief on May 21, 2004 and I received this brief on May 26, 2004.

I received the transcript of the March 30 and 31, 2004 proceedings on June 3, 2004. DEC Staff submitted a response to the petitions for party status which I received after close of business on June 9, 2004. The Applicant mailed its response on June 9, 2004 and I received it on June 14, 2004. On June 14, 2004, I notified the persons on the service list that I would consider the two responses and I set June 30, 2004 as the deadline for the final responses in support of the proposed issues. On June 16, 2004, the Concerned Homeowners Association asked to have until after July 3, 2004 to submit this correspondence because of the limited hours of operation of the two local libraries where the transcripts are available and the date on which the transcripts had become available. On June 23, 2004, I extended this deadline to July 6, 2004, the next business day after July 3, 2004. On June 21, 2004, the Concerned Homeowners Association had also asked for a further extension on the basis that two pages were missing from the transcript. On June 25, 2004, I denied this request but asked that the Applicant obtain and distribute the two missing pages.³ Timely responses were submitted by New York/New Jersey Baykeeper, by Mr. Dillon and the Concerned Homeowners Association, and a joint response by the Municipal Art Society and New Yorkers for Parks. The last of these arrived at the Office of Hearings and Mediation Services on July 8, 2004.

Between the issues conference and the date of this ruling, additional correspondence took place among the persons on the service list concerning a variety of subjects, including numerous procedural motions and distribution of information to follow up on discussions at the issues conference.

On May 5, 2004, Senator Sampson withdrew his petition for party status. Brooklyn Community Board No. 5 did not submit any supplemental petition or other correspondence in support of its one-page petition dated March 30, 2004. The Brooklyn Solid Waste Management Advisory Board did not submit a petition for party status.

PARTY STATUS

Section 624.5(d) of 6 NYCRR provides that full party status will be granted based on: “(i) a finding that the petitioner has filed an acceptable petition pursuant to paragraphs (b)(1) and (2) of this section [the filing and contents of petitions]; (ii) a finding that the petitioner has raised a substantive and significant issue or that the petitioner can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party; and (iii) a demonstration of adequate environmental interest.” In addition, DEC Staff and the Applicant are mandatory full parties pursuant to 6 NYCRR 624.5(a).

³ Page 139 of the issues conference transcript is also missing, and the Applicant will need to provide a copy of this page.

Amicus status, which allows a person to introduce written argument on one or more specific issues, may be requested by filing a petition which includes the contents specified in 6 NYCRR 624.5(b)(1) and (3).

Petitions for full party status were submitted by: New York/New Jersey Baykeeper, the Concerned Homeowners Association, Ronald J. Dillon, Senator John L. Sampson, and Brooklyn Community Board No. 5. Senator Sampson later withdrew his petition. The Chairman of the Brooklyn Solid Waste Advisory Board stated that the Board intended to submit a petition late, but this did not occur. The Municipal Art Society of New York and New Yorkers for Parks, participating together, submitted a petition for amicus status.

Ruling: For the reasons stated below, full party status is granted to New York/New Jersey Baykeeper (Baykeeper) and to the Concerned Homeowners Association and Mr. Dillon (CHA) participating as a consolidated party. Amicus status is granted to the Municipal Art Society of New York and New Yorkers for Parks (Amici), participating as a consolidated amicus party. The petition for party status by Brooklyn Community Board No. 5 is denied.

Discussion concerning party status

Baykeeper's petition meets the requirements of section 624.5. The petition states that Baykeeper is a membership organization incorporated under the name Raritan Baykeeper, Inc. and doing business under the name NY/NJ Baykeeper, that endeavors to protect and preserve the productivity and ecological integrity of the Hudson-Raritan estuary and its tributaries and watersheds including Jamaica Bay. The petition summarized commercial, recreational and service activities conducted by Baykeeper and its members on and around Jamaica Bay, and advocacy and litigation carried out by Baykeeper related to Jamaica Bay. Baykeeper has adequate environmental interest in this proceeding. In its petition and the supplement to the petition, and in its arguments at the issues conference and in writing, Baykeeper has identified issues for adjudication that are substantive and significant and has presented a sufficient offer of proof. The issues proposed by Baykeeper overlap to some extent with those proposed by CHA. To the extent these issues are considered to be issues raised by CHA, Baykeeper has shown it can make a meaningful contribution to the record regarding these issues.

The Concerned Homeowners Association and Mr. Dillon submitted separate petitions for party status but the petitions are nearly identical and Mr. Dillon represented the Concerned Homeowners Association as its president in addition to representing himself as an individual. Because of the similar viewpoints and input expressed, the association and Mr. Dillon are consolidated as one party to this hearing (6 NYCRR 624.8(b)(1)(xi)) and will be referred to as CHA in this ruling. The association's petition, and the earlier comment letters cited in the petition, state that the association is comprised of approximately 100 homeowners in the Old Mill Creek and New Lots communities of Brooklyn, New York. The proposed project is located in this area. Mr. Dillon is a resident of this community whose address is a few blocks from the site. CHA asserts that the association and Mr. Dillon are adversely affected by the loss of waterfront parkland and the operation of the facility that has already taken place, as well as by

the proposed future operation. CHA stated that the association's efforts during the past decade have focused on land use issues including efforts towards restoration of the waterfront parkland.⁴

CHA proposed many issues, most of which are not issues requiring adjudication. CHA did, however, raise certain substantive and significant issues as described later in these rulings and identified witnesses it proposed to call to testify on these issues. To the extent these issues are considered to be issues raised by Baykeeper, CHA has identified additional proposed witnesses for some issues and has shown it can make a meaningful contribution to the record regarding these issues. CHA's petition meets the requirements of section 624.5.

The Municipal Art Society of New York, Inc. is a private, non-profit membership organization involved with land use, planning and urban design matters in New York City. New Yorkers for Parks is a not-for-profit corporation that identifies its mission as promoting and protecting park conditions and services for people in every community of New York City. Both organizations identified an environmental interest in the state and local protection of parkland and described the project as consuming or infringing on the community's parkland. The petition asserted that, in the absence of legislative approval for a nonpark use, the project would violate the public trust doctrine. The petition also asserted that a zoning amendment would be required for the project. The first of these issues is a legal and policy issue, and to some extent a factual issue, to be resolved in this hearing, although the second of these proposed issues is not an issue for the hearing. The two organizations seeking amicus status have sufficient interest in the first issue and have already contributed materially to the record on this issue. The Amici meet the requirements of section 624.5 concerning amicus status.

The petition by Brooklyn Community Board No. 5 was dated March 30, 2004 and received on March 31, 2004, after the March 26, 2004 deadline for petitions. The petition states that Community Board No. 5 requests party status, and notes that the Board Chairman would not be able to attend the issues conference but planned to send objections to the project within the next five days. The petition notes the need for full board approval in relation to the late filing of the petition. In my April 14, 2004 memorandum, which was sent to Community Board No. 5 among others, I allowed Community Board No. 5 to supplement its petition on or before May 21, 2004. No correspondence was submitted by Community Board No. 5 after the March 30, 2004 petition. The March 30, 2004 petition does not identify any grounds for opposition or support of the project, does not identify an issue for adjudication, does not present an offer of proof, and does not identify a legal or policy issue to be briefed. The petition does not meet the requirements of section 624.5 concerning party status.

⁴ CHA's correspondence refers to the park as the "Old Mill Creek Waterfront Park." The park, however, is identified on the New York City Department of Parks and Recreation's record map, and in other official documents, as Spring Creek Park and that name is used in this ruling.

ISSUES FOR ADJUDICATION

Standards for identifying issues for adjudication

Section 624.4(c) of 6 NYCRR specifies the standards for adjudicable issues in a DEC permit hearing. An issue is adjudicable if it relates to a dispute between the DEC Staff and an applicant over a substantial term or condition of the draft permit (6 NYCRR 624.4(c)(1)(i)). Where DEC Staff has determined that a permit application as conditioned by a draft permit will meet all statutory and regulatory requirements, the potential party proposing an issue has the burden of persuasion to demonstrate that the proposed issue is substantive and significant (6 NYCRR 624.4(c)(4)). In the present case, DEC Staff prepared a draft permit and the Applicant does not dispute the conditions in the draft permit.

An issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project such that a reasonable person would require further inquiry (6 NYCRR 624.4(c)(2)). An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit (6 NYCRR 624.4(c)(3)).

In order to establish that adjudicable issues exist, "an intervenor must demonstrate to the satisfaction of the Administrative Law Judge that the Applicant's presentation of facts in support of its application do not meet the requirements of the statute or regulations. 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, Decision of the Commissioner, April 2, 1982). Subsequent decisions of the Commissioner have provided additional interpretation of this standard.

With regard to SEQRA issues, if an agency other than DEC serves as the lead agency and has determined that the proposed action does not require the preparation of a Draft Environmental Impact Statement, the ALJ will not entertain any issues related to SEQRA unless lead agency status is re-established with the Department pursuant to 6 NYCRR 617.6(b)(6) (formerly 617.6(f)) (see, 6 NYCRR 624.4(c)(6)(ii)(a)).

Proposed issues

SEQRA procedures

In its May 11, 2004 supplemental petition, Baykeeper argued that DEC and the Applicant are required to act as co-lead agencies and conduct a coordinated SEQRA review of transfer stations for which both DEC and the Applicant issue permits. CHA argued in support of this position in its July 6, 2004 brief (at 65 - 66). Baykeeper cited a March 1992 stipulation in City of New York v Dept. of Environmental Conservation (Sup Ct, Albany County, Index No. 7218/91) as requiring this procedure. Baykeeper stated that the term “transfer stations” as used in the stipulation refers to “both solid waste transfer and recycling facilities within the City of New York.” Baykeeper argued that the proposed facility is a recycling facility, and is among the facilities subject to the stipulation, based upon the types of waste it will handle. Baykeeper argued that, if DEC is required to be co-lead agency for this project, the ALJ may review a determination by DEC Staff not to require preparation of an environmental impact statement. Baykeeper stated that it was an error of law to find that the facility would not have a significant adverse environmental impact and that the negative declaration should be reconsidered.

Under the definitions contained in the 1988 version of 6 NYCRR part 360, a “recyclables handling and recovery facility” meant “a solid waste management facility, other than collection and transfer vehicles, at which recyclables are separated from the solid waste stream, or at which previously separated recyclables are collected” (former 360-1.2(b)(121)). There was no separate definition of “recycling facility.” “Recyclables” were defined as “solid waste that exhibits the potential to be used repeatedly in place of a virgin material” (former 360-1.2(b)(120)). “Composting facility” meant “a solid waste management facility used to provide aerobic, thermophilic decomposition of solid organic constituents of solid waste to produce a stable, humus-like material” (former 360-1.2(b)(29)). “Yard waste” meant “leaves, grass clippings, garden debris, and small or chipped branches” (former 360-1.2(b)(169)).

The 1988 version of part 360 contained subparts governing composting facilities (former 360-5), transfer stations (former 360-11) and recyclables handling and recovery facilities (former 360-12). The present application would have been treated as a composting facility under the 1988 version of part 360, and is a composting facility under the present regulation. Baykeeper’s argument about wood being non-putrescible does not change this conclusion. Logs, trees and stumps delivered to the facility would be chipped and mixed into mulch windrows (see, Engineering Report, at 4-13 and 4-24). Thus, the 1992 stipulation does not apply to this project and DEC is not required by the stipulation to be co-lead agency.

CHA challenged whether the Applicant could act as lead agency for the SEQRA review, stating that the Applicant should have been barred from this role due to a conflict of interest (CHA petition, at page 6 paragraph 30 and pages 20 - 21). SEQRA, however, does not bar project sponsors from being the lead agency for SEQRA review of their projects. It allows for an agency that will be carrying out an action to be the lead agency (ECL 8-0111(6); 6 NYCRR 617.6(b)(3)). The lead agency makes the determination of significance.

Ruling: DEC is not co-lead agency, and no basis exists for re-establishing lead agency with DEC in this role. Another agency, serving as lead agency, issued a negative declaration. Consequently, issues related to SEQRA will not be included in this hearing.

Alienation of parkland

The land on which the project has been constructed is within Spring Creek Park, a New York City park. Counsel for the Applicant stated at the issues conference that the land is owned by the City and is under the jurisdiction of the New York City Department of Parks and Recreation (Issues conference transcript (IC Tr.), at 45, 152 - 153). It is undisputed that the site is parkland (IC Tr. 44; also see, map submitted with Applicant's letters of April 26 and June 2, 2004).⁵

On August 27, 2001, the Applicant and the New York City Department of Parks and Recreation (Parks) entered in to a memorandum of understanding (MOU) concerning use of land in Spring Creek Park by the Applicant for a yard waste composting facility. Under the MOU, the Applicant would begin to phase out composting operations at Canarsie Park upon commencement of composting operations at Spring Creek Park (see, MOU attached with section 7 of the Engineering Report). The Engineering Report, at section 7, also refers to an October 28, 1997 MOU between the Applicant and Parks regarding use of New York City parkland by the Applicant for composting. This 1997 MOU is not included in the application, but DEC Region 2 provided a copy to me on February 5, 2004. The Applicant's December 17, 2002 negative declaration for the project states that the composting facility at Spring Creek Park would replace composting operations located in Canarsie Park and Idlewild Park.

“[D]edicated park areas in New York are impressed with a public trust for the benefit of the people of the State. Their ‘use for other than park purposes, either for a period of years or permanently, requires the direct and specific approval of the State Legislature, plainly conferred’ [citation omitted]” (Friends of Van Cortlandt Park v City of New York, 95 NY2d 623, 631, 727 NYS2d 2, 7 [2001]). “[L]egislative approval is required when there is a substantial intrusion on parkland for non-park purposes, regardless of whether there has been an outright conveyance of title and regardless of whether the parkland is ultimately to be restored” (id., at 630, 727 NYS2d

⁵ The map is a copy of the October 2002 revision of the record map for Spring Creek Park, noted as Park B-165 and B-165A. This map shows most of the project site (west of Sheridan Avenue) as being within the boundary of the original park as mapped in the 1930's. The map shows the site area east of Sheridan Avenue as having been added to the park in 1992. Although the Environmental Assessment Statement attachment (at page 3) refers to “Spring Creek Park, most of which extends south across the Shore Parkway and contains the former Fountain Avenue and Pennsylvania sanitary landfills,” the record map shows the land south of the Shore Parkway (Belt Parkway) as having been surrendered to Gateway National Recreation Area on March 1, 1974.

at 6). This is so even when the non-park activity serves an important public purpose (id., at 631, 727 NYS2d at 6).

“The definition of ‘temporary’ varies with the context of the case” (Chatham Green, Inc. v Bloomberg, 1 Misc 3d 434, 765 NYS2d 446 [Sup Ct, New York County 2003]) but non-park uses for periods of years have been interpreted as alienation of parkland (id., see also, Friends of Van Cortlandt Park, 95 NY2d at 631, 727 NYS2d at 6; Matter of Ackerman v Steisel, 104 AD2d 940, 480 NYS2d 556 [2d Dept 1984]; Bates v Holbrook, 171 NY 460 [1902]).

Uses that the courts have determined to be non-park uses include landfills (Vil. of Croton-on-Hudson v County of Westchester, 38 AD2d 979, 331 NYS2d 883 [2d Dept 1972]) even if these might eventually be developed into park facilities (Stephenson v County of Monroe, 43 AD2d 897, 351 NYS2d 232 [4th Dept 1974]), parking of city vehicles (Chatham Green, 1 Misc 3d 434, 765 NYS2d 446), a museum proposed by the Safety Institute of America (Williams v Gallatin, 229 NY 248 [1920]), and an underground water treatment plant (Friends of Van Cortlandt Park, 95 NY2d 623, 727 NYS2d 2). Uses that the courts have determined to be park uses include restaurants (795 Fifth Avenue Corp. v City of New York, 15 NY2d 221, 257 NYS2d 921 [1965]) and a license for development of an amphitheater (SFX Entertainment, Inc. v City of New York, 297 AD2d 555, 747 NYS2d 91 [1st Dept 2002]).

The concept of park use versus non-park use includes the question whether the park land would be open to the public for park use. In evaluating a cancellable ten-year lease of a park building by the Safety Institute of America, the Court of Appeals stated that, “The legislative will is that Central Park should be kept open as a public park ought to be, and not be turned over by the commissioner of parks to other uses. It must be kept free from intrusion of every kind which would interfere in any degree with its complete use for this end” (Williams, 229 NY at 254). In Friends of Van Cortlandt Park, the reasons leading to a conclusion that construction of the water treatment plant required legislative approval included that “an appreciable area of the park will be closed for more than five years” (Friends of Van Cortlandt Park, 95 NY2d at 631, 727 NYS2d at 6).

In the present case, Baykeeper, the Amici and CHA argue that the proposed project is an alienation of parkland, for which the Applicant has not received legislative approval. Baykeeper and the Amici argue that the permit should be denied in the absence of legislative authority, delayed pending this authorization, or alternatively, be conditioned to require legislative authorization before the facility is allowed to operate (Baykeeper’s 5/20/04 supplemental petition, at 9; Amici’s 5/20/04 brief, at 1, IC Tr. 9). CHA argues that the permit should be denied, and that the permit condition identified by Baykeeper would not be protective of parkland (CHA 7/6/04 brief, at 28).

DEC Staff initially took the position that the project appeared to violate the judicial doctrine concerning alienation of parkland, citing the Friends of Van Cortlandt Park decision, and asked the Applicant whether legislation had been passed authorizing the proposed land use or whether the Applicant could demonstrate that the project would not violate this doctrine. At that time, DEC Staff also stated that any permit issued for the facility would prohibit the

commencement of work unless and until any required legislation was passed (Notice of Incomplete Application, July 31, 2002, included as section 1.F of the background documents for the project). DEC Staff later took the position that parkland use is a local land use issue controlled by the municipality, and that the DEC does not enforce local land use laws or doctrines. DEC Staff stated that general condition number 5 of the draft permit reminds the Applicant that it is responsible for obtaining other approvals that may be required for the project and that it must comply with all applicable legal requirements (February 18, 2004 response to comments and draft permit, included in section 3.F of the background documents; see draft permit for exact text of general condition 5; IC Tr. 10 - 12, 35 - 36). In its June 9, 2004 reply brief, DEC Staff stated that the public trust doctrine has only been judged relevant to DEC permitting in cases involving the Freshwater Wetlands Act and the Tidal Wetlands Act (Reply brief, at 4).

The Applicant argued that DEC's part 360 permitting process is not the appropriate forum to determine whether the proposed use of parkland complies with this common law doctrine, and that in other DEC permit hearings where issues about the public trust doctrine were proposed, the Commissioner instead decided the cases only under the statutes administered by DEC (Applicant's 6/9/04 reply brief, at 9 - 12). The Applicant also took the position that the project would not constitute alienation of parkland for various reasons including that most of the compost will be used in City parks, the Applicant's position that the project "is a temporary project with a fifteen year limit that includes conditions for restoration of the site if the Department of Parks and Recreation requires the site for actual park development at any point," that the project involves no transfer of interest from Parks to the Applicant, that Parks must approve the Applicant's site plans, that compost from the facility will be used in parks and community gardens, and the Applicant's position that the facility "serves a purpose that is similar to other service, administrative and maintenance facilities located within the city's parks." The Applicant argues that the land in question is disused, has no particular natural resource value, is on an ash landfill, and that at this time, Parks has no plan to develop this portion of the park. (IC Tr. 32-35; Applicant's reply brief, at 15 - 20).

In the present case, the proposed issue involves three questions: (1) is it appropriate for the Commissioner to consider this issue in deciding whether to issue a permit under 6 NYCRR part 360; (2) if so, is the proposed project an alienation of parkland for which legislative approval would be necessary; and (3) if so, how should this affect the decision on the permit application (i.e., denial or additional special conditions).

Black's Law Dictionary defines the public trust doctrine as "[t]he principle that navigable waters are preserved for the public use, and that the state is responsible for protecting the public's right to the use" (Black's Law Dictionary 1246 [7th ed 1999]). New York State courts have stated that parkland is impressed with a public trust, and the decision in Friends of Van Cortlandt Park noted that the public trust doctrine is rooted in much earlier history than the Williams case (Friends of Van Cortlandt Park, 95 NY2d, at 630 n 3, 727 NYS2d, at 5 n 3).

Alienation of parkland is not a local land use issue to be controlled by a municipality, although management of parks for park purposes is a local action. The 795 Fifth Avenue

decision cited by DEC Staff concluded that the New York City Parks Commissioner had “the power to control and manage [city park] property ‘for the improvement’ of the park, or for the ‘establishment’ of ‘playgrounds and other recreational properties.’” The Court concluded that there are restaurants and cafes in public parks and that these are commonly regarded as appropriate. The 795 Fifth Avenue decision was in a taxpayers’ action under section 51 of the General Municipal Law, in which the question was whether the project was illegal.

The state Legislature, not DEC, the Applicant, or Parks, would have authority to authorize alienation of parkland in Spring Creek Park. The courts would have the final say over whether a particular land use is alienation of parkland, although other governmental entities as a practical matter would need to evaluate this question in the course of their own decision-making, including in a decision by a municipality to go forward with a land use that was being challenged as a parkland alienation and not pursue legislative approval for that land use. DEC, if presented with a permit application for a project it concludes is, or probably is, an unauthorized alienation of parkland, could impose a permit condition requiring legislative approval before the project proceeds. The permit condition could be contested in court by the permittee if it wished to carry out the project without getting legislative authorization. This procedure could put the question before the courts and potentially before the state Legislature. DEC is the natural resources agency of the State of New York and, if a project over which DEC has permitting authority looks likely to be an unauthorized alienation of parkland, DEC should not leave it to private parties to put this question before the proper entities.

The public trust doctrine is only mentioned specifically in a limited number of DEC permit hearing decisions.⁶ The Commissioner’s decision in Matter of Michael Matthews (May 20, 2004) declined to adopt the ALJ’s conclusion that the Tidal Wetlands Act “codifies” many of the rights, privileges or interests previously protected by the riparian rights and public trust common law doctrines. The Commissioner stated that it was not necessary “to reach such a conclusion in order to conclude that the Tidal Wetlands Act legitimately imposes a limitation on the scope and exercise of riparian rights” (Matthews, at 1, 8). In the Matthews decision, the Commissioner did not reject all consideration of the public trust doctrine in DEC permit hearings, and only mentioned this doctrine briefly.

Although the public trust doctrine has been discussed in DEC cases involving tidal or freshwater wetlands permits, and the decision in Bisignano v Department of Environmental

⁶ Word searches on the relevant data base of Westlaw did not find any Commissioner’s decisions or ALJ rulings that discussed projects alleged to be alienation of parkland, either in deciding an issue or rejecting a proposed issue. The issues ruling in Matter of Hudson River Park Conservancy (Rulings of the ALJ, November 30, 1998) reports that speakers at the legislative hearing on that project argued that the project was not a “true” park but instead would commercialize the waterfront and block public access. The issues ruling did not address alienation of parkland as such, although it stated that issues as to the nature of the trust created to oversee the Hudson River Park (a public benefit corporation) or the Hudson River Park Act “reside within the jurisdiction of the Legislature and not before this agency” (Ruling, at 10).

Conservation (132 Misc 2d 850, 505 NYS2d 555) relates the public trust doctrine to the Department's role in safeguarding wetlands within the state, no party cited a case stating that this doctrine is not relevant to other permitting decisions by the Department.

In Matter of Stephen Kroft (Decision of the Commissioner, July 8, 2002), the Commissioner decided the case based upon the standards for issuance of a tidal wetland permit and did not address the public trust doctrine in her decision. The Commissioner did, however, adopt the ALJ's hearing report with the exception of one recommendation, not relevant here, about an alternative project. The ALJ's conclusions included the following:

“The project does not comply with the standards in 6 NYCRR 661.9(b)(1)(ii) in that it is not compatible with the public health and welfare. At present, the public enjoys unobstructed access to nearly 6 miles of beachfront in this area of Noyack Bay. The area is currently used by the public for walking, swimming, shellfishing and recreational boating. The Applicant's proposal would significantly diminish this fundamental right of access.”

Part 360 contains a standard similar to the tidal wetland permit standard cited above. Paragraph 360-1.11(a) states, in part, that: “The provisions of each permit issued pursuant to this Part must assure, to the extent practicable, that the permitted activity will pose no significant adverse impact on public health, safety or welfare, the environment or natural resources, and that the activity will comply with the requirements identified in this Subpart and the applicable Subpart pertaining to such a facility, and with other applicable laws and regulations.” If the public right of access to the beachfront can be taken into account in applying the tidal wetland standard concerning public welfare, this suggests the public's right to use parkland can be taken into account in evaluating a solid waste management facility's impact on public welfare under subdivision 360-1.11(a).

That parkland can be taken into account in applying the standards of part 360 is also supported by the recent addition to part 360 of a setback requirement between yard waste composting facilities and “public contact areas,” which include public parks. This requirement was added by an amendment to part 360 that became effective 60 days after its January 7, 2003 filing, and as discussed below (under Variances) there remains a question regarding whether this or the preceding version of part 360 govern the setbacks applicable to this project. The new setback requirement, however, supports the Commissioner's authority to take into account alienation of parkland in evaluating whether a project meets the standards of part 360. Although parks are not mentioned in the siting prohibitions applicable to all solid waste management facilities (see, 6 NYCRR 360-1.7(a)(2)), the current regulation requires that yard waste composting facilities be a minimum of 200 feet away from parks, or a greater distance if deemed necessary by the Department based on the characteristics of the neighboring areas (see, 6 NYCRR 360-5.7(b)(7)). The present project is not 200 feet away from a park, but rather is in a park. Even if the former setback requirements, which do not include a distance from parks, apply to this project based upon the date the application became complete, parks are among the environmental features the Commissioner has authority to consider in regulating solid waste management facilities. In cases where it appears likely to the Commissioner that a project

subject to part 360 would require legislative authorization for alienation of parkland, this can be taken into account in deciding whether to grant, deny, or condition a permit so as to prevent significant adverse impacts on public welfare, the environment and natural resources.

The second question, in the analysis outlined above, is whether the proposed composting facility is an alienation of parkland. This is mainly a legal question, applied to the project as proposed and conditioned by the draft permit, but also involves factual disputes. The arguments presented to date by the parties are based on court cases, on the information in the record thus far including the application and the MOUs between the Applicant and Parks, and on factual assertions some of which appear undisputed and others of which are in dispute. Comparison of the project to cited court decisions, and consideration of the facts not in dispute, indicates it is likely that the project would constitute alienation of parkland.

The reasons for this include the following. Public recreation access to the portion of the park occupied by the project site would be eliminated while the composting facility is in existence. Although some of the waste would come from parks and some of the compost would be used in parks, the facility would also accept non-park wastes and the compost produced at the facility would also be used on non-park locations (Engineering Report, at 3-1, 4-1 to 4-11; IC Tr. 73- 81; Draft permit special condition 35). It is unclear from the application how much of the waste will be from city parks and how much will be from Department of Sanitation collections of private yard waste and waste from landscapers, in addition to horse manure, but the Engineering Report states that “the overwhelming majority of incoming material would be produced by the residential areas of Brooklyn and Queens” (report, at 3-1). Although special condition 35 of the draft permit would require the Applicant (the permittee, at that time) to submit a proposal for the soil and habitat improvement of 20 acres of upland parkland as close to the subject facility as practicable, with at least 15 acres of such improvement to “be contiguous,”⁷ the location of this parkland is not specified. It is questionable whether 15 acres of upland parkland would be available for this work within Spring Creek Park because the facility occupies 19.6 acres and a large part of the remaining acreage of the park is tidal wetland (compare record map of park, Fig. 2-2 of Engineering Report, and the section of the DEC tidal wetlands map including in section 4.A of the background materials). At the issues conference, the Applicant stated that as of that time there was no certain destination for the compost, but the Applicant was negotiating with Parks “to use as much as possible as close as practical to the project site” (IC Tr. 79 - 80).

Although the Applicant described the facility as temporary, the 15 year duration of the August 27, 2001 Parks/Sanitation MOU exceeds durations that the courts have refused to consider as temporary in cases involving alienation of parkland. The MOU also does not provide for the composting to end after 15 years of such use, but provides for renewals of the MOU for additional term(s) (Engineering Report, attachment to section 7). The Engineering

⁷ It is also unclear whether this permit condition would require the 15 acre park improvement to be contiguous with the facility, with Spring Creek Park, or with itself as one 15 acre area.

Report contains a statement that the closure plan (Appendix C of the report) “was developed in accordance with the requirements of 6 NYCRR 360 and addresses the requirements necessary for the proper closure of the facility, *if necessary*” (emphasis added, see report at 6-9). The closure plan is cursory, with no detailed restoration plan. The closure plan also states that, “The proposed yard waste composting facility represents an integral component of the City of New York’s Comprehensive Solid Waste Management Plan.” The application documents themselves indicate that the facility is not temporary, and indeed may be permanent.

The New York State Office of Parks, Recreation and Historic Preservation issued a guidance document, most recently revised in 2000, entitled “Guide to the Alienation or Conversion of Municipal Parklands.” (Conversion refers to the procedure required whenever park facilities for which federal funds have been provided are conveyed or cease to be used for public outdoor recreation.) Among the actions this document describes as alienation of parkland is “[r]estricting to local residents the use of recreational facilities which had previously been open to all persons” (Guide, at 2). The proposed project would restrict such a facility to an even more limited population. The document also states the National Park Service has determined “use of parklands for a nonpark purpose, such as commuter parking lots or composting facilities” is a conversion (Guide, at 13). This document is guidance, not a court precedent or a regulation, but it suggests the proposed composting facility is not a park use.

The third question involved in this issue concerns the effect on the permitting decision if the project is determined to be an alienation of parkland for which legislative approval would be necessary. Among the outcomes proposed by the intervenors are that the permit be denied or that it be conditioned on the Applicant receiving legislative authorization before operating the facility. These actions could be taken by the Commissioner in deciding this matter, based on the completed hearing record. Adjourning the hearing until the Applicant has sought and obtained legislative approval, as suggested by Baykeeper and the Amici, is not appropriate in this case. The Applicant has already made clear it does not intend to seek such approval and the hearing can proceed to a decision with the absence of legislative approval as a fact the Commissioner can consider.

This is a significant issue, as that term is defined in 6 NYCRR 624.4(c)(3). It is also substantive, in that there is sufficient doubt about the Applicant’s ability to meet statutory or regulatory criteria applicable to the project such that a reasonable person would require further inquiry. The parties have already presented arguments on the legal aspects of this issue, and certain facts relevant to it are already in the record. I anticipate receiving the application documents and the memoranda of understanding as exhibits in evidence. The record may be developed further by presentation of testimony and other evidence on disputed or unresolved fact questions relevant to this issue including the condition of the park, governmental and private efforts towards maintenance or improvement of the park, and the significance of the Department of Parks and Recreation’s designation of Spring Creek Park as “forever wild.”

Ruling: Whether the proposed project is an alienation of parkland for which legislative approval is necessary, and if so, whether the requested permit should be additionally conditioned or denied, is an issue for adjudication in this hearing.

Zoning

The Amici, Baykeeper and CHA argued that under the New York City Zoning Resolution, a zoning amendment would be necessary before the site could be used for a composting facility. These parties quoted New York City Local Law 11-13 as requiring that “[i]n the event that a *public park* or portion thereof is sold, transferred, exchanged, or in any other manner relinquished from the control of the Commissioner of Parks and Recreation, no building permit shall be issued, nor shall any *use* be permitted on such former *public park* or portion thereof, until a zoning amendment designating a zoning district therefor has been adopted by the City Planning Commission and has become effective after submission to the Board of Estimate in accordance with the provisions of Section 75-00” (italics in original).⁸

The Amici asserted that this is a legal issue and should be determined as a preliminary matter, and opposed issuance of a permit by DEC if the activity violates the local zoning law. Both the Amici and Baykeeper cited 6 NYCRR 360-1.11 as requiring that a proposed solid waste management facility must “comply with requirements identified in this Subpart [360-1] and the applicable Subpart pertaining to such a facility [other subparts of part 360], and with other applicable laws and regulations.” These parties cited the decision in Matter of Washington County Cease, Inc. v Persico (120 Misc2d 207, 465 NYS2d 965 [Sup Ct, Washington County 1983], affd. 99 AD2d 321, 473 NYS2d 610, affd. 64 NY2d 923, 488 NYS2d 630) as holding that a DEC permit could not be issued for an activity that plainly violated local zoning law. CHA asserted that the application is defective in that it identifies the site as located within an area of R3-2 zoning, while the Zoning Resolution section 11-13 states, “District destinations indicated on *zoning maps* do not apply to *public parks*, except as set forth in Section 105-91 (Special District Designation on Public Parks)” (italics in original).⁹

DEC Staff disagreed with the intervenors’ position. DEC Staff stated that the regulatory requirement imposed by 6 NYCRR 360-1.11(a) is met in the draft permit by General Condition 4 which states that the Applicant would be “responsible for obtaining any other permits, approvals, lands, easements, and rights of way that may be required for the subject work” and “must comply with all applicable local, state, and federal statutory, regulatory, and legal requirements.” DEC Staff also cited DEC administrative decisions and a court decision as requiring DEC to review and approve a permit application, if it meets DEC regulations, even if it violates local zoning law (DEC Staff 6/9/04 brief, at 3 - 4).

The Applicant took a position similar to that of DEC Staff, citing additional cases in support. Both DEC Staff and the Applicant distinguished the present situation from the

⁸ The Amici attached a copy of this section as appendix A of their petition.

⁹ CHA petition supplement, May 19, 2004, at 6. CHA noted that section 12-10 of the Zoning Resolution pertains to definitions and states that terms in italics are to be interpreted in accordance with that section.

Washington County Cease decision, DEC Staff noting that DEC's decision-making was constrained by local zoning in that case because DEC was the permit applicant (for approval of a PCB landfill). The Applicant in the present hearing stated that in Washington County Cease the case was decided on a specific statutory provision governing hazardous waste facilities which required denial of a permit based on violations of local zoning laws.

I agree with DEC Staff's conclusion that compliance with zoning is not an issue for adjudication in this hearing. Prior court decisions, decisions by the Commissioner and rulings in DEC permit hearing cases have concluded that zoning issues fall outside the DEC's area of responsibility and that DEC has no authority to decide disputes concerning local approvals (Matter of Hingston v Dept. of Environmental Conservation, 202 AD2d 877, 609 NYS2d 446 [3d Dept 1994], Matter of Town of Poughkeepsie v Flacke, 84 AD2d 1, 445 NYS2d 233 [2d Dept 1981], Matter of 4-C's Development Corporation, Interim Decision of the Commissioner, May 1, 1996). Zoning questions need to be decided by the local government having jurisdiction, subject to judicial review if necessary (4-C's, at 3, citing Town of Poughkeepsie). Reviews of permit application by DEC are not put on hold until disputes about zoning have been decided (id.)

Some cases cited by the parties involved mined land reclamation permits. The Mined Land Reclamation Law contains a provision allowing an opportunity for determinations by the chief administrative officer of a local government about specified subject areas, including setbacks from property boundaries or public thoroughfare rights-of-way and whether mining is prohibited at the proposed location. That law gives the DEC discretion to decide whether the determinations made by the local government are reasonable and necessary and, if so, to incorporate them into the permit if one is issued. If the DEC decides not to incorporate the local determinations into the permit, it must provide a written explanation of the reasons for this decision, but DEC is not bound by the local determinations (ECL 23-2711(3)). The Mined Land Reclamation Law also defines the relationship between it and local zoning laws (ECL 23-2703(2) and (3)). Similar provisions do not apply to permit applications for solid waste management facilities, and the differences between the two programs need to be kept in mind in considering how the DEC Staff or the Commissioner has treated applications in past cases.¹⁰

¹⁰ The Applicant's description of how setback distances were dealt with in the hearing on the application by Steven J. Kula is not accurate. The ALJ's issues ruling, dated June 8, 1995, concluded the Town of Naples had made a recommendation concerning setbacks that was not incorporated into the draft permit, but there was no indication that DEC Staff had provided a written response as required. The ruling also stated that the setback distance was related to other issues in the hearing and that the Town's setback might be reasonable and necessary. The ruling identified the setback distance as an issue for adjudication. The August 11, 1995 interim decision of the Commissioner stated this was not an issue, based upon omissions from the Town's offer of proof, and that DEC Staff's appeal of the issues ruling had provided Staff's responsive determination regarding setbacks.

The Washington County Cease decision concerned an application by the Department of Environmental Conservation to itself for permits and variances, and to the Industrial Hazardous Waste Facility Siting Board for a certificate of environmental safety and public necessity, for the Hudson River PBC reclamation project under consideration in the early 1980's. Supreme Court, Washington County, held that the state was subject to the Town of Fort Edward zoning ordinance on the basis of the express language contained ECL article 27 as it existed at that time. Former section 27-1105(2)(f), repealed in 1987, provided that, "The Board shall deny an application to construct or operate a facility if...construction or operation of such facility ...would be contrary to local zoning or land use regulations in force on the date of the application" (120 Misc 2d 207, 215 and 219, 465 NYS2d 965, 971 and 974). No similar provision exists with regard to DEC's decisions on solid waste management permit applications. Similarly, the power plant cases cited by the Amici are under different requirements from the present case. Public Service Law (PSL) Article X also contains provisions regarding local laws (PSL 168(2)(d) and 172(1)) not found in part 360 or the ECL provisions governing solid waste management facilities.

Baykeeper and CHA also argued that the project violates the New York City Charter, through an unauthorized extension of the Parks Commissioner's powers and by not complying with procedures including the City's Uniform Land Use Review Procedure, respectively (Baykeeper July 6, 2004 brief, at 13; CHA May 19, 2004 letter). As with zoning, these disputes are outside of DEC's jurisdiction.

Ruling: The project's compliance with the New York City zoning law and City Charter is not an issue for adjudication in this hearing.

Odor, litter, dust and vectors

Paragraph 360-1.11(a)(1) of 6 NYCRR requires, in part, that, "The provisions of each permit issued pursuant to this Part must ensure, to the extent practicable, that the permitted activity will pose no significant adverse impact on public health, safety or welfare, the environment or natural resources, and that the activity will comply with the requirements identified in this Subpart and the applicable Subpart pertaining to such facility, and with other applicable laws and regulations."

Section 360-1.14 contains operational requirements that apply to all solid waste management facilities. These include the following:

"Confinement of solid waste. Blowing litter must be confined to solid waste holding and operating areas by fencing or other suitable means. Solid waste must be confined to an area that can be effectively maintained, operated and controlled. Solid waste must not be accepted at a solid waste management facility unless the waste is adequately covered or confined in the vehicle transporting the waste to prevent dust, and blowing litter" (6 NYCRR 360-1.14(j)).

“Dust control. Dust must be effectively controlled so that it does not constitute a nuisance or hazard to health, safety, or property. The facility owner or operator must undertake any and all measures as required by the department to maintain and control dust at and emanating from the facility” (6 NYCRR 360-1.14(k)).

“Vector control. The facility must be maintained so as to prevent or control on-site populations of vectors using techniques appropriate for protection of human health and the environment and prevent the facility from being a vector breeding area” (6 NYCRR 360-1.14(l)).

“Odor control. Odors must be effectively controlled so that they do not constitute nuisances or hazards to health, safety or property” (6 NYCRR 360-1.14(m)).

Baykeeper proposes to call Sebastian and Geraldo De Jesus, two neighbors of the site, and Craig Swanberg, the manager of a bus facility located across Flatlands Avenue from the site, to testify about odor, litter, dust and insect problems during the operation of the facility in 2001 and 2002. Baykeeper stated that the neighbors’ testimony will show that dust from the composting activities, at a smaller scale of operation than is proposed in the application, adversely affected their health and accumulated inside their home and that odor from the facility interfered with outdoor activities. Baykeeper also stated that both Mr. Sebastian De Jesus and Mr. Swanberg would testify about having to clean up plastic bags that blew away from the composting facility, including bags that accumulated on the bus facility’s fence.¹¹ Baykeeper submitted two letters and a statement from Mr. Swanberg, who also spoke at the legislative hearing. These documents and the hearing comment complained about litter and odor problems, and stated that dust from the composting operation adversely affecting the heating, ventilation and air conditioning system at the bus facility leading to increased maintenance costs for this system. In his comment at the legislative hearing, Mr. Swanberg also stated that his company had never had a problem with gnats until the composting facility operated in 2002, and that the problem lasted until the composting facility ceased operation. (Baykeeper 5/11/04 supplemental petition, at 5 - 6; 5/20/04 supplemental petition; 7/6/04 brief, at 23 - 28; Legislative hearing transcript, at 105 - 108).

Baykeeper stated that special condition 25 of the draft permit would require the Applicant to pick up trash around the perimeter of the site, but that the trash goes well beyond the perimeter into the residential and commercial property of surrounding neighbors (5/11/04 supplemental petition, at 7). Baykeeper also asserted that special condition 30 would require the Applicant to effectively control odors so they do not constitute a nuisance or hazard to health, safety or property, but that the Applicant has not in the past demonstrated an ability to meet this condition (5/11/04 supplemental petition, at 8). Although Baykeeper stated that DOS was told on numerous occasions of the impact the dust was having on the Command Bus facility, Mr.

¹¹ The notice of incomplete application issued by DEC Region 2 on June 19, 2002 states (at item 11) that on April 17, 2002 DEC staff visited the site and observed plastic bags in the trees and littering the ground on the surrounding properties.

Swanberg's letters attached with Baykeeper's supplemental petition were addressed to officials of the New York City Department of Transportation. One letter asked the NYC DOT to contact the Applicant to make whatever changes were necessary. Baykeeper's May 11, 2004 supplemental petition stated that Mr. Swanberg would testify that the Applicant did not respond to the complaints.

CHA proposed to call as witnesses Mr. Swanberg, Mr. Dillon, and James Watt, a person who works in the area of the site and who spoke at the legislative hearing about litter and pests associated with the earlier operation of the site. CHA also contested whether the City of New York's "311" complaint line is a meaningful recourse in the event of nuisance conditions (IC Tr. 111-116). CHA also proposed testimony about its position that the DEC is unwilling or unable to enforce part 360 in this section of New York City and that the Applicant allows or commits violations at solid waste management facilities operated by private entities or the Applicant.¹²

The August 27, 2001 memorandum of understanding (MOU) between the Applicant and the New York City Department of Parks and Recreation states, in the third and fourth "Whereas" paragraphs, that the two agencies have cooperated in the establishment and operation of leaf and yard waste composting sites in City parks, including one in Canarsie Park, and that these agencies desire to discontinue the composting operation in Canarsie Park. The MOU goes on to say that therefore, the Department of Parks and Recreation will allow the Applicant to establish composting and soil production operations, and vehicular access paths as required, at the site of the proposed project. The Applicant's negative declaration states that the proposed project "would replace composting operations located in Canarsie Beach Park and Idlewild Park" (Background documents, at 2.D).

Baykeeper asserted that odor impacts were the main reason the neighbors surrounding the Applicant's composting facility at Canarsie Park fought, and succeeded, in closing that composting facility down. Baykeeper did not, however, propose any testimony concerning the Canarsie Park Facility (5/11/04 supplemental petition, at 8). CHA, in its May 19, 2004 supplemental petition, listed as proposed witnesses 10 persons and two organizations whose testimony was described as including "Canarsie Beach Park siting and operation." At least three of the persons are or were public officials, but any relation of the other persons to the Canarsie facility is not identified in the supplemental petition. CHA's July 16, 2004 reply, however, states that CHA intends "to call Canarsie community witnesses who fought successfully against the Seaview Park facility" (Reply, at 77).¹³ The two organizations listed in this context are

¹² The conditions and enforcement situation cited by CHA resemble those described in the issues ruling in Matter of American Marine Rail, LLC (Rulings of the ALJ, August 25, 2000, at 65).

¹³ From the context of CHA's documents, "Seaview Park" is apparently Canarsie Park. No park by the name of Seaview Park is listed on the web site of the New York City Department of Parks and Recreation, but the two park names are presented as being synonymous at page 3 of the tables attached with CHA's July 6, 2004 document and elsewhere in that document. The

“Southern Canarsie Civic Association” and Canarsie Cares. The website of Partnership for Parks (www.itsmypark.org, described as a joint program of the City Parks Foundation and the New York City Department of Parks and Recreation) lists Canarsie Cares and United Canarsie South Civic Association as two of the community groups active in Canarsie Park.

The Applicant stated that the application includes measures to control odor, litter and other nuisances. The Applicant argued that the intervenor’s proposed testimony is merely generalized allegations that do not identify any deficiencies in the draft permit and that there was no offer of expert testimony that would show the proposed operating protocols and permit conditions are inadequate (IC Tr. 96 - 97, 114; Reply brief, at 20 - 22). The Applicant stated that “311,” the City government action line, was available for any complaints about a city agency or function (Tr. 111- 112).

DEC Staff cited special conditions 26, 27, 30, 31, 32 and 34 and provisions of the Engineering Report as addressing these impacts, and argued that Baykeeper’s offers of proof do not specifically address all the relevant conditions in the application and draft permit.¹⁴ DEC Staff also stated that Baykeeper proposed no expert testimony. DEC Staff stated that the dust and odors observed by Baykeeper’s proposed witnesses might have come from other sources, and provided other criticisms of Baykeeper’s offer of proof that are discussed below (IC Tr.120, Reply brief at 6 - 8).¹⁵ DEC Staff disagreed with statements by CHA and the Brooklyn Solid Waste Advisory Board criticizing DEC’s enforcement as lax or lacking in resources (IC Tr. 123 - 129).

The intervenors are not proposing to present expert testimony on the issue of compliance with 6 NYCRR 360-1.14(j) through (m), but expert testimony would not be necessary in order to raise issues on these subject. Testimony by fact witnesses would be relevant, and could form the basis for denying or conditioning a permit. In hearings in Matter of Albert C. Alfredo (Order of

negative declaration refers to it as “Canarsie Beach Park.” The use of unofficial names for this park and for Spring Creek Park is a potential source of confusion. The parties should use the official park names in future correspondence in this hearing.

¹⁴ The cited special conditions require the permittee to patrol the land immediately outside and adjacent to the site to pick up litter, generally require that the project not create off-site litter, odors or other nuisances, require materials to be de-bagged or processed within specified times after delivery, and require additional information about handling of yard waste from private landscapers, grass clippings or horse manure 90 days before the facility would intend to start receiving these wastes.

¹⁵ Although DEC Staff’s reply brief (at 2) argued that the facility is authorized to operate only from 7 AM to 4 PM, Monday through Friday, the section of the draft permit cited in support of this statement actually authorizes these hours “with excursions as described in Section 4.1.3 of the December 2002 Engineering Report cited in Special Condition 16, below.” Section 4.1.3 of the Engineering Report provides for accepting material “on a three-shift basis” (presumably 24 hours per day) during peak periods between October 1 and December 31.

the Commissioner, August 21, 1996) and Matter of Mohawk Valley Organics, LLC (Order of the Commissioner, July 21, 2003), DEC Staff called fact witnesses to testify about odor impacts in support of a summary abatement order and revocation of a permit, respectively, in addition to calling expert witnesses. The proposed testimony in this case involves observations by persons living or working near a site concerning effects of the site's operation that could be observed by a lay person. DEC Staff's suggestion that there may have been other sources of the odors and dust, and that the Applicant would have more expertise in managing horse manure than the local horse stables, are matters for cross examination or proof by DEC Staff or the Applicant rather than reasons for concluding there is no issue.

Doubts about an applicant's ability to meet regulatory criteria applicable to its project may be raised by an offer of proof that a project, as conditioned by a draft permit, would violate standards even if an applicant complied with its permit. Such doubts may also be raised by an offer of proof that an applicant cannot be relied upon to carry out the terms of its permit. In the present case, the intervenors' offers of proof include both of these concepts. As discussed below, the offers of proof raise an issue regarding whether the facility would comply with the four provisions of part 360 quoted at the beginning of this section. Not all of the testimony proposed by the intervenors is relevant, however, as discussed in the next section of this report concerning record of compliance and enforcement issues.

The fact that the earlier operation occurred without a permit, and without the conditions that would be required under the draft permit, does not eliminate the issue of odor, litter, dust and vectors. Even composting facilities that were exempt from part 360 on the basis of the volume and type of waste accepted were exempt "provided the process follows acceptable methods of composting" (former paragraph 360-5.1(b)(1)). This requirement would have applied even if the earlier operation of the facility had been exempt from needing a permit.¹⁶ In addition, the Applicant applied for a permit from DEC in October 2001. It is reasonable to expect that an applicant would be careful to avoid violations and other problems while an application was pending.

The Applicant's operation of this or a similar facility is relevant to the Applicant's ability to meet regulatory criteria applicable to this project. "One must also not lose sight of the

¹⁶ The February 18, 2004 response to comments, prepared by DEC Staff, concedes that the facility's input exceeded 3,000 cubic yards of waste. It states that DEC Staff used its discretion and, rather than taking enforcement action, decided to encourage the Applicant to pursue a permit application (Background documents, at 3.F). The facility is designed for far more than 3,000 cubic yards per year (Engineering Report, at 4-2) and a November 6, 2002 memo, although not yet in evidence, indicates this threshold was exceeded in 2001 (Background documents, at 7.D). The analysis of a similar threshold in the mining program (Matter of Carlson Associates, Order of the Commissioner [September 1, 1993]) suggests the composting facility needed a permit from the start of its 2001 operation in order to operate legally. Operation of a solid waste management facility without the necessary permit could be taken into account under the DEC Record of Compliance Policy discussed below.

Department's obligation to determine whether or not an applicant can meet all environmental and public health based permitting standards. In assessing any applicant's ability to meet those standards, the Department is not limited to reviewing engineering plans and reports but must also judge the applicant's ability to carry out the commitments made in those documents. The best design or operating plan is worth little if the party implementing it cannot be relied upon to carry out its terms" (Matter of American Transfer Company, Interim Decision of the Commissioner, February 4, 1991).

The DEC guidance document under which a permit applicant's compliance history may be evaluated is the Record of Compliance Enforcement Guidance Memorandum (Commissioner Policy DEE-16, issued on August 8, 1991 and revised on March 5, 1993).¹⁷ As discussed in more detail in the next section of these rulings, this policy provides for an applicant's record of compliance to be taken into account in deciding whether to deny a permit or to impose additional conditions. The portion of the intervenors' proposed testimony and documentary evidence that is relevant to this policy concerns the operations of the composting facility at Spring Creek Park from 2001 to the present, the operations of the Canarsie Park composting facility the proposed project would replace, and whether the City of New York's "311" line is a meaningful recourse in the event of nuisance conditions. If a permit is issued, effective and feasible enforcement measures might need to be added as permit conditions. The Record of Compliance Policy focuses on a particular applicant's record and its consequences for permit issuance, not on the DEC's enforcement capabilities with regard to regulated entities in general.

The permit conditions cited by DEC Staff do not resolve the proposed issue. The litter problem alleged by the intervenors and the speakers at the legislative hearing extends beyond the area immediately outside the facility perimeter that would be patrolled by the Applicant. In addition, at least some of the observations apparently relate to a time period when the fence around the facility was already in place. It is not clear when the fence was built, but Mr. Swanberg's April 10, 2002 letter discusses debris going over the facility's berm and fences (see, Baykeeper's May 11, 2004 supplemental petition, Exhibit B). The suggestion in DEC Staff's reply brief that a fence will be installed in the future to control litter does not appear accurate.

The Applicant's operations and maintenance plan (Appendix A of the Engineering Report, at A-23) states that most of the leaves delivered to the facility would arrive in plastic bags. Page A-23 also states, "During future leaf collection periods, the [Applicant] will instruct residents to place leaves in paper bags." The operation and maintenance plan does not state in what year or how this instruction would be given, and it concedes that complete compliance is an unrealistic expectation. The issues conference and the later correspondence did not address whether use of paper bags would or could affect litter control at the site, and the discussion of bags in the operation and maintenance plan relates to the time required to debug waste. The draft permit refers to plastic bags as part of the litter to be controlled and does not specify use of paper bags for any reason (Special Conditions 25 and 26).

¹⁷ The policy is on DEC's internet site at www.dec.state.ny.us/website/ogc/egm/roc.html

With regard to odor, a November 6, 2002 memo from the Applicant states that the Applicant delivered 5,261.82 tons of leaves to the Spring Creek site in the fall of 2001 (Background documents, at 7.D). There is no indication that the facility received grass or horse manure during that time. The draft permit contains a condition about adding a bulking agent and/or lime to potentially odorous materials such as grass and horse manure (Special Condition 30), but the draft permit largely leaves the procedures and conditions for handling grass and horse manure to be figured out in the future after the Applicant has completed two years of operation at the facility and has notified DEC it intends to accept these additional wastes (Special Condition 34). The earlier operation of the facility involved a smaller amount and more limited types of waste than would be composted under the proposal, and if the evidence proves that odor constituted a nuisance under those conditions it would call into question the Applicant's ability to comply with part 360 and the draft permit when carrying out more extensive composting.

The proposed issue is substantive, in that the offers of proof raise sufficient doubt that a reasonable person would require further inquiry. It is significant in that it could result in denial of the permit or denial of the requested variances discussed below. It could also result in significant permit conditions if the Commissioner were to find that enhanced enforcement measures are warranted in view of the history of this facility.

Ruling: The proposed issue of odor, litter, dust and vector impacts is an issue for adjudication in this hearing. The scope of this issue includes these impacts and the related control measures at this facility, both during operations that already occurred and the proposed operations, and related impacts during the Applicant's operation of the Canarsie Park facility.

Other record of compliance and enforcement issues

The Record of Compliance Enforcement Guidance Memorandum describes, among other subjects, the procedure by which the DEC will consider events that may be a basis for the DEC to exercise its discretion in denying a permit application, and identifies the categories of crimes, violations and problems that should be considered.

Those applicants who have violated the Environmental Conservation Law or similar laws in the past may be denied permits or may be issued permits with strict reporting or monitoring conditions. The DEC may also conclude that a prior violator can demonstrate that it has re-established a reasonable record of compliance and can now carry out activities in a responsible manner. The policy focuses on violations of environmental laws and on conduct that may indicate a lack of truthfulness. Categories of such events are identified in section IV of the policy. Evidence of a violation that has been adjudicated or admitted by the violator should enter the record principally through the document which reflects the result of the adjudication or admission. Circumstances that would constitute a violation over which DEC has administrative jurisdiction, and that have not yet been adjudicated, may be adjudicated in the permit hearing but this procedure is not available where the violation is one that could not be handled by the DEC

administratively (Commissioner Policy DEE-16; see also, Matter of A-1 Recycling and Salvage, Interim Decision of the Commissioner, March 19, 1992).

CHA made general assertions that the Applicant: is a RICO (Racketeering Influenced Corrupt Organization) enterprise; engaged in intimidation and fraud; ignored illegal acts by private waste management facilities; and converted certain areas in southeast Brooklyn into superfund sites or brownfields (3/18/04 petition, at 3; 5/19/04 supplemental petition, at 8; attachment to July 6, 2004 correspondence at 266 - 287). Most of CHA's assertions relate to matters outside DEC's administrative jurisdiction. These include allegations about the Applicant's enforcement of its own requirements with regard to private entities and allegations of criminal activity. CHA offered no documentary evidence concerning convictions or findings of violation by the governmental entities that would have jurisdiction. The allegations and offers of proof are also very general, and some of the events concerning old landfills probably occurred before the DEC was formed. This group of proposed issues will not be adjudicated.

The exception to this is CHA's statement that Department of Sanitation transport vehicles have illegally dumped solid waste on sidewalks and streets, and CHA's offer of proof about this in the form of testimony by Mr. Dillon and formal written complaints of CHA (see page 272 of the attachment to CHA's 7/6/04 correspondence).¹⁸ Disposal of solid waste other than at authorized or exempt disposal facilities would constitute a violation 6 NYCRR 360-1.5(a) and is a matter over which DEC has administrative jurisdiction. This is the only portion of the proposed issue that might be adjudicated.

CHA made this offer of proof in the last correspondence concerning proposed issues, and there has not been an opportunity for the Applicant to respond. Where circumstances that would constitute a violation over which DEC has administrative jurisdiction are alleged but no adjudication has taken place, an applicant should be placed on notice of the circumstances at issue and the provisions of law that were allegedly violated (see, A-1 Recycling and Salvage, at 3). If CHA wishes to present testimony and evidence on waste dumped from Department of Sanitation vehicles, it will need to state the dates and places where this allegedly occurred and a description of the waste, and identify any other DEC regulatory or permit requirements this allegedly violated. CHA would need to mail this information on or before September 10, 2004. The Applicant will be given an opportunity to respond, with this response to be mailed on or before September 20, 2004 or included in any appeal the Applicant may submit regarding this issues ruling.

¹⁸ With regard to this allegation, CHA also proposes to call Commissioner Crotty and Governor Pataki as witnesses, as well as Christopher Boyd of the New York City Comptroller's office. It appears highly unlikely that the Commissioner or the Governor would be able to provide relevant testimony on this question. The nature of Mr. Boyd's testimony is not identified.

In addition, the odor, litter, dust and vectors issue identified earlier in these rulings, and the operation of the facility prior to receiving a permit, are relevant to the Applicant's record of compliance.

Ruling: The Applicant's compliance history in general and CHA's allegations of corrupt activity are not an issue for adjudication. CHA's allegation of waste dumping by the Applicant's trucks might require adjudication, depending on the outcome of the further submissions described above. The record of compliance policy is relevant in considering the issue, identified earlier in this ruling, of odor, litter, dust and vector impacts, and the operation of the facility prior to receiving a permit.

Variances

The Applicant requested variances from three requirements of 6 NYCRR 360 concerning distances between the proposed facility and surrounding land uses or water. The variance applications were submitted in October 2001 and, on December 20, 2002, DEC Staff determined the application to be complete. The provisions of part 360 from which variances were sought were amended on January 7, 2003, effective 60 days after filing of the amendment.

In the version of part 360 effective on the date the application was determined to be complete, subpart 360-5 governed composting facilities and subpart 360-4 governed land application facilities. The setback distances for composting facilities were stated, in part, by reference to those for land application facilities. Former subdivision 360-5.5(g) required that "[t]he minimum horizontal separation distances set forth in section 360-4.4(d) of the Part also apply to yard waste composting facilities, *except the minimum horizontal separation distance to a residence or place of business must be 200 feet*" (emphasis added).

Former subdivision 360-4.4(d) required that:

"The minimum horizontal distance from the perimeter of the site to be used for land application of sewage sludge or septage must meet or exceed the following:

Item	Minimum horizontal separation distance in feet
Property line	50
Residence* or place of business	500
Potable water well or supply	200
Surface water body	200
Drainage swale	25

* The landowner's or operator's residence is excluded from this separation distance requirement."

The variances requested by the Applicant, as described in the variance applications, are as follows:

- 1) Variance from subdivisions 360-4.4(d) and 360-5.5(g), which required a minimum horizontal separation distance of 50 feet between the property line and the perimeter of the site. The variance application states that an earthen berm 30 feet wide at its base would exist along parts of the border of the site¹⁹ and that actual operations would take place inside the berm, roughly 32 feet from the site property lines.
- 2) Variance from the same subdivisions, which required a minimum horizontal separation of 200 feet between places of business and residences and the perimeter of the site. The variance application states that actual operations would take place roughly 132 feet from the closest residences, the Brooklyn Developmental Center, a telephone company service center, a bus depot and a U.S. Postal Service general mail and vehicle maintenance facility.²⁰
- 3) Variance from the same subdivisions, which required a minimum horizontal separation of 200 feet between surface waters and the perimeter of the site. The variance application states that the southeastern corner of the site would have an approximately 136-foot stretch that would be between 192 and 200 feet of Spring Creek. It also states that the southern portion of the site would have a 152-foot stretch that would be between 160 and 200 feet from Old Mill Creek, although this corner of the site would contain a berm and a stormwater management basin and actual operations would occur further than 200 feet from surface waters.

Subparts 360-4 and 360-5 were repealed in early 2003 and replaced by two new subparts: 360-4 (Land application and associated storage facilities) and 360-5 (Composting and other Class A organic waste processing facilities), the latter of which contains a section 360-5.7 (Yard waste composting facilities). Paragraph 360-5.7(b)(7) contains the setback requirements for yard waste composting facilities under the amended regulation, as follows:

“The minimum horizontal separation distance as measured from the facility to the nearest residence, place of business or public contact area (except for turf farms and plant

¹⁹ The variance applications state that a berm would be developed along the northern and western borders of the site where active composting operations would occur, but the general site layout drawing (Figure 4-2 of the Engineering Report) does not depict a berm along the north side of the active mulching pad.

²⁰ A satellite communications center would also be within 132 feet of operations, and Figure 2-9 of the Engineering Report shows an area marked as “Gateway Estates (Under Construction)” as having its boundary the same distance from the facility as the boundary of the Brooklyn Developmental Center. The 26th Ward auxiliary water pollution control plant is also within 200 feet of the composting facility. CHA states the plant is staffed and that Mr. Watt, a proposed witness, works there (CHA 7/6/04 brief, at 73 and attachment at 69 and 140).

nurseries) must be 200 feet or greater if deemed necessary by the department based on the characteristics of the neighboring areas. The following criteria apply:

“(i) a facility without a pad and leachate collection system must maintain a minimum separation of 200 feet to a potable water well or surface body and 25 feet to a drainage swale;

“(ii) the separation distance requirement from a public contact area may be reduced for totally enclosed facilities if approved by the department; and

“(iii) the landowner’s or operator’s residence is excluded from the separation requirement for a residence.”

“Public contact area” is defined as “land with a high potential for contact by the public including, but not limited to, public parks, ball fields, cemeteries, plant nurseries, turf farms, golf courses and school yards” (6 NYCRR 360-5.2(a)(15)).

In its petition for party status, Baykeeper argued that the Applicant applied for variances from provisions that do not exist and needed, but failed to apply for, variances from 6 NYCRR 360-5.7(b). The amendment of the regulation was discussed at the issues conference, leading to publication of a supplemental notice. In the course of that discussion, DEC Staff stated that the transition provisions in 6 NYCRR 360-1.7(a)(3)(vi) apply and that the variance requests were reviewed by DEC Staff under the requirements in effect when the variance applications were submitted (IC Tr. 87 - 89).

The transition provision in 6 NYCRR 360-1.7(a)(3)(vi) pertains to “complete applications pending on the effective date of this Part.” It provides that if a permit to construct or operate a solid waste management facility was complete pursuant to 6 NYCRR part 621 on or before “the effective date of this Part,” the DEC will review the application in compliance with the solid waste management facility regulations in effect on the day before “the effective date of this Part.” However, if a permit is issued following that date, the permittee must comply with the operational, closure and post-closure requirement set forth “in this Part” pertaining to the type of solid waste management facility in question.

This provision or one very similar to it was in the 1988 version of part 360 and subsequent amendments. Although the amendment that took place in early 2003 only changed portions of part 360, it is reasonable to interpret “the effective date of this Part” as meaning the effective date of each amended version of part 360. The present application would be subject to the regulations in effect at the time it was determined to be complete, except that the Applicant would be required to comply with operational, closure and post-closure requirements of the regulation as revised.

This interpretation does not, however, clearly answer the question of which setback requirements apply to this project. DEC Staff apparently considers the setback requirements to be a design or construction requirement, rather than an operational requirement, and arguments

could be made in support of this interpretation. However, section 360-5.5 as it existed on the date the application was complete is entitled “operational requirements: yard waste” and includes the setback requirements. Further, the current version of part 360 puts the setback requirements under a section entitled “Design criteria and operational requirements.” Clarification, particularly from DEC Staff, will be necessary concerning whether the setback requirements are an operational requirement. I am requesting that DEC Staff provide clarification of whether, and why, the setback requirements are or are not an operational requirement, with this clarification to be mailed to the persons on the interim service list on or before September 20, 2004.

Regardless of the outcome of this questions, however, the Applicant would need a variance from the setback related to residences and places of businesses. Under the “old” regulation, the required distance would be a minimum of 200 feet between the perimeter of the site and residences or places of business. Under the “new” regulation, the required distance would be 200 feet, or greater if deemed necessary by the department based on the characteristics of the neighboring areas, between the facility and the nearest residence or place of business.

In the “new” regulation, this 200 foot or greater setback requirement includes not only residences and places of business but also “public contact areas” among which are public parks. If the “new” regulation applies to the setbacks for this project, a variance from this requirement would also be necessary because the facility would be within a public park, resulting in a setback distance of zero feet. The Applicant has not applied for this variance, presumably because it was proceeding under the “old” regulation.

The “old” regulation contains a setback between the property line and the perimeter of the site,²¹ and the Applicant applied for a variance from this provision. The “new” regulation does not contain a setback requirement of this kind, and this variance application would become moot if the “new” regulation applies.

The Applicant also requested a variance from the 200 foot setback from surface waters. The distance in the “new” regulation is the same, but it only applies to facilities without a pad and leachate collection system. The proposed project would include an asphalt pad and a drainage collection system. If the “new” regulation applies, clarification would also be necessary about whether the drainage collection system constitutes a leachate collection system; if it does, this variance application would also become moot.

CHA, at page 21 and 22 of its March 18, 2004 petition, stated that the December 16, 2002 Environmental Assessment Statement failed to consider new homes located to the north of the eastern portion of the facility and two-year old homes located three blocks east of the proposed facility. In the adjudicatory hearing, the parties may present evidence identifying additional residences, places of business and public contact areas developed in recent years and

²¹ The “site” is defined in paragraph 360-1.2(b)(154) as “the geographically contiguous property of a solid waste management facility and includes the land area of that facility and its access roads, appurtenances and land buffer areas.”

not reflected in the application documents, as well as any such land uses removed in recent years, to update the record so that it reflects existing conditions.

Under 6 NYCRR 360-1.7(c)(2), variance applications must:

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

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

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

Paragraph 360-1.7(c)(3) states that, “In granting any variance under this subdivision, the department will impose specific conditions necessary to assure that the subject activity will have no significant adverse impact on the public health, safety or welfare, the environment or natural resources.”

As discussed in an earlier section of these rulings, the intervenors have raised issues for adjudication regarding odor, litter, dust and vector impacts. For the same reasons, the project’s compliance with subparagraph 360-1.7(c)(2)(iii) is substantively in dispute, and an adjudicable issue exists concerning whether or not the necessary variances should be granted. This issue is significant because denial of the variances would necessitate a substantial modification of the project.

With regard to subparagraph 360-1.7(c)(2)(ii), the variance applications did not cite any unreasonable safety burden imposed by compliance with the setbacks. The reason cited by the Applicant is primarily an economic reason. All three variance applications state that, “The proposed site is located on City-owned land and requires no purchase or condemnation, thereby conserving economic resources.” Each variance application identifies the acreage by which the facility would need to be reduced in order to comply with each setback distance from which a variance is sought. The application for a variance from the property line setback goes on to state that, “With the implementation of such a size restriction, the City would have to locate a composting facility at another site, perhaps one that would require purchase or condemnation, in an area less suitable for operations, thereby substantially increasing capital and operating costs.” The application for a variance from the setback from residences and places of business contains a nearly identical statement. The application for a variance from the surface waters setback states that the size reduction resulting from compliance with this setback could result in an increase in operational costs.

The intervenors are not disputing that use of this site would save the Applicant money and no testimony or evidence is necessary regarding section 360-1.7(c)(2)(ii). Whether the

record supports a conclusion that the Applicant has met this portion of the variance standard is a legal question to be decided in the Commissioner's decision.

Ruling: An adjudicable issue exists concerning whether the requested variances should be granted. Further clarification will be necessary regarding which setback requirements apply to this project. If this clarification is not addressed in appeals of this ruling and an interim decision of the Commissioner, I will schedule further correspondence about it when scheduling the hearing.

Waterfront Revitalization Program consistency

The City of New York has a local waterfront revitalization program approved by the New York State Secretary of State.²² The project site is within the Coastal Zone. Baykeeper argued that issuing the draft permit would violate the New York City Waterfront Revitalization program, and stated that the Applicant provided materially inaccurate answers to certain questions on its consistency assessment form under this program.²³ Baykeeper stated that the proposed facility may not be allowable under the Waterfront Revitalization Program (WRP), and that conforming the proposed composting facility to the WRP could result in a major modification of the proposal or denial of the permit.

Baykeeper asked at the issues conference that the application be found incomplete on the basis of inaccurate answers on the coastal assessment form, and that the determination of significance under SEQRA be reconsidered (IC Tr. 202). The completeness of the application is not, however, a question that can be adjudicated in the hearing, although additional information necessary for a decision can be required (6 NYCRR 624.4(c)(7)). With regard to SEQRA, the determination of significance issued by the lead agency following coordinated review is binding on all other involved agencies (6 NYCRR 617.6(b)(3)(iii)).

The Applicant defended the answers it provided on the coastal assessment form and the attachment to that form, as discussed further below. The Applicant argued that Baykeeper had only asserted, incorrectly, that there were a few wrong answers and was merely offering an unsubstantiated alternative interpretation of the policy goals of the Waterfront Revitalization Program (Reply brief, at 23-25).

²² A table identifying the status of local waterfront revitalization programs, including that of the City of New York, is at http://nyswaterfronts.com/downloads/pdfs/LWRP_Status_Sheet.pdf [last viewed on August 30, 2004].

²³ The consistency assessment form is included within section 2.D of the background materials for this project.

DEC Staff stated, in its reply brief, that the answers criticized by Baykeeper “simply reflect a different perspective on environmental impacts and contrary legal interpretations.” DEC Staff maintained that its consistency determination, which is contained in the draft permit as General Condition No. 15, was and is proper. This condition states that, “In accordance with Title 19, Part 600.4(c) of the New York Code of Rules and Regulations, the Department hereby certifies that the action described and approved in this permit, if located within the Coastal Zone, is consistent to the maximum extent practicable with the policies and purposes of the New York City Waterfront Revitalization Program.”

Among other answers Baykeeper stated were inaccurate is the Applicant’s answer to question 38. This question asks, “Would the action result in shipping, handling, or storage of solid wastes; (sic) hazardous materials, or other pollutants?” The Applicant answered “No.”²⁴ At the issues conference, the Applicant stated that the consistency assessment form references waterfront policy 7 with regard to question 38 and cited the categories of wastes mentioned in that policy, which do not include yard waste. The Applicant argued that yard waste is not what is at issue in this policy. The Applicant conceded that “it is questionable whether or not this question was answered correctly or incorrectly.” The Applicant argued that disputing the answer to this question does not invalidate the form. DEC Staff stated that yard waste is a solid waste, that the facility would handle solid waste, and that the definition of solid waste is very broad (IC Tr. 197 - 202). In its reply brief, the Applicant stated that its answer was correct, “because Policy 7 by its plain terms does not apply to composting facilities” (Reply brief, at 24).

The Waterfront Revitalization Program, attached as Exhibit D of Baykeeper’s petition, is the New York City Department of City Planning’s “The New Waterfront Revitalization Program,” dated September 2002.²⁵ Policy 7 of that document, in addition to mentioning the wastes cited by the Applicant at the issues conference, states that, “Solid wastes are those materials defined under ECL 27-0701 and 6 NYCRR 360-1.2.” These definitions include yard waste, and composting of yard waste is regulated under part 360 as solid waste management. The answer to question 38 of the consistency assessment form is incorrect.

Baykeeper also criticized the Applicant’s answer to question 48 of the form, which asks, “Does the project site involve lands or waters held in public trust by the state or city?” The Applicant answered “No” to this question. The Applicant argued that the project does not involve transfer of interest in the land and that the land would be “put to a park use” by the project and be “consistent with park land use” (IC Tr. 209; Reply brief, at 24 - 25).

As discussed above, under “Alienation of Parkland,” the site is located within a city park and there is no dispute that it is parkland. The Court of Appeals held, in Friends of Van

²⁴ A related question, number 41 on the form, asks “Will the proposed activity result in any transport, storage, treatment, or disposal of solid wastes or hazardous materials, or the siting of a solid or hazardous waste facility?” The Applicant answered “Yes” to question 41.

²⁵ www.nyc.gov/html/dcp/html/wrp/wrp.html [last viewed on August 30, 2004].

Cortlandt Park, that “dedicated park areas in New York are impressed with a public trust for the benefit of the people of the State” (supra, at 631). The Applicant’s answer to question 48 is also incorrect, regardless of the outcome of the question whether the proposed composting facility is a park use of land.

Baykeeper also disputed the Applicant’s answer to question 42, which asks, “Would the action result in a reduction of existing or required access to or along coastal waters, public access areas, or public parks or open spaces?” The applicant answered “No” to this question. The Applicant, in the attachment to its consistency assessment form (see end of section 2.D of the background materials), stated that, “The proposed action would maintain existing physical, visual and recreational access to the waterfront.” This answer apparently was in reference to the answer to question 43, which also relates to open space. In its reply brief, the Applicant stated that the facility does not block access to Spring Creek or Old Mill Creek (Reply brief, at 25).

The site occupies only a portion of the Brooklyn side of Spring Creek Park, and none of the Queens side of the park. It is possible that a person might still be able to get to the waterfront by going through park land south or east of the project site. Notwithstanding this, the proposed project would block access to that portion of the park occupied by the composting facility. The Engineering Report specifies that the perimeter of the composting facility site would be enclosed by an eight-foot high chain link fence, with gates locked or monitored to control access. All gates would be secured during off hours (Engineering Report, at 6-4). As depicted in a drawing in the Engineering Report, the fence around the area of the truck scale and trailer would be 10 feet high and topped with barbed wire and razor wire.

Part 360 of 6 NYCRR requires that access to and use of solid waste management facilities be strictly and continuously controlled by fencing, gates, signs, natural barriers or other suitable means, a requirement that applies to all solid waste management facilities (6 NYCRR 360-1.14(d)). Public access to facilities with permanent operating mechanical equipment may occur only when an attendant is on duty (6 NYCRR 360-1.14(c)). The project would have such equipment on site (Engineering Report, at 4-11 to 4-12, 4-14 to 4-18).

Public access to the portion of the park occupied by the composting facility would be eliminated during the facility’s lifetime, except for those persons delivering yard waste or manure or removing compost. This would be a reduction of access to a public park. In addition, one could consider the site to be removed from being open space during the lifetime of the facility since the site, formerly vegetated and listed by Parks as “forever wild,” would be paved and converted into a waste management facility. Thus, the Applicant’s answer to question 42 is also incorrect.

Question 46 of the form asks, “Will the proposed project impede visual access to coastal lands, waters and open space?” The Applicant answered, “No.” Baykeeper stated that project includes an earthen berm approximately 30 feet wide at its base and eight feet high, which will impede visual access to a significant portion of Spring Creek Park (Petition, at 13-14). Berms would surround a large portion, although not all, of the perimeter of the facility (Engineering Report, Fig. 4-2). The Applicant asserted, without explaining the effect of the berm, that the

facility “would maintain existing physical, visual and recreational access to the waterfront” (Reply brief, at 24). DEC Staff stated that the answer depends on what one means by “impede visual access,” and suggested that a vegetated berm might not be considered as impeding visual access in a manner incompatible with coastal zone management (IC Tr. 221 - 222).

This question could involve more interpretation and project-specific considerations than the ones discussed above. A person at ground level at locations around most of the site, however, probably had visual access to the open space of the site prior to construction of the berms but could not see this same area after construction of the berms. Thus, the project would impede visual access to coastal lands, open space, and possibly waters. DEC Staff’s interpretation appears to evaluate visual impact rather than visual access.

The last of the disputed questions to be addressed specifically in this ruling is question 18, which asks, “Is the action located in one of the designated Special Natural Waterfront Areas (SNWA): Long Island Sound-East River, Jamaica Bay, or Northwest Staten Island?” The Applicant answered “No.” Question 19 asks, “Is the project site in or adjacent to a Significant Coastal Fish and Wildlife Habitat?” The Applicant answered “Yes” to question 19.

The Engineering Report states, at 2-32, “The proposed Spring Creek Yard Waste Composting Facility site is located within the designated coastal zone boundary and *within, or adjacent to*, a designated significant coastal fish and wildlife habitat, and *within, or adjacent, to* a designated special natural waterfront area as specified by the New York Department of State Coastal Zone Management Program and the New York City Department of City Planning Waterfront Revitalization Program. In addition, the site is located within the Jamaica Bay Critical Environmental Area as designated by NYSDEC” (emphasis added).

The application does not include any map, of the site and surrounding area, depicting the boundary of either the Jamaica Bay Special Natural Waterfront Area (SNWA) or any Significant Coastal Fish and Wildlife Habitat. The September 2002 Waterfront Revitalization Plan includes a map showing the Jamaica Bay SNWA (Exhibit D of Baykeeper petition, see also internet version of Waterfront Revitalization Program, supra). On this map, the boundary of the SNWA is not depicted clearly enough to determine whether the site or portions of it are within the boundary, but it appears that part of the site may be within the boundary (see, Jamaica Bay SNWA map and Fig. 2-2 of Engineering Report). The Applicant will need to provide a map showing the site boundary, the boundary of the Jamaica Bay SNWA, and the boundary of the designated significant coastal fish and wildlife habitat such that these can be compared.

Baykeeper’s May 11 and July 6, 2004 submissions also cited several other questions Baykeeper asserts were answered incorrectly. The offer of proof with regard to these questions, however, does not require further consideration in this hearing, other than to the extent Baykeeper’s assertions about question 6 actually relate to odor impacts. The other questions are question 6 (change in scale or character or a neighborhood), question 22 (rare ecological communities or vulnerable species) and question 25 (discharges to water bodies). The citation to question 8 is probably a typographical error. Baykeeper did not propose to show any effects on rare ecological communities or vulnerable species, and did not take into account the stormwater

management basins and the provisions for drainage from these (Engineering Report, at 4-18 to 4-23).

The errors and disputes concerning the coastal assessment form relate to several policies in the New York City Waterfront Revitalization Program, including, but not limited to Policies 4 and 4.1 (“Protect and restore the quality and function of ecological systems within the New York City coastal area”), 7 and 7.3.B (“Minimize environmental degradation from solid waste and hazardous substances”), 8 and 8.1, 8.3, 8.4, and 8.5 (“Provide public access to and along New York City’s coastal waters.”)

At the issues conference, DEC Staff stated that if it discovered a coastal assessment form contained errors, it would notify the lead agency (in this case, the Applicant) about the error. DEC Staff, however, described the possibility of errors in the Applicant’s coastal assessment form as speculative and hypothetical (IC Tr. 195 - 196). In its reply brief, DEC Staff reiterated its determination of consistency with the City’s Waterfront Revitalization Program.

Section 600.4 of 19 NYCRR (regulations of the New York State Department of State) identifies the review procedures to be followed by state agencies with regard to actions within the coastal zone. Section 600.4(c), cited by DEC Staff in General Condition 15, pertains to actions that have received a negative declaration under SEQRA, are in the coastal area within the boundaries of an approved local Waterfront Revitalization Program, and are actions identified by the Secretary of State pursuant to Executive Law section 916(1)(a). This Executive Law section provides that the Secretary of State shall, after approval of a local waterfront revitalization program, identify actions under state agency programs which are likely to affect achievement of the policies and procedures of the program, and shall notify the affected state agency. According to the Department of State internet site, a list of state agency actions subject to consistency with an LWRP is included in Section VI of approved LWRPs.²⁶ New York City’s September 2002 “New Waterfront Revitalization Program” does not include such a Section VI.²⁷ One can conclude, however, that issuance of the requested DEC permit is an action identified by the Secretary of State under Executive Law 916(1)(a) with regard to New York City’s LWRP based upon there being a standard condition about waterfront consistency in the general permit and based upon DEC Staff having made a consistency determination for this project.

Under 19 NYCRR 600.4(c), state agencies must file with the Secretary of State a certification that the action will not substantially hinder the achievement of any of the policies and purposes of the applicable approved LWRP and whenever practicable will advance one or more such policies, or if not, instead certify that requirements regarding alternatives, minimization of adverse effects and overriding benefits have been met as stated in more detail in that section. This certification is a substantive determination, not just a matter of providing

²⁶ www.nyswaterfronts.com/consistency_state.asp (last viewed on August 30, 2004).

²⁷ The Applicant will need to provide for the record of this hearing a copy of Section VI of its WRP, if it exists.

information to the lead agency. It relates to both the certification DEC needs to provide to the Secretary of State and to a condition of the draft permit. The Applicant's coastal consistency form contains errors related to policies in the Waterfront Revitalization Program, as well as answers that are substantively disputed in the existing record of this hearing. The outcome of correcting the errors, resolving the disputes, and clarifying the boundaries identified above, when compared with the policies and purposes of the LWRP, has the potential to result in the Commissioner not being able to certify consistency of the project with the Waterfront Revitalization Program or only doing so following major modifications to the project or imposition of significant permit conditions. To the extent the Applicant wishes to change its answers, please advise the persons on the interim service list about this by September 10, 2004.

Ruling: A substantive and significant issue exists for adjudication regarding the project's consistency with the New York City Waterfront Revitalization Program. This issue concerns questions 18, 38, 42, 46 and 48 of the consistency assessment form.

Environmental Justice

On March 19, 2003, Commissioner Erin M. Crotty issued a policy on Environmental Justice and Permitting (CP-29). The policy provides guidance for incorporating environmental justice concerns into the Department's permit review process and its application of SEQRA. The policy defines "environmental justice" as "the fair treatment and meaningful involvement of all people regardless of race, color, or income with respect to the development, implementation, and enforcement of environmental laws, regulations and policies. Fair treatment means that no group of people, including a racial, ethnic, or socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies" (CP-29, at 3).

CHA asserts that the area of Brooklyn near the site is an environmental justice community and argues, in many places throughout its petition, other correspondence, and statements at the issues conference, that both the project and the review process violate principles of environmental justice (see, for example, petition at 2, 6 - 8). CHA's arguments include that there was insufficient notice of the application and the hearing and insufficient time to respond, that the composting facility was moved from what CHA described as a relatively affluent community (Canarsie) to the current site, that the Old Mill Creek community where the current site is located is already burdened with many environmentally damaging land uses, that the community's loss of park land to this project is part of an historic pattern of destroying parks in this community, and that the Department is not willing or able to enforce the ECL against violations by waste management facilities in this community.

The permit applications subject to the provisions of the environmental justice policy are those received after the March 19, 2003 effective date of the policy (CP-29, at 2). The present application was received by DEC Region 2 in October 2001 and was determined to be complete in December 2002. Technically, the present application is not subject to the policy. The

Commissioner, however, by adopting the policy, stated an intent on the part of the Department to take environmental justice into account in reviewing permit applications and thus the intent of the policy is not irrelevant.

The hearing notice distribution, and the time between the notice and the hearing on this application, are beyond the minimum requirements in 6 NYCRR part 624. Subdivisions 624.3(a) and (d) authorize notice beyond the minimum requirements, and additional notice was provided in this case. As discussed at the issues conference, section 624.4(b)(1) allows for additional time to be provided in the issues conference process in order to protect the rights of prospective parties, and the schedule was adjusted in this manner (IC Tr. 261 - 268; see also memorandum dated April 14, 2004).

Even if the Department had received the application after the effective date of the environmental justice policy, it is not clear whether the Department could require an applicant to carry out an enhanced public participation plan to the full extent required by the policy (see, CP-29, at 8) if an applicant resisted doing so. The policy is a guidance document, not a regulation. As it is, the Applicant in the present case opposed allowing additional time for supplements to the petitions and opposed publishing the supplemental notice, although it did publish it (IC Tr. 254 - 258; letter dated April 15, 2004).

With regard to CHA's environmental justice arguments about the project itself and its impact on the community, some aspects of this are included within the issues identified for adjudication. The Commissioner also has the general authority, under ECL 3-0301(1)(b), to "[p]romote and coordinate the management of water, land, fish, wildlife and air resources to assure their protection, enhancement, provision, allocation, and balanced utilization consistent with the environmental policy of the state and take into account the cumulative impact upon all of such resources in making any determination in connection with any license, order, permit, certification or other similar action...."

Beyond these considerations, however, the environmental justice policy utilizes the State Environmental Quality Review Act process in evaluating additional environmental burdens on environmental justice areas (CP-29, at 9). In the present case, this avenue of review ended when the Applicant, acting as lead agency after coordinated review, issued a negative declaration under SEQRA.²⁸ The Applicant's determination is binding on all other involved agencies, including DEC (see, 6 NYCRR 617.6(b)(3)(iii)) and issues related to SEQRA cannot be adjudicated in the hearing (see, 6 NYCRR 624.4(c)(6)(ii)(a)). Circumstances under which a different agency could become lead agency do not exist in the present case (see, 6 NYCRR 617.6(b)(6)).

²⁸ DEC Region 2 notified the Applicant on July 31, 2002 of DEC's request for lead agency status, but on December 5, 2002 DEC Region 2 acknowledged the Applicant's designation as lead agency.

Ruling: No separate issue concerning environmental justice is identified for adjudication in this hearing.

Traffic

In its May 20, 2004 supplemental petition (at 3), Baykeeper proposed testimony, by Christopher Boyd of the New York City Comptroller's Office, that the Applicant's estimates of traffic and analysis of traffic impacts are not accurate. DEC Staff replied that Baykeeper failed to provide any indication of Mr. Boyd's expertise with regard to traffic and failed to show the issue is substantive and significant. Baykeeper's July 6, 2004 brief responded with regard to Mr. Boyd's qualifications. Baykeeper also stated Mr. Boyd's traffic analysis would show that the Applicant's estimates are based on questionable assumptions rather than on operating data available from the Canarsie Park composting facility, resulting in an underestimate of the traffic associated with the Spring Creek project. Baykeeper argued that this underestimate is significant because paragraph 360-1.11(a)(1) requires a permitted facility to minimize nuisance conditions that arise from its operation.

CHA also proposed that traffic be an issue, particularly regarding the route that trucks would probably take to get to the facility. CHA asserted that the Linden Avenue/Fountain Avenue intersection is not adequate to handle existing traffic, apart from traffic to the composting facility, that the application did not include a traffic survey analysis, and that trucks near the site routinely use residential streets such as Crescent Street although these are posted as non-truck routes. CHA also stated that DEC records document more truck traffic than that claimed by the Applicant (July 6, 2004 brief, attachment at 173 - 175).

Although Baykeeper made an offer of proof that the Applicant's traffic estimates not accurate, Baykeeper did not propose to show what level of traffic could be expected nor how this would cause nuisance conditions. The adequacy of roads and intersections near the site, and violations of city traffic restrictions, are not within the jurisdiction of DEC.

Ruling: The proposed traffic issues are not issues for adjudication in this hearing.

Hazardous waste

CHA alleged that the park land on which the site is located is a state Superfund site, due to waste from the former South Shore Incinerator, and that the Applicant is required to remediate it. At the issues conference, I asked what testimony or documents CHA intended to present on this question. CHA stated it would provide a copy of the listing of the site as a Superfund site and that it needed to be remediated in a manner similar to the Fountain Avenue and Pennsylvania Avenue landfills. The Applicant stated the site is neither a federal Superfund site nor a state Superfund site, and DEC Staff stated it was not aware of any listing of the project site as a state Superfund site (IC Tr. 224 - 229). I asked for clarification of this from the parties as well as clarification concerning various landfills mentioned in the background materials accompanying

the application (section 5 of these materials), and made a more detailed request for information on this in my memo of April 14, 2004.

CHA, DEC Staff and the Applicant submitted correspondence and maps concerning this question. I also reviewed the DEC Registry of Inactive Hazardous Waste Disposal Sites in New York State, Volume 2, April 2002 and April 2003 editions (which list such sites in New York City) and the U.S. Environmental Protection Agency (EPA) on-line Superfund Information System (www.epa.gov/superfund/sites/siteinfo.htm).

The only sites identified that were on federal or state lists of inactive hazardous waste sites are the Spring Creek (Emerald Street) site and the South Shore Incinerator Site. Neither of these are on current lists. The Fountain Avenue and Pennsylvania Avenue sites (listed in the Registry) are on the opposite side of the Shore Parkway from the composting facility.

The Spring Creek (Emerald Street) site is located over half a mile from the compost facility site. DEC Staff states this site was included in the Registry in January 1989 and was removed from the Registry in June 1991 after remedial activities (removal of drums and contaminated soils) were completed (see, CHA letter dated July 16, 2004 and DEC Staff letter dated July 22, 2004).

The South Shore Incinerator site (EPA ID No. NY0001049303) is listed in the EPA Superfund Information System as an archived site. According to the description contained in EPA's Superfund Information System, the "archive" designation "means that assessment at a site has been completed and EPA has determined no steps will be taken to designate the site as a priority by listing it on the National Priorities List (NPL). No further remedial action is planned for these sites under the Superfund Program." With regard to this site, the Superfund Information System gives dates in the late 1990's for "discovery," "preliminary assessment," and "archive site."

Of the landfills, studies and remedial projects described in the correspondence, only one of these was shown to be within the site of the composting facility. The area on which ash from the South Shore Incinerator was reportedly landfilled includes the eastern end of the composting facility (Sheridan Avenue and east, see map in sections 5.F and 5.K of the background materials and the Applicant's April 26, 2004 letter). DEC Staff's letter of April 27, 2004 acknowledges that the ashfill appears to have included the area below pad #3 (the eastern portion) of the composting facility, but states that discussions between DEC and Parks that took place in late 2002 about remedial work in Spring Creek Park did not concern remedial work at the compost facility site and remediation at this site is not included in a recent proposal for remedial work submitted to DEC by the U.S. Army Corps of Engineers. DEC Staff states that conditions in the draft permit would prevent leaching of or contact with contaminants that may be present in the ground, and that special condition 23 of the draft permit prohibits the facility from interfering with any investigation or remediation of subsurface contamination.

The offer of proof, concerning the project site's status on hazardous waste site lists and requirements that the Applicant remediate the project site, is not supported by the documents

submitted by the parties and information available on state and federal databases. The proposed issue does not have the potential to result in permit denial or in imposition of conditions beyond those in the draft permit.

Ruling: No issue has been raised for adjudication concerning a Superfund site, or requirements for remediation of hazardous waste, on the project site.

Noise

CHA alleges that the application fails to consider noise impacts and that the Applicant did not respond regarding specific deficiencies cited in a notice of incomplete application (CHA 5/19/04 petition supplement at 15, 20). The intervenors did not offer any proof concerning noise impacts during the past operation of the facility nor any expert testimony about noise.

This offer of proof normally would not raise any issue concerning noise. In the present case, however, comparison of the June 19, 2002 notice of incomplete application, the application that was later determined to be complete, and the provision part 360 regarding noise (360-1.14(p)) indicates that additional information from the Applicant will be necessary in order to determine whether the project will comply with this provision (see, 6 NYCRR 621.15(b)). Depending on the information provided, adjudication may be necessary but it is premature to decide whether that is so.

The June 19, 2002 notice of incomplete application instructed the Applicant to describe in detail the noise monitoring program, referencing section 6.8.1 of the application. (The original version of this section, if different from the present one, is not in the record.) The notice directed the Applicant to include the make and model number of the noise monitoring equipment, number and location of measurements and the proximity of measurement points to heavy equipment. Not having the original application for comparison, one cannot tell if it contained a proposal for a future noise monitoring program or a report of a monitoring program the Applicant had already carried out.

In either event, the requested information is not in section 6.8.1 of the December 2002 engineering report. That section also does not contain any quantitative assessment of noise levels associated with the facility, either from measurements or from evaluation of reported noise levels from the equipment that would be used. Instead, it presents cursory assurances that a minimal amount of noise would be generated, a statement that it is not anticipated the facility would cause significant off-site noise generation which exceeds regulatory limits, and three sentences about noise monitoring that would occur at the start up of the next operational season. Section 6.8.1, as currently written, also does not account for all of the equipment that would generate noise. It mentions the trommel (used for opening leaf bags) but makes no mention of the tub grinder used for chipping wood.

The noise standard in 360-1.14(p) is a quantitative standard that specifies maximum sound levels beyond solid waste facility property lines at locations zoned or otherwise authorized

for residential purposes. It specifies such sound levels for rural, suburban and urban areas, with lower levels from 10 PM to 7 AM than during the rest of the day. The Spring Creek compost facility would be authorized to operate 24 hours per day during its peak season between October 1 and December 31 (Engineering Report section 4.1.3 and page 1 of draft permit). The part 360 noise standard for urban areas during 10 PM to 7 AM is an Leq energy equivalent sound level of 57 decibels (A). The engineering report and its appendices do not contain any estimate of the sound levels that would occur at the property line as a result of the equipment that would operate at the facility.

Such an analysis may have been done at some point by the Applicant, however. The attachment to the Environmental Assessment Statement (EAS) (in section 2.D of the background materials, at 8 - 9) states a noise analysis was performed for the project using measurements (without mitigation) from active composting site equipment and information from an equipment manufacturer. Certain results of this study are stated in the EAS, but the study itself is not presented in this document nor in the application. (It is possible that the noise monitoring program about which the notice of incomplete application requested more information was this study.) The results summarized in the EAS suggest the noise levels may violate the relevant nighttime noise limit in part 360. The EAS states, "No equipment exceeded 66.4 decibels beyond a distance of 168 feet. The equipment producing the highest reading was the tub grinder, which would be located on the eastern portion of the site, adjacent to vacant land on the east and south, with the U.S. Postal Service facility on several acres to the north and a municipal bus facility on several acres to the northwest. The nearest residence to this site is over 1000 feet away." The site layout map in the engineering report (Fig. 4-2) has no scale but shows the tub grinder quite close to the property line. This same figure shows the trommel debagger, for which the EAS reports no noise level, located very close to the western property line across Fountain Avenue from the Brooklyn Developmental Center.

The Applicant will need to provide for the record, with copies to all persons on the interim service list, a copy of noise analysis discussed in the EAS, the supplemental information requested by DEC Staff in the notice of incomplete application, and a copy of section 6.8.1 of the engineering report as it read at the time of the June 19, 2002 notice of incomplete application. These documents are to be transmitted on or before September 10, 2004. After receiving these documents I will decide what additional procedures may be necessary.

Ruling: It is premature to decide whether an issue exists for adjudication concerning noise. Additional information, as described above, is necessary in order to determine whether the project would comply with part 360 and whether an issue concerning noise needs to be adjudicated in the course of determining this.

Procedural issues and issues related to history of the site

CHA presented numerous arguments about the procedures followed in the application review and the hearing thus far, and about land use decisions in the area of this project. These arguments do not raise issues for adjudication in the hearing on the present permit application.

To the extent that some of these arguments might support SEQRA issues, they are precluded from the hearing due to there being a negative declaration, as discussed above under “SEQRA procedures.”

Appeals

Pursuant to 6 NYCRR 624.6(e) and 624.8(d), these rulings on party status and issues may be appealed in writing to the Commissioner on an expedited basis. While 6 NYCRR 624.6(e)(1) provides that such appeals are to be filed with the Commissioner in writing within five days of the disputed ruling, this time frame may be modified by the ALJ, in accordance with 6 NYCRR 624.6(g), to avoid prejudice to any party.

Any appeals must be received at the office of the Commissioner no later than 4:00 P.M. on September 20, 2004, at the following address: Commissioner Erin M. Crotty, NYS Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1010. Any replies must be received no later than 4:00 P.M. on October 4, 2004 at the same address.

Copies of any appeals and replies must be transmitted to all persons on the interim service list at the same time and in the same manner as they are sent to the Commissioner, with two copies being sent to my address. Service by fax is not authorized.

Interim and revised service lists

A copy of the current interim service list is attached. This list includes the persons, agencies and organizations that are parties pursuant to this ruling or that submitted and have not withdrawn petitions for party status. After the Commissioner’s interim decision on any appeals of this ruling, or after the deadline for appeals if none are filed, a service list with only the addresses for the parties will be distributed.

Albany, New York
August 30, 2004

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

TO: Persons on 8/17/04 Interim Service List