

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

February 19, 2008

DEC Application No. 2-6105-00666/00001

The present ruling concerns the coastal consistency review process conducted by the staff of the New York State Department of Environmental Conservation (DEC Staff) with regard to the above application. The ruling remands the revised coastal consistency documents and a special condition of the draft permit to DEC Staff for additional analysis and revision.

Background

The application that is the subject of the present hearing and of the coastal consistency review was submitted by the New York City Department of Sanitation (Applicant). The application is for a permit pursuant to 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 on a 19.6 acre site within Spring Creek Park. The facility, which has already been constructed prior to issuance of a permit, is located within the designated coastal zone and is within the area included in the New York City Local Waterfront Revitalization Plan (LWRP). The coastal consistency review process of 19 NYCRR part 600, regulations of the New York State Department of State, is applicable to this project.

In one of two rulings I issued on February 6, 2007, I remanded the state coastal assessment form (CAF) and the consistency determination to DEC Staff for review and revision, as described in that ruling. The history of this review, up to February 6, 2007, is described in more detail in the ruling (2/6/07 ruling, pages 1-3). Briefly, the June 14, 2006 interim decision of the Executive Deputy Commissioner described the process by which the Department of Environmental Conservation (DEC or Department) reviews projects for consistency with

approved local waterfront revitalization plans.¹ The interim decision directed DEC Staff to complete a State CAF and a revised certification, and provided that these documents would be resubmitted to the parties and to me for review. The scope of my review would be limited to whether DEC Staff's State consistency determination was irrational or otherwise affected by an error of law.

As discussed in the February 6, 2007 ruling, on September 20, 2006 DEC Staff submitted a CAF and a certification that the proposed project will not substantially hinder achievement of the policies and purposes of the LWRP and will advance certain policies of the LWRP.² Following additional correspondence, described in the February 6, 2007 ruling, I remanded the CAF and consistency certification for further review and revision.

Among the reasons for the remand were that the September 2006 certification stated the impacts of the project would be offset by a 20 acre habitat remediation project, but the location(s) of such work were unknown, and the soil and habitat work had not been specifically described or incorporated as a permit condition. It was unclear whether sites were available, whether the work was feasible, and whether the remedial sites would be within the coastal zone.

In a memorandum to the parties on April 13, 2007, I asked DEC Staff to provide an update concerning its further review and to identify when the reviewed documents were expected to be available. DEC Staff responded on April 20, 2007, stating among other things that it expected to receive a report from the staff of the New York City Department of Parks and Recreation (Parks) within two weeks and would submit a new coastal consistency determination on or before May 11, 2007. DEC Staff's April 20, 2007 letter also identified two remediation sites, which it described as "owned by the New York City Department of Parks and Recreation." One site is 15 acres within Spring Creek Park adjoining and east of the Spring Creek compost facility, and the other site is 5 acres within an approximately 10 acre area in Canarsie Park. The 15 acre area and the 10 acre area were

¹ Matter of New York City Department of Sanitation (Spring Creek Yard Waste Composting Facility), Interim Decision of the Deputy Commissioner [June 14, 2006], at 19 - 26.

² The plan involved in this review is New York City's September 2002 "New Waterfront Revitalization Program" (NWRP).

depicted on figures attached with DEC Staff's letter, in the form of a boundary superimposed on an aerial photograph.

Also on April 20, 2007, Ronald J. Dillon and Concerned Homeowners Association (collectively, CHA), an intervenor party in the hearing, submitted a letter criticizing DEC Staff's April 20 submission, asking that I direct DEC Staff to include certain information in its revised coastal consistency determination, and expressing an intent to comment once the revised determination was submitted in its entirety. DEC Staff responded to this letter on April 24, 2007, stating that if any response is required regarding the two remediation sites, DEC Staff will respond appropriately at the time it submits a revised coastal assessment and consistency determination.

I did not direct DEC Staff to provide any additional specific information in response to CHA's letter. The information requested included documentation about parkland restoration and enhancement undertaken as a result of permit conditions in the permit of the Applicant's Canarsie Park compost facility, other parkland renovations approved and budgeted for Canarsie Park prior to April 19, 2007, a map showing wetlands, roads and paths at the Spring Creek site, and site enhancements or remedial work considered by government agencies for Spring Creek Park prior to April 19, 2007. CHA also asked that DEC Staff's submission include information on any parkland enhancement undertaken pursuant to conditions of the permit for the Applicant's Soundview Park compost facility.

Testimony in the hearing on the permit application began on May 15, 2007, and continued on eleven additional dates in May, June, July, September and October 2007. As discussed in my November 20, 2007 ruling, no further testimony is scheduled at this time, and it is possible that the testimony has concluded.³

On May 11, 2007, DEC Staff submitted an update of its September 18, 2006 State CAF and certification. The May 11 submission consisted of a letter to me from John Nehila, Assistant Regional Attorney, a supplemental statement and update of the September 18, 2006 consistency determination, a response concerning several items in the September 18, 2007 State CAF that

³ November 20, 2007 ruling, at 10. The ruling concerned an additional proposed issue (or alternatively, additional testimony on issues already identified). CHA has appealed the November 20, 2007 ruling and the appeal is pending at present.

were discussed in my February 7, 2007 ruling, a one-page preliminary proposal for the habitat improvement project at the Spring Creek and Canarsie remediation sites, color prints of the aerial photos showing the mitigation⁴ sites, and a two page document entitled "Soil and Habitat Improvement Project for the Spring Creek Yard Waste Composting Facility, Overview." The "Overview" document is mainly a summary of past landfilling in New York City parks, a general discussion of habitat conditions and restoration efforts at these areas, and the names of some sites at which Parks has used methods similar to those in the preliminary proposal. Although DEC Staff took the remediation project into account in arriving at its revised determinations, as of May 2007 the proposal had not yet been put in the form of a draft permit condition.

At the hearing on May 30, 2007, prior to going on the record, I inquired further about the draft permit and the proposed remediation. This discussion was described in my letter of June 12, 2007 to Mr. Nehila and to Michael Burger, Esq., who at that time was one of the attorneys representing the Applicant. The letter stated, in part:

"[On May 30, 2007,] I asked whether DEC Staff anticipated receiving any additional description of the proposal, as part of its coastal review, and DEC Staff said they did not. I also asked whether the Department of Sanitation ('Applicant') agreed to carry out the work described in the preliminary proposal, which the Applicant apparently interpreted as a question whether the remedial project would be done regardless of whether or not a Part 360 permit is issued for the compost facility. The Applicant also referred me to the existing draft permit as being responsive to the question. The draft permit, however, does not specify the locations that are identified in DEC Staff's May 11, 2007 correspondence, nor the work identified in the preliminary proposal. I clarified that I was asking whether the Applicant agreed with carrying out the work generally identified in the preliminary proposal, at the locations shown on the air photos, as a requirement if the permit is issued. Counsel for the Applicant stated they would need to check about this.

⁴ In the documents submitted concerning the coastal review, the terms "remediation," "mitigation" and "soil and habitat improvement" appear to be used interchangeably to designate the same work.

"Special condition 35 of the draft permit, as currently [i.e., June 12, 2007] written, does not specify the two proposed locations or the work described in the preliminary proposal. Under special condition 35, the remediation project could be conducted in an area of the city distant from Spring Creek and well outside the coastal zone, notwithstanding the existence of the preliminary proposal. Nothing in the draft permit would require the Applicant to carry out that proposal, as opposed to other remediation work elsewhere. The preliminary proposal itself is specific in some aspects, such as the one-foot depth of the compost to be applied, but is very general in other aspects (particularly the planting). It could allow for very limited and sparse revegetation, possibly no more than a few individual plants.

"DEC Staff will need to draft a permit condition that identifies the soil and habitat improvement actions the Applicant would need to carry out as a condition of the permit, if one is issued, and the locations at which this work would take place. The Applicant will then need to state whether it agrees to the permit condition or disputes it. Following that, I will set a deadline for comment from the other parties on the revised CAF and consistency determination, and then determine whether the DEC's review of consistency with the applicable local waterfront revitalization program is complete."

In a memorandum to the parties dated September 25, 2007, I set October 19, 2007 as the deadline for DEC Staff to provide the permit condition and November 2, 2007 as the deadline for the Applicant's response. On October 19, 2007, DEC Staff submitted a revised Special Condition 35 and reaffirmed its May 11, 2007 certification of consistency as amended by inclusion of its October 19 letter and the revised permit condition.

On November 2, 2007, the Applicant sent a response by electronic mail, which did not go through to my computer. The Applicant re-sent its response on November 7, 2007, stating that the Applicant consents to the revised Special Condition 35 submitted by DEC Staff on October 19, 2007.

I then set a deadline for comments by the other parties to the hearing. Timely comments were submitted by both CHA and New York/New Jersey Baykeeper (Baykeeper) on November 30, 2007.

Landmarks

For understanding the assertions made about the coastal consistency determination, a description of certain landmarks is provided in this section of the ruling. Attached as Appendix A with the paper copies of this ruling is a figure from the Applicant's engineering report that shows the compost facility site (although the site actually extends somewhat farther east than shown), names of streets (although some of the streets depicted do not actually exist as streets in certain blocks where they are shown), and tidal wetlands (Exhibit (Ex.) 4, Figure 2-5). Also attached with the paper copies of this ruling, as Appendix B, is a copy of the aerial photograph transmitted with DEC Staff's May 11, 2007 letter, that shows the boundary of the potential mitigation site in Spring Creek Park. Attached as Appendix C of this ruling is a copy of the record map for Spring Creek Park, as revised in October 2002, that was attached with the Applicant's June 2, 2004 letter to me, in response to a request in my April 14, 2004 memorandum to the parties. These appendices will not be included in electronic copies of the present ruling.

The compost facility, enclosed within a fence, is in an approximately L-shaped and approximately 19.6 acre area occupying the northwest corner of Spring Creek Park. The area that comprises "Spring Creek Park" has been described by the Applicant in various ways in this record, but for purposes of this ruling I am considering Spring Creek Park to consist of the areas identified as this park on the October 2002 record map. The park is located on the Brooklyn/Queens border, immediately north of Shore Parkway (also known as the Belt Parkway). Fountain Avenue runs along the west side of the park. The intersection of Fountain Avenue and Flatlands Avenue is at the northwest corner of the park. Flatlands Avenue is on the north side of the park, running east⁵ to the dead end of Flatlands Avenue at Sheridan Avenue. The northern edge of the park continues approximately east for three blocks beyond that dead end, to the south end of Forbell Street, a north-south street. The park then includes two blocks that are north of the line of Flatlands Avenue and bounded on the west by Forbell Avenue, which blocks the record map states were a park addition assigned to Parks by the New York City Department of Citywide Administrative Services on August 21,

⁵ The directions discussed here are approximate, as the street grid in this area does not line up precisely with compass directions.

2001. Also included in the park are two irregularly shaped blocks immediately east of the previous two blocks. These last two irregularly shaped blocks are in Queens County, while the parkland nearer to Flatlands Avenue and to Fountain Avenue is in Brooklyn.

South of the two irregularly shaped blocks, 75th Street in Queens (also shown as Ruby Street on some of the maps in the record) is along the east edge of the park. Aerial photographs in the record show residential development on the five blocks in Queens bounded by Ruby (75th) Street, 156th Avenue, 80th Street and 157th Avenue. A triangular portion of the park extends along both sides of Ralph Creek south of the section of 157th Avenue that is between Ruby and 79th or 80th Street. The southern edge of the park is along Shore Parkway, with the southwest corner of the present park located at Shore Parkway and Fountain Avenue. Although there are references in the record to Spring Creek Park including land south of Shore Parkway,⁶ the record map provided by the Applicant shows the area south of the parkway as having been surrendered to Gateway National Recreation Area on March 1, 1974.

A portion of Old Mill Creek, a tidal creek connected to Jamaica Bay, is within the southwest portion of Spring Creek Park. The 26th Ward auxiliary water pollution control plant is located on Old Mill Creek, approximately within the corner of the "L" formed by the composting facility. Ralph Creek and Spring Creek are tidal creeks that appear as branches off the east side of Old Mill Creek, with Ralph Creek as the southern of the two branches. The Brooklyn/Queens borough boundary runs from approximately the southwest corner of the park (at Fountain and Shore Parkway), north along Old Mill Creek to the 26th Ward auxiliary water pollution control plant, east across the plant, across Spring Creek to the corner of Ruby Street and 157th Avenue, and north along Ruby Street and then an additional block north to where 155th Avenue or Cozine Avenue would be located. Much of the southern portion of the park is tidal wetlands.

A residential area exists north of the northwest corner of the park. Two witnesses in the hearing, Sebastian DeJesus and Cuyler Young, live in this area, near the corner of Crescent Avenue and Flatlands Avenue. New residential development exists on the blocks between Grant and Forbell Streets immediately north

⁶ See, for example, page 3 of the Environmental Assessment Statement attachment contained in section 2.D of Ex. 3)

of the park. Other land uses north of the park are a bus depot and a large Postal Service facility. The Brooklyn Developmental Center is across Fountain Avenue, west of the park and the compost facility.

The potential mitigation site within Spring Creek Park is shown as an irregular-shaped area immediately east of the auxiliary water pollution control plant and immediately south of the eastern portion of the compost facility, extending northeast along the northwest side of Spring Creek although not immediately at the creek's edge, and including the four blocks of the park that are north of a line that would represent an eastward extension of the line of Flatlands Avenue. (The maps depict this line as Fairfield Avenue or 156th Avenue, where it is shown in Queens).

Contrary to assertions by CHA, this mitigation area appears to be primarily outside of tidal wetlands, although some of this area might have been tidal wetlands decades ago and prior to preparation of the DEC tidal wetlands maps. A portion of this mitigation area might be within the adjacent area of tidal wetlands (see, 6 NYCRR 661.4(b)) but it appears to be predominantly in uplands (see, Ex. 4, Fig. 2-5, attached with this ruling, and Ex. 3 section 4.A, a portion of the DEC tidal wetlands map).

Summary of comments

Baykeeper's comments

Baykeeper's November 30, 2007 letter cited the requirements of 19 NYCRR 600.4(c) as requiring DEC Staff to either file a certification that the action will not substantially hinder the achievement of any of the policies and purposes of the applicable LWRP and whenever practicable will advance one or more of such policies, or to certify that three requirements (concerning alternatives, minimization of adverse effects, and overriding benefits) have been satisfied.

Baykeeper stated the "action" under consideration is the issuance of a permit and development of the composting facility, and that DEC Staff should have focused on this action alone in determining whether it substantially hinders achievement of NWRP policies. Baykeeper described the habitat improvement work as an

indirect benefit⁷ and as mitigation distinct from the action itself. Baykeeper stated that although DEC Staff could propose mitigation, it could do so only after finding the action hinders policies of the NWRP and as part of an analysis that includes alternatives, minimization of adverse effects on the NWRP, and benefits of the action. Baykeeper stated that allowing DEC Staff to propose mitigation without certifying that the action "will substantially hinder" the policies of the NWRP allows DEC Staff to avoid examining alternatives and the other cited requirements.

Baykeeper argued that, even if DEC could properly consider the remediation project when determining whether the action will substantially hinder policies of New York City's September 2002 NWRP, the action does substantially hinder such policies. Baykeeper discussed several policies, which it described as examples, that it argued would be hindered by the Spring Creek composting facility. The policies Baykeeper discussed were 4.1(E), concerning development affecting Significant Coastal Fish and Wildlife Habitats; 8.2(A), concerning high quality public spaces and public access; 8.5, concerning public trust lands; and 9.1, concerning scenic elements, open space and views to the coast. Baykeeper stated that testimony about recreational use of the area that is presently the compost facility, information on Parks' interpretive sign at the facility, and features of the compost facility demonstrate that the facility hinders policies of the NWRP.

In an earlier submission, prior to my February 7, 2007 ruling, Baykeeper submitted a copy of an article from the October 31, 2006 Daily News that discussed criticisms of the Applicant's Soundview Park composting facility, including statements that the Applicant had failed to comply with a permit condition concerning a 12 acre mitigation area in that park. A witness for the Applicant was questioned concerning the Soundview composting facility at the hearing on May 15, 2007 (5/15/07 Transcript (Tr.) at 80 - 88) and the Soundview facility's permit is an exhibit in evidence (Exhibit (Ex.) 8).

⁷ Although Baykeeper characterized the habitat improvement project as a benefit "proposed by the applicant," the proposal actually appears to have been produced by Parks, at the request of DEC Staff following my February 6, 2007 ruling. On November 2, 2007, the Applicant consented to the mitigation.

CHA's comments

CHA's November 30, 2007 letter argued that the Applicant had submitted false and incomplete information with regard to the project's relation to coastal resources, calling into question whether the Applicant would comply with a permit condition to remediate a location "it deems of no value." CHA stated the "City of New York has never engaged in any site remediations in connection with its solid waste processing program. Thus there is no rational basis to assume or to conclude that it would engage in such remediation in connection with" the present project (CHA 11/30/07 letter, at 5 and 7).

CHA argued that testimony of its proposed witness Christopher Boyd would have been relevant to whether "removed materials" (presumably finished compost and mulch) would actually be used for parkland remediation, and alleged again that the Applicant had tampered with this witness and caused him to refuse to testify.

With regard to the remediation areas, CHA argued that the one at Spring Creek Park is at least partially in a different county (Queens) than the compost facility and is in a different community. CHA also stated that the Canarsie Park remediation area is approximately three miles west of the compost facility. CHA argued that habitat restoration work in the remediation sites was already planned as part of separate habitat improvement or mitigation work for other projects, and that DEC Staff had not provided the information earlier requested by CHA about these other projects. In its April 20, 2007 letter, CHA argued such work could not also be counted as remediation for the Spring Creek compost facility. In its November 30, 2007 letter, CHA noted that the map of the potential mitigation area in Canarsie Park did not show which portion of this ten acre area was mitigation for the Spring Creek compost facility as opposed to mitigation for the Applicant's former Canarsie Park compost facility.

CHA stated that part of the remediation site at Spring Creek Park appears to be area used by the Applicant for its ongoing operations and there has been no indication that the Applicant "intends to cede its control of the area for any remediation effort." CHA argued that the October 28, 1997 memorandum of understanding (MOU) between the Applicant and Parks requires these two agencies to prepare an appendix to the MOU for specific composting sites, providing information on subjects including

specific end uses of the compost, but no such appendix had been prepared.

CHA stated, "From a 'Forever Wild' park site, as designated by the New York City Department of Parks and Recreation, the location has been converted into an inaccessible asphalt wasteland" (11/30/07 letter, at 9). CHA argued that the most direct route for nearby residents to access the shoreline was through the parkland that is now the compost facility, and that Brooklyn residents will not have easy and direct access to the proposed remediation site within Spring Creek Park. CHA stated that DEC Staff's assertions about the compost facility site's limited wildlife, open space, recreational, visual and aesthetic value are not supported by the testimony nor by studies of the Jamaica Bay ecosystem, and are contradicted by Parks' own signage at the site.

Regulatory provisions concerning coastal review

As stated in the interim decision, the standard by which the ALJ is to review DEC Staff's coastal consistency determination is whether the determination is rational and not affected by an error of law (Interim Decision, at 24). The interim decision also outlined statutory and regulatory provisions governing the consistency review.

In the present case, the Applicant was lead agency for the State Environmental Quality Review Act process (SEQRA, Environmental Conservation Law article 8 and 6 NYCRR part 617). DEC Staff acknowledged the Applicant's designation as lead agency (Ex. 3, section 2.C). The Applicant issued a negative declaration, stating that the action would not have a significant effect on the environment (Ex. 3, section 2.D). Consequently, no environmental impact statement was prepared.

With respect to the coastal consistency review, 19 NYCRR 600.4(c) provides that for an action that has received a negative declaration, is within the boundaries of an approved LWRP, and is an action identified pursuant to Executive Law section 916(1)(a) one requiring consistency review,⁸ a State agency such as DEC must file a certification with the Secretary of State that "the

⁸ Issuance by DEC of a solid waste management facility (part 360) permit is an action requiring consistency review under the approved NWRP (Interim Decision, at 19 - 22).

action will not substantially hinder the achievement of any of the policies and purposes of the applicable approved local Waterfront Revitalization Program and whenever practicable will advance one or more of such policies."

Section 600.4(c) of 19 NYCRR goes on to state, "If the action will substantially hinder the achievement of any policy or purpose of the applicable approved [LWRP], the State agency shall instead certify that the following three requirements are satisfied: (1) no reasonable alternatives exist which would permit the action to be taken in a manner which would not substantially hinder the achievement of such policy or purpose; (2) the action taken will minimize all adverse effects on the local policy and purpose to the maximum extent practicable; and (3) the action will result in an overriding regional or statewide public benefit."

This analysis pursuant to 19 NYCRR 600.4(c) is required as part of DEC's review of the part 360 permit application for the Spring Creek compost facility, and is conducted as an administrative process not requiring adjudication (Interim Decision, at 19 - 23).

Section 600.4(c) requires the Department to initially consider whether the action will hinder achievement of any policies or purposes of the LWRP and, if so, to then consider whether the three requirements identified in that section are met.

Baykeeper argued that DEC Staff has not followed this procedure. As discussed below, the application materials and other documents in the record support Baykeeper's interpretation of how the action in the present case should be identified and how the analysis under 19 NYCRR 600.4(c) should be conducted.

The "action" under review

The action under review is a solid waste management project, and the soil and habitat remediation work described in DEC Staff's May 11, 2007 letter is mitigation added later, through a permit condition and a lengthy process during the hearing and the coastal review.

The descriptions of the project that appear in the variance applications (Ex. 15), the Applicant's environmental assessment form (Ex. 3, section 2.B), the Applicant's negative declaration

and City Environmental Quality Review (CEQR) environmental assessment statement (Ex. 3, section 2.D) focus primarily on the composting activity. The project descriptions in the variance applications make no mention of remediating parkland, although they contain a reference to compost being "distributed to City agencies." The negative declaration states that the project will provide sufficient compost to Parks to remediate a minimum of 20 acres of parkland including in Spring Creek Park, but does not state where this would occur or to what extent it would occur in Spring Creek Park, and also states that compost will be made available to community gardeners. The Applicant's engineering report (Ex. 4, at 6-3 and 6-4)) states that the Applicant would reserve 10 percent of the compost generated each year for distribution to residents and for public greening projects such as community gardens. For the remaining 90 percent of the compost, the engineering report identifies two alternative uses: 1) the compost would be made available to Parks to use "at its discretion and expense in restoration and/or beautification projects throughout the City"; or 2) "Parks may designate all or part of the remaining compost produced to be utilized in restoration projects at Spring Creek." Under the second alternative use, the Applicant would furnish the labor and materials necessary for such projects. The Applicant's CEQR Environmental Assessment Statement contains similar statements (Ex. 3, section 2.D, at page 1 of the EAS Attachment and pages 2 - 3 of the EAS Appendix 1).

In its February 18, 2004 draft permit (Ex. 30), DEC Staff included a condition requiring the Applicant, within 90 days following commencement of work authorized by the permit, to submit a proposal for soil and habitat improvement of 20 acres of upland parkland as close to the subject facility as practicable (Ex. 30, special condition 35). This condition also required that "[a]t least 15 acres of such improvement shall be contiguous."

At the time of the March 31, 2004 issues conference, the location of the soil and habitat improvement had not been specified. Counsel for the Applicant stated that there was no certain destination for the compost and that the Applicant was negotiating with Parks to use as much as possible as close as practicable to the project site (3/31/04 transcript, at 79 - 80).

The subsequent process of identifying the remediation locations and remedial work described in DEC Staff's letter of May 11, 2007 is discussed in my February 6, 2007 ruling and earlier in the present ruling.

Effects on policies of the local waterfront programPolicies cited by Baykeeper

Baykeeper argued that, even if DEC could properly consider the proposed upland habitat improvement when determining whether the action will substantially hinder the policies and purposes of the NWRP, the action does pose such a hindrance. The first policy cited by Baykeeper is Policy 4.1(E), protecting designated Significant Coastal Fish and Wildlife Habitats from development which would "destroy habitat values associated with the designated habitat through direct physical alteration, disturbance, or pollution, or indirect effects of actions that would result in a loss of habitat," and other impairments as discussed in that policy. Baykeeper quotes Park's interpretive sign, posted on the chain-link fence surrounding the compost facility, as describing Spring Creek Park as containing "the largest amount of undeveloped land and wetlands in the area" and as helping to protect the Jamaica Bay ecosystem.

Significant Coastal Fish and Wildlife Habitats (SCF&WH) are depicted on a map, and a question about the facility's location with respect to a SCF&WH and a Special Natural Waterfront Area was discussed in the issues ruling (Issues ruling, at 35 - 36). Following requests to the Applicant and DEC Staff for a map showing the site boundary and the nearby SCF&WH (Issues ruling, at 36, and my September 27, 2006 memorandum to the parties, at 2), DEC Staff obtained information from the New York State Department of State and asked the Applicant to produce a map with both boundaries. DEC Staff provided this map and a section of the SCF&WH map with Mr. Nehila's letter of October 6, 2006.⁹ The map shows the SCF&W habitat as overlapping an area of tidal marsh from Spring Creek to Shore Parkway and within Spring Creek Park. The compost facility site is near this area but not within it. The extent to which the undeveloped upland area that is now the compost facility served to protect the SCF&WH is a judgement call and is a subject that has not been developed extensively in this hearing record. Parks' signage and Parks' designation of Spring Creek Park as a "forever wild" park suggest, however, that

⁹ The SCF&WH map may be out of date. The habitat boundary includes area that was marked as marsh (on the U.S. Geological Survey map used as the base map) but that is now a developed residential area located between 75th and 80th Streets and between 157th and 156th Avenues in Queens.

removing habitat in the 19.6 acre part of the park's uplands is not consistent with this policy.

Baykeeper argued the project substantially hinders Policy 8.5, but the section Baykeeper quoted is from Policy 8.5(A) which pertains to interests in lands under water. The overall policy stated as Policy 8 is: "Provide public access to and along New York City's coastal waters." The overall policy stated in Policy 8.5, is: "Preserve the public interest in and use of lands and waters held in public trust by the state and city." The compost site, as City parkland, is held in public trust by the City of New York. Baykeeper's comments stated "it is unclear how upland habitat improvement in an area that is already a public park mitigates the loss of 19.6 acres of public parkland" (Baykeeper 11/30/07 comments, at 7).

Baykeeper argued the project hinders Policy 8.2(A) of the NWRP ("Encourage the development and maintenance of high quality public spaces in appropriate locations, particularly those that would facilitate connection of existing waterfront public access spaces and allow continuous access along the shore").

Baykeeper and CHA both argued that testimony given in the hearing demonstrated that, prior to construction of the compost facility, residents in the area near Flatlands and Fountain Avenues used the area that is now the compost facility for recreation, including riding bicycles, playing ball and walking to the water's edge (5/30/07 Tr. 82-83; 10/25/07 Tr. 546). CHA noted that the most direct route from this residential area to the shoreline was through the parkland that is now the compost facility (CHA's 11/30/07 comments, at 10).

DEC Staff's May 11, 2007 updated CAF states that the most direct routes to the shore are south and east of the facility, but that statement reflects the current condition resulting from construction of the compost facility, which is closed to public access by an 8-foot chain link fence with locked or monitored gates.

Baykeeper also quoted Policy 9.1(A) ("Ensure that new buildings and other structures are compatible with and add interest to existing scenic elements, such as landmarks, maritime industry, recreational boating facilities, natural features, topography, landforms and the botanic environment. Among the measures that may be considered are grouping or orienting structures to preserve open space and maximize views to and from the coast, and incorporating sound existing structures into

development where harmonious with their surroundings." Baykeeper stated the compost facility, including its berms, clearly obstructs access and views of the water.

Other NWRP policies relevant to this action

In addition to the policies quoted by Baykeeper, several other policies are noteworthy with regard to the coastal consistency review of this project. Policy 7 states: "Minimize environmental degradation from solid waste and hazardous substances," and Policy 7.3(B) states: "Site and design solid and hazardous waste facilities so that they will not adversely affect protected natural areas, including Significant Coastal Fish and Wildlife Habitats, habitats and wetlands critical to vulnerable species, rare ecological communities, surface waters and aquifer recharge areas." It is reasonable to consider parkland designated by Parks as "forever wild" as a protected natural area.

Policy 8.1 states: "Preserve, protect and maintain existing physical, visual and recreational access to the waterfront." Policy 8.1(B) states: "Maintain in good repair existing public access areas to ensure public safety and enhance enjoyment." Policy 8.3 and 8.3(A) state: "Provide visual access to coastal lands, waters and open space where physically practical. (A) Preserve existing visual access in the development of waterfront public lands and facilities. Minimize reduction of existing visual access caused by the scale, design, and location of public projects in areas such as streets, parks, bridges and highways. Preserve visual corridors provided or defined by mapped streets (open or improved) that terminate at the shoreline or within the waterfront block." Policy 8.4 states: "Preserve and develop waterfront open space and recreation on publicly owned land at suitable locations."

Policy 9.1(D) states: "Preserve existing vegetation or establish new vegetation where necessary to enhance scenic quality."

DEC Staff position on consistency with NWRP policies

DEC Staff's October 6, 2006 letter stated that the compost facility would have adverse effects on natural resources including wildlife habitat, open space, recreational resources, visual impact and aesthetics, but that these impacts would not be

significant. DEC Staff cited the criteria for determining significance of an action under SEQRA (6 NYCRR 617.7(c)) in this regard.¹⁰

DEC Staff's May 11, 2007 revised coastal consistency certification relies on the restoration of soil and habitat in 15 acres immediately to the east of the compost facility and 5 acres in Canarsie Park to conclude that the net effect of the compost facility and the mitigation work will not substantially hinder the achievement of any policies and purposes of the NWRP and will advance two such policies, Policy 4 (protection and restoration of the quality and function of ecological systems within the New York City coastal area) and Policy 9 (protection of scenic resources that contribute to the visual quality of the New York City coastal area). DEC Staff stated the 19.6 acres was undeveloped parkland, with limited value and subject to dumping, while the restored areas will have native vegetation and enhanced wildlife habitat and will not be subject to waste dumping.

Discussion

Substantial hindrance of NWRP policies

The project, even with the mitigation identified in revised special condition 35, will substantially hinder numerous stated policies of the NWRP. As discussed below, DEC Staff's determination that issuing the permit would not substantially hinder achievement of any policies of the NWRP is not rational. As a result, it was an error of law to not state the action will substantially hinder achievement of such policies and then proceed with the analysis of alternatives, mitigation and benefits under sections (1) through (3) of 19 NYCRR 600.4(c).

The compost facility has closed off public access to 19.6 acres of parkland immediately adjacent to a residential area, and has blocked access routes to the water that were formerly used by local residents. While it is still possible to get to the water

¹⁰ If 6 NYCRR part 617 is used as guidance in assessing how substantially this action would hinder policies of the NWRP, additional relevant sections are 617.4, under which the physical alternation of 2.5 acres within publicly owned parkland is the threshold for a Type I action, and 617.7(c)(3) that identifies factors to consider in evaluating qualitative terms used in 617.7(c)(1).

from the residential area by walking south on Fountain Avenue, access has been reduced. The recreation and open space uses of the 19.6 acre area itself have been eliminated. The residential area near Fountain and Flatlands Avenue has numerous recently-constructed residential buildings, whose residents cannot use the section of the park that Mr. DeJesus and Mr. Young used before the compost facility was built. Residents of the new buildings located between Grant and Forbell Streets immediately north of the compost facility would have direct access to the 15 acres of remediated parkland, but their access to the neighboring 19.6 acres has also been cut off because it is now the compost facility.

The project will result in the net removal of 19.6 acres of parkland, with a requirement that 15 acres of existing nearby parkland and 5 acres elsewhere be improved. Although the record indicates that the 19.6 acres was vegetated by non-native species (including *Phragmites*, *Ailanthus* and mugwort)¹¹ and was subject to illegal dumping of used appliances, tires, derelict vehicles and litter (5/15/07 Tr. 20 - 21, 229), the record also indicates it was nevertheless vegetated open space used for recreation by the public (5/30/07 Tr. 82-83; 10/25/07 Tr. 546). Parks' web site states that Spring Creek park was intentionally left undeveloped ("In keeping with the wilderness of the surrounding area, the park has been left mostly undeveloped.")¹² The level of maintenance of the 19.6 acres was at least partially within the control of Parks and the Applicant. The Applicant's Brooklyn District 5 office and one of its lot cleaning facilities are within a few blocks of the compost facility (5/15/07 Tr. 205 - 213). Deterring dumping and removing trash from this portion of the park would appear consistent with the NWRP. Instead, the Applicant has removed this portion of the park from public use, removed the vegetation, and converted open space into a solid waste management facility.

Under the revised draft permit, any improvements that might be made to the habitat, open space and recreational resources of the 15 acre remediation area in Spring Creek Park would be

¹¹ See, DEC Staff's September 18, 2006 CAF supplemental statement and Parks' interpretive sign text attached with Baykeeper's November 30, 2007 comments.

¹²

http://nycgovparks.org/sub_your_park/historical_signs/hs_historical_sign.php?id=10407, last viewed on January 16, 2008.

coupled with the complete loss of such resources in the 19.6 acres used for the compost facility, which use would be for an indefinite number of years and perhaps be permanent.¹³

Evaluation of remedial projects

Although DEC Staff's coastal assessments take the position that the 15 acre remediation area in Spring Creek Park will not be subject to dumping, the location of this remediation area and the remediation plans do not support this conclusion. This remediation area is immediately adjacent to the 19.6 acres now developed as a compost facility and adjacent to residences and roads. A reason stated by DEC Staff for concluding that the remediation area, unlike the 19.6 acre area, will be subject to only minimal dumping, is that "the planned soil enhancement would increase the remediation sites' elevation by three feet. Since illegally deposited waste is usually dumped down a slope or onto level ground, and it is improbable that anyone would lift waste three feet up in order to dispose of it, the proposed remediation is likely to minimize any future illegal dumping on the remediation sites." This reasoning is not at all persuasive, based both on Parks' proposal for soil enhancement and on how waste might be dumped. Parks' proposal states that a one foot thick layer of facility-generated compost would be applied to the soil, which would then be top dressed with sandy loam achieving soil depth appropriate to the growth needs of the target planting. The proposal does not specify, or suggest, a three foot elevation change, or that a two foot thick layer of sandy loam would be added above the foot of compost. Even with a three foot elevation increase, there is no basis to assume this would entail a steep three-foot slope, as opposed to a gradual slope, nor that a three-foot elevation increase would pose any serious barrier to someone who had already transported waste to the site.

Revised special condition 35 of the draft permit would also require the Applicant to remediate five acres within a ten acre area of Canarsie Park. The ten acre area is specified on a map, but the five acres within it are not. Canarsie Park is located within the coastal zone, approximately two miles west of Spring Creek Park. Canarsie Park was the site of a yard waste compost facility for which DEC issued the Applicant a part 360 permit on

¹³ Regarding the duration of the compost facility, see Issues Ruling, at 15 - 16, and application documents cited in that portion of the ruling.

August 19, 1999. A witness for the applicant testified that the Canarsie compost facility stopped operation in 2004. An exhibit used by this witness lists the Canarsie facility as having "no program" of compost operations in 2002 and 2003, and as "closed" in 2004.¹⁴

CHA's April 20, 2007 letter contended that the Canarsie Park remediation work associated with the Spring Creek facility is nothing more than a duplicate submission of the same remediation work already required for the Canarsie composting facility. DEC Staff's letter of May 11, 2007 stated that two independent remediation projects will occur within the 10 acre site, five acres for the Spring Creek facility and two acres separately associated with closure of the Canarsie facility, but the letter only identified the overall 10 acre site. The revised draft permit does not identify what portion of the ten acre site would be the remediation area associated with Spring Creek, and neither DEC Staff nor the Applicant have identified for this record the two acres associated with the Canarsie facility or the five acres for the Spring Creek facility.

CHA's April 20, 2007 letter stated the two remediation projects associated with the Spring Creek compost facility were already planned and approved prior to, and independent of, the Applicant's use of land at Spring Creek Park for a compost facility. In addition to CHA's assertion that remediation at Canarsie is essentially being double-counted for two compost facilities, CHA argued that DEC Staff failed to identify "other remediation grants that were awarded for site restorations" in the Spring Creek area (CHA 11/30/07 comments, at 8). CHA, however, also failed to identify such grants, or to show that they duplicate the remediation work proposed in connection with the Spring Creek compost facility. CHA also referred to remediation associated with the "Jewels Streets Sewer Project," but did not state what this remediation involved or its location. CHA also asserted that the entire Canarsie Park is part of an independent renovation project, but did not provide any information that indicates this project overlaps the 10 acre area identified in DEC Staff's May 11, 2007 correspondence. A witness for the Applicant, in his testimony, mentioned funding that had become available for work on an undeveloped part of Canarsie

¹⁴ May 15, 2007 Transcript, at 13; Ex. 13. A copy of the Canarsie facility's permit and engineering report were enclosed with Mr. Nehila's May 8, 2007 letter to me.

Park, but this testimony also does not identify the location of this work (5/15/07 Tr. 226).

The Applicant, in its December 2002 CEQR environmental assessment, stated that Parks "has no plans to develop this portion of Spring Creek Park as active parkland in the foreseeable future (i.e., in the 20 year capital plan)" (Ex. 3, section 2.D, at pages 2 - 3 of the Environmental Assessment Statement attachment). DEC Staff, in its May 11, 2007 letter, stated that the United States Fish and Wildlife Service (USF&W) produced a report in March 2004 describing a then-proposed 47 acre restoration project in Spring Creek Park that included the 15 acres now proposed as a remediation area. DEC Staff also stated that although DEC, Parks and the U.S. Army Corps of Engineers had discussed this project, the project did not move forward because federal funding was diverted elsewhere, and it was DEC Staff's understanding as of May 2007 that the Corps' project would not go forward. The City of New York's Open Accessible Space Information System depicts most of the 15 acre remediation area as being within a larger New York/New Jersey Harbor Estuary Program restoration site,¹⁵ but the status of any such project is not in the present record.

It is not clear whether the remediation identified in DEC Staff's May 11, 2007 letter and in revised special condition 35 is or is not a duplicate of work already required or authorized as mitigation for other projects or as independent projects that would take place anyway.

Revised Special Condition 35

The revised version of this condition of the draft permit was submitted by DEC Staff on October 19, 2007 and accepted by the Applicant on November 2, 2007. This revised condition identifies the remediation work to be done more specifically than such work was identified in the February 18, 2004 draft permit, including by identifying remediation sites that are within the coastal zone. Despite this, revised special condition 35 still does not identify the particular 5 acres to be remediated in Canarsie Park. It also does not provide specific information

¹⁵ <http://www.oasisnyc.net>, map layers showing this information last viewed on January 18, 2008.

regarding the revegetation aspect of the work.¹⁶ The revised condition refers to Parks' preliminary proposal that was submitted with DEC Staff's May 11, 2007 letter, but this preliminary proposal is very general with respect to plantings. As noted in my letter of June 12, 2007 to DEC Staff and the Applicant, the preliminary proposal could allow for very limited and sparse revegetation. The planting is described, in the preliminary proposal, as: "...Apply native herbaceous seed...plant 2 inch herbaceous plugs...plant container-grown native trees and shrubs." The preliminary proposal refers to the specifications of a 2001 status report of the New York/New Jersey Harbor Estuary Program with regard to watering, fertilizing, placement of topsoil and other work but does not incorporate any requirements regarding species or densities of planting that are or may be in that document.¹⁷ A literal reading of the preliminary proposal would allow the Applicant to argue it had complied with revised special condition 35 if it planted more than two trees and more than two shrubs of native species, plus enough native herbaceous seed to control erosion.

If a permit is issued, and if the remediation work is relied on by the Department in concluding that the project will not substantially hinder policies and purposes of the NWRP, special condition 35 should be additionally revised to ensure that it incorporates all such work and is an unambiguous requirement. This is not a speculative concern, as demonstrated by testimony regarding the Applicant's compost facility at Soundview Park in the Bronx. The permit for that facility was issued on October 2, 2003 (Ex. 8). By June 6, 2005, it had been operating long enough to have thousands of cubic yards of both in-process compost and finished compost at the facility (Ex. 72). The Soundview permit contains a special condition 31 requiring the Applicant to submit a proposal for habitat restoration and recreational enhancement

¹⁶ In addition to the remediation area, DEC Staff's September 18, 2006 coastal assessment cited the berm around the compost facility as providing "a modest amount of secure habitat for native plants." It is unclear whether this September 2006 document was supplemented by or superceded by DEC Staff's May 11, 2007 update. Nevertheless, the application materials and draft permit do not appear to provide for planting and maintenance of native vegetation on the berm other than planting approximately 400 white pines along the top of the berm.

¹⁷ An excerpt from this 2001 status report is section 4.E of Ex. 3.

on a 12-acre upland site within Soundview Park, and to do so within 180 days following issuance of the permit (i.e., by approximately April 1, 2004). Despite this requirement, as of May 15, 2007 the Applicant had still not submitted the habitat restoration plan for Soundview, and the Applicant's witness who was questioned on this subject dismissed the deadline for this plan as an "arbitrary deadline" (5/15/07 Tr. 80 - 88, 86). Although this witness stated that he had submitted a request to DEC for extension of this deadline, he did not say whether the request had been granted (5/15/07 Tr. 80) and no date of an extended deadline has been identified.

Conclusion

Even with the remediation identified in revised special condition 35, issuance of a part 360 permit for the Spring Creek composting facility will substantially hinder the following policies of the New Waterfront Revitalization Plan: policies 7, 7.3(b), 8, 8.1, 8.1(B), 8.2(A), 8.3, 8.3(A), 8.4, 8.5, 9.1(A), and 9.1(D).¹⁸

The May 11, 2007 revised coastal consistency determination is affected by an error of law, in not concluding that the action will substantially hinder the achievement of policies or purposes of the NWRP and then proceeding to conduct the additional analysis required by 19 NYCRR 600.4(c)(1) through (3). Had this additional analysis been carried out, the present record indicates that the remediation work as currently proposed would not minimize all adverse effects on the local policy to the maximum extent practicable (19 NYCRR 600.4(c)(2)). There is no basis in the present record to conclude that no reasonable alternatives exist that would permit the action to be taken in a manner that would not substantially hinder the achievement of the NWRP (19 NYCRR 600.4(c)(1)). Portions of the revised consistency determination are not rational, particularly the assumptions about waste dumping at the remediation site versus at the compost facility site, the lack of clarity about whether the remediation is already required or authorized in connection with other projects, and the differences between Staff's assertions about the remediation and what revised special condition 35 would actually require.

¹⁸ In addition, the project might hinder policy 4.1(E) but the extent of such hindrance cannot be determined from the present record of the case.

The revised State CAF and coastal consistency determination, and special condition 35 of the draft permit, are remanded to DEC Staff for further revision consistent with this ruling. The further revised State CAF and coastal consistency determination must identify clearly what portions, if any, of the earlier coastal review documents are included or superceded.

If DEC Staff elects not to revise its State CAF and coastal consistency determination further, the hearing report will note that position and will recommend that the Commissioner conclude that the certification required by 19 NYCRR 600.4(c) cannot be made.

Albany, New York
February 19, 2008

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

To: Persons on 2/12/08 service list