

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

July 11, 2008

DEC Application No. 2-6105-00666/00001

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### Summary

The City of New York Department of Sanitation (Applicant) submitted several additional maps of the above project. Following receipt of comments from the parties, I am requiring the Applicant to submit additional information by August 29, 2008 as discussed in this ruling. A deadline of August 15, 2008 is also established by which one of the intervenors may submit certain additional information concerning assertions made in its comments on the maps.

### Background

As discussed in my memorandum dated September 25, 2007, I directed the Applicant to provide information required to be in site plan maps and vicinity maps for composting facilities. The requirements are those of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) section 360-1.9(e)(2) and former section 360-5.4(a)(1) and (2)<sup>1</sup>.

On April 14, 2008, the Applicant provided copies of a "Location Plan and Topographic Survey" for the above project, plus geographic information system (GIS) figures intended to replace certain figures in the engineering report. Because the testimony already in the record referred to the aerial mapping, general site layout and figures that were part of the Applicant's engineering report (Exhibit 4), I assigned separate exhibit numbers to the materials distributed on April 14, 2008, as stated

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<sup>1</sup> Subpart 360-5 of 6 NYCRR was revised after December 20, 2002, the date that DEC Staff determined the application was complete. The version of the map requirements that was in effect on December 20, 2002 applies to this application (see, September 25, 2007 memorandum, at 1 through 3; see also, February 8, 2005 supplemental issues ruling, at 3 through 5).

in my memorandum of April 25, 2008. The earlier drawings that are part of Exhibit 4 remain part of that exhibit.

The additional exhibits, that were given exhibit numbers for identification in my April 25 memorandum but are not yet in evidence, are listed again here for reference in reading the present ruling. These exhibits remain marked for identification only and I will determine at a later date whether to receive them in evidence. The Applicant's request that the maps be included in Exhibit 4 indicates the Applicant intends the maps to be in evidence.

Exhibit 105: Location Plan and Topographic Survey, that my April 25 memorandum interpreted as being the site plan, consists of a cover page, eleven numbered pages of drawings, and an unnumbered page that depicts the compost facility on one page.

Exhibit 106: GIS figure labeled Figure 2-2, Site Location.

Exhibit 107: GIS figure labeled Figure 2-3, Tax Block and Lot.

Exhibit 108: GIS figure labeled Figure 2-7, Zoning.

Exhibit 109: GIS figure labeled Figure 2-8, Land Use.

Exhibit 110: GIS figure labeled Figure 2-9, Ownership Information.

Exhibit 111: Figure 4-2, General Site Layout.

On April 25, 2008, I wrote to Ramin Pejan, Esq., counsel for the Applicant, and asked whether the perimeter of the site is depicted on the site plan map, and if so, which line depicts this boundary. No line was labeled as this feature on the maps. I also inquired about what a line around the general area of the compost facility was intended to represent. Mr. Pejan replied by e-mail on May 1, 2008, stating that the perimeter of the facility is the fence line, and describing how the fence line is depicted on Exhibits 105 and 111. Mr. Pejan stated that the other line represents the general contour boundary limit, with a five foot contour interval outside the line and a one foot contour interval inside the line.

Also on May 1, 2008, New York/New Jersey Baykeeper (Baykeeper) sent an e-mail stating that Drawing 6 of Exhibit 105 appeared to be identical to Drawing 9, and that Drawing 6 did not correspond to the portion of the cover page labeled "6." The

Applicant replied that a drawing was accidentally mislabeled and that a correct version of Drawing 6 would be sent to the parties and the Administrative Law Judge. The Applicant subsequently sent the drawing to the parties and to me.

#### Comments by other parties

Staff of the Department of Environmental Conservation (DEC Staff), Baykeeper, and the consolidated party of Concerned Homeowners Association and Ronald J. Dillon (CHA) submitted comments about the maps on May 29 and 30, 2008.

The comments may be summarized briefly as follows. DEC Staff stated that the distances from the property line of the facility to certain residences and the Brooklyn Developmental Center are the same as the distances shown for those measurements on the original maps (approximately 100 feet). DEC Staff stated that the distance between the facility property line and new residences built after 2002 is also approximately 100 feet, and concluded that the relevant distances shown on the aerial mapping done in 2000 and those on the new survey are essentially the same although additional residences now exist at that distance or greater from the facility. DEC Staff also included comments on other features depicted on the maps. DEC Staff recommended that, even if the new information submitted by the Applicant is to be considered in the permitting decision, a permit should be issued for the facility.

Baykeeper stated that nothing in the Applicant's submission was designated as a "vicinity map" and that the maps that were submitted failed to provide certain information that former section 360-5.4(a)(1) requires on a vicinity map. Baykeeper stated the maps failed to delineate the boundary of the compost facility, and that the Applicant's May 1, 2008 e-mail confused matters due to discrepancies in where the fence line is depicted on various maps. Baykeeper argued that the maps' identification of contiguous landowners is incomplete, and that the Brooklyn Developmental Center, which is across Fountain Avenue from the compost facility, should be identified as a residence. Baykeeper objected to the maps' depiction of the prevailing winds in the area on the basis that testimony had shown the Applicant's conclusions on this subject to be unreliable.

Baykeeper asked that the recent maps be excluded from the record and that the Applicant be directed to submit additional materials that comply with the requirements, or alternatively

that additional hearing dates be scheduled for cross-examination about the basis for the information on the maps.

CHA objected to including the recent maps in the record unless they are redacted to eliminate information that CHA argued was objectionable and/or erroneous. CHA questioned the accuracy of the data sources cited on the maps and the manner in which streets around the facility were identified as "built," "mapped," "unmapped" and related designations. CHA stated there were discrepancies among the maps, and between the maps and other information sources, regarding the depiction of streets, zoning, vegetation, land uses and ownership on and around the site. For each of Exhibits 105 through 111, CHA listed specifically its assertions about defects in the maps. CHA moved that the maps be excluded from the record even for identification purposes, that certain information be removed from the maps, and that CHA be given additional time to provide information if what it did provide is found to be insufficient.

#### Further correspondence

Although no further correspondence about the maps had been scheduled, the Applicant submitted a letter on June 4, 2008 in which it disputed statements by the intervenors about the schedule on which the maps and comments had been submitted, and described how some of the information had been developed. The Applicant asserted that the source data was reliable and accurate, and that the submission complies with the requirements of 6 NYCRR sections 360-5.4(a)(1) and (2). The Applicant argued that although no map was specifically labeled as a "vicinity map," the information required for such a map was presented on several maps because it would be difficult to read one map that contained all the required information. The Applicant responded to certain specific criticisms in Baykeeper's May 30, 2008 comments, and to the intervenors' statements about the prevailing wind direction shown on two exhibits. The Applicant's response included one paragraph concerning CHA's additional specific comments on the contents of Exhibits 105 through 111, stating that CHA did not understand that mapped streets could be unbuilt or located within designated parkland and that CHA "seems to confuse land use and zoning." The Applicant also disputed CHA's general comments concerning the data sources used in preparing the drawings.

Baykeeper replied in a short e-mail on June 4, 2008, disputing the Applicant's statements about the schedule and otherwise stating that Baykeeper rested on the comments it

submitted on May 30, 2008. CHA replied on June 5, 2008, arguing that the Applicant's response engaged in *ad hominum* attacks against Mr. Dillon but failed to respond to the substance of CHA's comments.

## Part 360 requirements and the April 14, 2008 maps

### Discussion

I reviewed the comments submitted by the parties (including the additional early June responses), the April 14, 2008 maps, the related maps in Exhibit 4, and applicable requirements of 6 NYCRR part 360. The recent maps provide some of the information that was missing from the maps in Exhibit 4. The recent maps, however, also still lack required information, contain numerous internal inconsistencies between maps, and contain information about vegetation cover without identifying the basis for that information. In addition, certain features that have been the subject of controversy or testimony in this hearing, and that are among the "existing and proposed man-made features relating to the project" (former section 360-5.4[a][1]) are not shown or are obscurely shown on the map, as discussed below.

Some of the criticisms stated by Baykeeper and/or CHA concern discrepancies that are not material or relevant to issues in the hearing, but others are material and relevant. Rather than reconvening the hearing for cross-examination concerning the April 14, 2008 maps, I am requiring the Applicant to provide additional information and corrections as outlined in the present ruling. Following that, I will determine whether it is necessary to reconvene the hearing. I am also requesting several items of information from CHA if it wishes to pursue its assertions about several aspects of the maps, as identified below.

The present ruling does not discuss in detail all of the comments by Baykeeper and CHA, nor all of the responses by the Applicant. It does discuss the more notable omissions and inconsistencies in the maps, and identifies certain information that the Applicant will need to add or change. To the extent that discrepancies exist between the Applicant's individual maps, and between those maps and evidence in the rest of the record, these discrepancies will be considered in evaluating the weight to be given to particular exhibits and testimony.

### Map requirements

Specific types of information must be included in the vicinity map and the site plan map that are part of an application for an initial permit for a composting facility to compost exclusively yard waste.<sup>2</sup> The requirements were quoted and paraphrased in my September 25, 2008 memorandum, and are as follows:

Subpart 360-1 of 6 NYCRR, general provisions that apply to all solid waste management facilities subject to part 360, requires that "[s]ite plans must contain the location of all property boundaries certified by an individual licensed to practice land surveying in the State of New York" (6 NYCRR 360-1.9[e][2]).

Former 6 NYCRR 360-5.4(a)(1) required "[a] vicinity map (minimum scale of 1:24,000) that delineates the area within one mile of the composting site boundaries; the zoning and land use, residences, surface waters, access roads, bridges, railroads, airports, historic sites, and other existing and proposed man-made features relating to the project."

Former 6 NYCRR 360-5.4(a)(2) required "[a] site plan map (minimum scale of 1:2,400 with five feet contour intervals) that delineates the following:

"(i) the location of the proposed composting area and boundary locations, and location of the compost facility within the site boundaries;

"(ii) a description of the composting facility drainage characteristics identifying the direction of both site run-on and run-off, ditches, and swales together with any run-off controls that now exist or will be implemented with facility construction;

"(iii) a delineation of the composting staging and storage area;

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<sup>2</sup> In addition to the vicinity map and the site plan map, former section 6 NYCRR 360-5.4(a)(3) required a map showing regulated wetlands and floodplains, if applicable. My September 25, 2007 memorandum did not require the Applicant to submit an additional map of this kind. Figures 2-4 and 2-5 of Exhibit 4 present this information.

"(iv) the location of access roads and on-site roads;

"(v) the location of property boundaries and the names and addresses of all contiguous landowners;

"(vi) the location of all water supply wells, buildings, residences, surface water bodies, and drainage swales within 1,000 feet of the site. Identification of all buildings owned by the applicant or operator must be included; and

"(vii) existing and proposed elevation contours and direction of prevailing winds."

#### Labeling of maps

The Applicant's April 14, 2008 transmittal letter identified the maps as "new site plans and GIS figures which replace those in the Engineering Report." The letter referred to Figure 4.2 (General Site Layout, Exhibit 111) as a GIS figure. Exhibits 106 through 110 are apparently GIS figures, based upon their references to data layers maintained by New York City agencies. Exhibit 105 is labeled "Location Plan and Topographic Survey." Correspondence from the Applicant refers to Exhibit 105 as the site plan map, but features that would be found on a site plan map are on the General Site Layout (Exhibit 111) as well.

It appears that the site plan map may consist of Exhibits 105 and 111, plus Exhibits 107 (tax blocks and lots on which the facility is located) and 110 (contiguous land owners). It also appears that Exhibits 106, 108 and 109, possibly supplemented by information from the other recent maps, represent the vicinity map. The Applicant argued that although it did not specifically label any map as "vicinity map," it submitted multiple maps containing the vicinity map information. The Applicant stated it would be difficult to read one map that had all the information on it.

Although the information required for the vicinity map or the site plan map might be provided on more than one sheet of paper if that would present the information more clearly, the identification of the maps should be consistent with the terms used in part 360. These maps would become part of the permit, if a permit similar to the draft permit (Exhibit 30) is issued. This is particularly important for the site plan map because it would identify activities the Applicant proposed to conduct and the Department approved.

Unless notified otherwise by the Applicant, I am considering the site plan map to consist of Exhibits 105, 107, 110 and 111, and the vicinity map to consist of Exhibits 106, 108 and 109.

The Applicant's April 14, 2008 letter asked that Exhibits 105 through 111 be substituted for the corresponding maps in the engineering report (Exhibit 4). Although I am considering Exhibits 105 through 111 to be additional exhibits (marked only for identification at present), and leaving the Exhibit 4 versions of the maps in evidence, it is my understanding that the Applicant intends that Exhibits 105 through 111 supercede the earlier similar maps as being the current application. If that understanding is not correct, the Applicant will need to clarify its intentions regarding what constitutes the current application, with any such clarification to be provided at the same time it submits the revised maps required below.

#### Map preparers and information sources

Section 360-1.9(e)(2) requires that "[s]ite plans must contain the location of all property boundaries certified by an individual licensed to practice land surveying in the State of New York." Exhibit 105, the location plan and topographic survey, is signed by a New York professional land surveyor. Exhibit 105 contains a note stating, in part, "Mapped by photogrammetric methods from aerial photographs. This map complies with National Map accuracy standards." The pages of Exhibit 105 that follow the cover page also contain a note stating, "Property lines shown on maps are from deed plots and tax map information only" (capitalization omitted).

In its May 29, 2008 comments, CHA argued that the revised maps were not prepared by an actual physical survey employing metes and bounds measurements and that the parties still do not have accurate physical measurements necessary to show compliance with the applicable regulations nor to support the variance applications.

In response, the Applicant's June 4, 2008 letter stated the surveyor used state of the art photogrammetric methods from aerial photographs, in full compliance with industry standards. The Applicant also stated the surveyor "conducted ground surveying on the Facility and around its vicinity in accordance with standard surveying methods." The Applicant stated that, because the surveyor was unable to access private residences around the facility, property lines and ownership information for contiguous landowners are from ownership information (including



tax block and lot data and addresses) from the New York City Department of City Planning and from record deed searches regarding properties across Fountain and Flatlands Avenues from the facility. The applicant stated that where no address information was listed on the "site plan map," no such information was available.

The notes on Exhibit 105 do not indicate what, if any, information was obtained by the surveyor through "ground surveying." The statements in the Applicant's June 4, 2008 letter suggest that property lines associated with the facility may have been surveyed on the ground, but the note on Exhibit 105 states that "property lines shown on maps are from deed plots and tax map information only" and does not distinguish between the facility-related property lines and those of surrounding parcels. The note appears to be a disclaimer, rather than a certification, by the surveyor concerning property lines.

As discussed further below, the location of the compost facility's boundary and property lines, and the property lines of adjacent parcels zoned or otherwise authorized for residential purposes, are relevant to the noise issue and to the requested setback variances. Even assuming that the reference to "all property boundaries" in 6 NYCRR 360-1.9(e)(2) means the property boundaries of the solid waste management facility site and those of contiguous landowners on the side adjacent to the facility (not all property boundaries within 1000 feet of the site), it does not appear from Exhibit 105 itself that the surveyor has certified the required information. The explanation in the Applicant's June 4, 2008 letter was provided by counsel for the Applicant, not by the surveyor.

The Applicant will need to provide: (1) an affidavit from the surveyor describing how the property boundaries shown on Exhibit 105 were determined; and (2) certification of the property boundaries as provided in 6 NYCRR 360-1.9(e)(2). These documents are to be provided on or before August 29, 2008. I would then evaluate whether any testimony by the surveyor is necessary.

Exhibit 105 was prepared by Greater Hudson Valley Engineering, while Exhibits 106 through 111 were apparently prepared by HydroQual, the Applicant's consulting firm that prepared the engineering report. Exhibits 106 through 111 are not signed by a surveyor, but they do not appear to be exhibits for which this would be required. They are, however, documents that are required to be certified by an individual licensed to practice engineering in the State of New York (6 NYCRR 360-

1.9[e]). Exhibits 106 through 111 contain the logo, address, phone and fax numbers of HydroQual, but no indication of who at that firm prepared the exhibits nor that any engineer has certified them.

As discussed further below, Exhibits 106 through 111 contain inconsistencies among themselves, and between these exhibits and Exhibit 105. Some of these inconsistencies are not relevant to issues being adjudicated in this hearing, but others are relevant. As with Exhibit 105, if Exhibits 106 through 111 had been available at the start of the adjudicatory hearing, these exhibits would have been introduced through a witness who could have been questioned about relevant information on the exhibits.

At a minimum, the Applicant will need to provide an affidavit that identifies preparer(s) of Exhibits 106 through 111 (and any revised versions of these, if the Applicant causes revised versions to be prepared). The Applicant will also need to demonstrate that these exhibits or revisions of them are certified by a New York State licensed professional engineer, and provide an affidavit identifying the engineer and his or her role in preparing the exhibits. Depending on the outcome of the additional submissions required and allowed by the present ruling, additional testimony concerning the site plan map and vicinity map may be necessary. The information in this paragraph is to be provided by August 29, 2008.

#### Vicinity map elements

Although no issue involving zoning is being adjudicated in this hearing, the zoning of areas surrounding the site is relevant to the noise issue (see, 6 NYCRR 360-1.14(p), "prevent transmission of sound levels beyond the property line at locations zoned or otherwise authorized for residential purposes" that exceed specified decibel levels). It also has some relevance to other issues as an indication of the land uses surrounding the site, in conjunction with other information required to be in the vicinity map, site plan map and application.

In the Applicant's recent maps, zoning is depicted on Exhibit 108 and land uses on Exhibit 109. The locations of residences are depicted mainly by inference from these maps plus Exhibits 105 and 110 (based on the shapes of buildings and the landowner names shown for some properties, the zoning, and the designations of "residential" or "mixed commercial and residential"). Baykeeper argued that the maps fail to meet

either the requirements for vicinity maps or those for site plan maps with respect to identifying residences. CHA argued that particular errors and omissions exist in the depictions of zoning, land use and residences on Exhibits 105, 108 and 109 (CHA's comments on Exhibit 105 are also discussed below, under "Site plan map elements.")

As noted above, the present ruling does not discuss every criticism presented by the intervenors concerning Exhibits 105 through 111. With respect to Exhibit 108 (zoning), CHA stated that the zoning designations for three areas are not shown, but Exhibit 108 does show zoning designations for larger areas (enclosed within a heavy solid line) that include the areas described by CHA. CHA's assertion that an area mapped "C2-4" "does not exist in the official zoning records" (CHA comments, at 9) cannot be evaluated based upon the information submitted to date, other than to note that Exhibit 108 describes this as a "commercial overlay" and such overlays might be reflected in documents other than the "official zoning records" mentioned (but not cited or provided) by CHA. This overlay area might be part of Gateway Mall, but the maps do not identify that feature although it was mentioned in the testimony. CHA also contested the zoning shown for parkland, arguing among other things that parkland is a designation in the City's zoning. CHA's position on this question is actually supported by a statement in the Applicant's engineering report (Exhibit 4, section 2.7.1, "...under current zoning regulations within the City of New York, the parkland designation supersedes the underlying zoning.") Identifying the parkland is discussed further below.

With regard to Exhibit 109, CHA noted numerous discrepancies among the maps, some of which are indeed discrepancies based upon examination of the maps themselves, particularly with regard to whether streets exist at certain locations. For example, Eldert, Grant and Forbell Streets between Flatlands Avenue and Cozine Avenue (immediately north<sup>3</sup> of the site) are depicted as existing on some of Exhibits 105 through 111 but not on others. In the area southeast of the compost facility, an area that the record map of Spring Creek Park (discussed further below) identifies as park is shown as "vacant land," while other parts of the park are shown as "open space and outdoor recreation." A similar discrepancy exists with regard to Blocks 4572 and 4573 (shown as

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<sup>3</sup> The directions referred to in this document are approximate, as the street grid in this area does not line up precisely with compass directions. Flatlands Avenue is referred to as an east-west street, and Fountain Avenue as north-south.

park on the record map, as owned by "Parks & Rec" on Exhibit 110, and as "vacant land" on Exhibit 109).

In other cases, CHA asserted that the land use shown on Exhibit 109 differs from the actual land use (for example, the redevelopment of the former satellite facility at Flatlands and Fountain Avenues, CHA comments at 10) but the accuracy of these assertions cannot be determined based in the information in the record at present. The land uses in the area across the street from the compost facility are particularly relevant to this hearing. CHA stated that the former satellite facility is being redeveloped, but did not provide any documentation to support this statement or describe the nature of the development. CHA also stated that the area south of Flatlands and west of Fountain Avenue, except for the satellite site, is being developed for residential use and includes streets not depicted on the maps, but CHA did not provide any documentation for this. The Applicant did not respond to either of these comments. Exhibit 109's map shows no land use at all (blank paper, with no symbols to designate a land use type) at the location formerly occupied by the satellite facility, and shows "vacant land" in what may be the residential development mentioned by CHA. Exhibit 109 also contains a note about the three parcels<sup>4</sup> at three of the four corners of the Fountain and Flatlands Avenue intersection that differ from what the symbols on Exhibit 109's map depict at those locations.

If CHA wishes to pursue its assertions with respect to discrepancies between Exhibit 109 and actual land use, it may submit documentation on or before August 15, 2008. This date is earlier than the deadlines for the Applicant's submissions so that the information provided by CHA can be taken into account by the Applicant in preparing the maps. The Applicant is already on notice that its land use map may be inaccurate, out of date, or both, and will need to correct the map or respond to the comments.

In addition to the comments noted by CHA, Exhibit 109 contains areas within and near the compost facility that do not have any land use designation (blank paper, as for the former satellite facility) and also are not shown as being streets.

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<sup>4</sup> With regard to the northeast corner of this intersection, the note's reference to "parcels" may actually pertain to a larger area extending up the block along the east side of Fountain Avenue north of Flatlands Avenue.

Both the vicinity map and the site plan map are required to show any residences within specified distances around the proposed compost facility. On Exhibits 105 through 111, some buildings are apparently residences, based upon looking at one map or several maps together. These residences include the Brooklyn Developmental Center (labeled Brooklyn Developmental Disabilities Center on Exhibit 110, ownership map). Baykeeper cited testimony by Peter Uschakow, of the Brooklyn Developmental Center, that 286 persons live at the center (10/10/07 transcript page (Tr.) 138). The Applicant's June 4, 2008 letter responded by objecting to the characterization of the center as the residence of 286 people and stated, "In any event, given that the regulations do not define residence, it was reasonable for [the Applicant] to decline treating individuals who may be residing with the Center as 'residences.' [sic]" (letter, at 6). The Applicant's interpretation is not reasonable in view of dictionary definitions of "residence."

Baykeeper (comments, at 4) stated that information was missing about the houses east of the site in Queens County (between 75th and 77<sup>th</sup> Streets and 156<sup>th</sup> and 157<sup>th</sup> Avenues, streets labeled on Exhibits 106, 108 and 109, but not on the other maps). Exhibit 105 shows these houses just as rectangles with no indication of addresses, ownership or what kind of building they are. It can be inferred that the rectangles are houses based upon Exhibit 109's depiction of these blocks as "residential." Exhibit 105 must, at a minimum, identify these rectangles as residences. For some of these houses, the names and addresses of the landowners should be provided under former section 360-5.4(a)(2)(v) because these lots are contiguous to Block 4585. That block is identified as part of the "Site" in the memorandum of understanding between the Applicant and the New York City Department of Parks and Recreation (Parks) regarding the compost facility, even though portions of the block are outside the compost facility fence.

Similar inferences about residences can be drawn concerning the buildings on three of the blocks north of the compost facility, two of which are labeled "Residential (Private)" on Exhibit 110. Exhibit 110 needs to be clarified to indicate that Block 4571 is also residential, as indicated by the land use shown for this block on Exhibit 109. Exhibit 105 and 109 are inconsistent with each other in that Exhibit 105 shows what appear to be houses on the west side of block 4565 while Exhibit 109 shows this same area as vacant land, and this inconsistency needs to be corrected.

In an area as densely developed as southeastern Brooklyn and southwestern Queens, residences might need to be depicted differently on a vicinity map than would be the case for a sparsely developed area where individual residences would appear on a U.S. Geologic Survey topographic map or could be added if they were built after the date of the mapping. In a city, it is possible that transportation, commercial and residential land uses could all exist on the same lot at different elevations above and below ground. Even in a densely developed area, however, the vicinity map and site plan map must clearly delineate where residences exist, and if this depiction is shown by a combination of maps, the maps must be internally consistent with each other.

Baykeeper argued that the maps do not show bridges (with the exception of one bridge), railroads, airports, or historic sites within one mile of the site. CHA stated that a railroad (MTA subway yard) exists within the one mile area, underneath a residential development. The Applicant's response stated there are no airports or railroads in the one mile vicinity and that the location of bridges can be ascertained from where Shore Parkway crosses water bodies or other roads. The Applicant did not respond regarding historic sites or CHA's assertion about the MTA subway yard.

If no airports or historic sites are within the one mile vicinity area, there would be nothing to depict concerning such features. Also, at this stage of the hearing, the issues being adjudicated do not involve railroads, airports, or historic sites. While the location of these features could be important in some cases, they are not relevant here.

The maps omit certain "existing and proposed man-made features relating to the project," some of which could also be considered as aspects of "land use" features that should be depicted on the vicinity map. Notable among these are the boundaries of Spring Creek Park, the 26<sup>th</sup> Ward auxiliary water pollution control plant, and Gateway Mall (the construction of which was the subject of some questions during the testimony). These features will need to be identified on revised maps. The area that Figure 2-9 of Exhibit 4 shows as "Spring Creek Auxiliary WPCP" (the 26<sup>th</sup> Ward auxiliary water pollution control plant) is depicted on Exhibit 109 (land use) partly as "open space & outdoor recreation," partly as "vacant land," and partly with no land use identified (blank paper). The 26<sup>th</sup> Ward auxiliary water pollution control plant is not shown on others of the recent maps, and is shown as an unlabeled polygon on Exhibits 105 and 111.

With regard to the boundaries of Spring Creek Park, the Applicant provided a copy of the New York City Department of Parks and Recreation's record map of Spring Creek Park, dated April 16, 1993 and revised on October 2002, as part of the correspondence concerning identification of issues for adjudication (attached with a letter of June 2, 2004 from Christopher G. King, Esq.). This map is hereby designated as Exhibit 112 for identification, and a copy is enclosed with the paper copies of this ruling. If a more recent revision of this map exists, the Applicant may provide, on or before August 29, 2008, a copy for the record with appropriate authentication concerning the source of the map.

Exhibits 108 and 109 also do not depict the existence or location of the former Fountain Avenue landfill, which is within the one-mile radius surrounding the compost facility. The area on which the landfill is located (see, <http://www.dec.ny.gov/cfm/xtapps/derfoil/index.cfm?pageid=3>) is shown on Exhibit 108 as an R3-2 zoning (a residential zoning) and on Exhibit 109 as "Open Space and Outdoor Recreation." This former landfill will need to be identified in some manner on revised maps.

CHA stated that Exhibit 111 does not show bus stops along Fountain Avenue next to the compost facility and that a bus stop on the east side of Fountain Avenue just south of Flatlands Avenue is omitted from Exhibit 105, Drawing 4 (CHA comments, at 13 and 14). Exhibits 111 and 105 do show one bus stop, on the east side of Fountain Avenue just north of Vandalia Avenue, but do not show the other bus stop. What the exhibits show may actually be bus shelters (as it appears, based upon the shape drawn on Exhibit 105), rather than signs indicating where buses stop. At least three witnesses were questioned about where bus stops are located around the site, and if a bus stop (although not a shelter) exists near the corner of Fountain and Flatlands, it must be indicated on any revised versions of Exhibit 105 and 111.

#### Site plan map elements

Exhibits 105 through 111 still do not contain a line labeled as the perimeter of the site and/or the horizontal limits of the compost facility.

The setback distances from which the Applicant is seeking variances are expressed in terms of horizontal distances from the

"perimeter of the site" (see, former sections 6 NYCRR 360-5.5(g), 360-4.4(d); Issues Ruling, at 27 - 29; Supplemental Issues Ruling, at 5). The site perimeter is also important in the context of any permit condition that limits activities to "on the site," notably special condition 29 of the draft permit (Exhibit 30) that requires that all truck queueing and parking associated with operation of the facility must occur "on the site." This draft permit condition was the subject of controversy during testimony on the noise issue.

At present, the only identification of the site perimeter, as it would appear on Exhibits 105 or 111, is contained in Mr. Pejan's May 1, 2008 e-mail message. This is not an adequate identification of a feature that is important to the Commissioner's evaluation of the hearing record, to any court review of the Commissioner's decision, and to enforceability of at least one permit condition. Even with the clarification provided by Mr. Pejan, that identified the fence line as the site perimeter, inconsistencies and ambiguities within and among the maps require that the site perimeter be clearly identified on a revised map. Some of the inconsistencies identified by Baykeeper might be due to mis-alignment of data layers in preparing the maps, which should be checked in preparing revised maps. Although the security and equipment storage area is clearly part of the compost facility, the existence of an internal fence around this area makes use of the fence as the facility boundary ambiguous. Figures 105 and 111 both show the old Department of Environmental Protection scavenger waste facility (the western one of these facilities) as being inside the fence line, which would show it as part of the compost facility if the fence line is used as the compost facility's perimeter. No gate is indicated on the Flatlands Avenue side of this scavenger facility, although this entrance was open to trucks as of the site visit that occurred in October 2007. A similar ambiguity exists with the area marked as "Conc." immediately west of the facility entrance.

In addition to clearly identifying and labeling the site perimeter, an additional line shown on Exhibit 105 will need to be labeled on a revised map. This is the line that Mr. Pejan's May 1, 2008 e-mail identified as the boundary between five foot and one foot contour intervals. It must be clearly identified as such on any maps that show it. This is a line that, as currently depicted in Exhibit 105, could be confused with a site boundary.

Exhibit 105 shows property lines surrounding most of the area occupied by the compost facility pads and berms but portions of the pads and berms are on areas marked as streets that are



mapped but unbuilt, outside the property lines. While it may be the case that part of the compost facility is on land that does not have property lines as such, due to being still designated as city streets, the owner of this land will need to be identified.

The August 27, 2001 memorandum of understanding (MOU) between the Applicant and Parks (see, Exhibit 4 (engineering report), Attachment 1) identified certain blocks as the "Site" on which "Parks will allow Sanitation to establish composting and soil production operations, and vehicular access paths as required," under conditions specified in the MOU. The blocks identified by the MOU as the "Site" are blocks 4580, 4584, 4585, 11455 and 11456 (the latter two blocks are in Queens, based upon the lot numbers shown on Parks' record map of Spring Creek Park). Among the conditions stated in the MOU were:

"2. Composting operations will take place primarily on Block 4580 and portions of Blocks 4584 and 4585. In no case will such operations infringe on wetlands or on the wetland setbacks defined by the New York State Department of Environmental Conservation, the United States Army Corps of Engineers, and any regulatory authority. 3. Composting operations are specifically excluded from Blocks 4572 and 4573, though vehicular access paths may be constructed on portions of these blocks to allow access from the Site to Sanitation Block 4555. Construction of such vehicular access paths will comply with all wetland regulations."

This description of the site overlaps with the area on which Exhibit 105 depicts the composting pads, berms and related features but also includes additional area. Differences between this definition of the Site and the perimeter of the composting facility as currently proposed underline the importance of identifying the perimeter of the site and the limits of the composting facility that would be approved if a permit is issued.

The noise standard in 6 NYCRR part 360 refers to the property line in setting numerical limits on noise levels (360-1.14[p]). Omission of the property line from the Applicant's drawings was noted in the supplemental issues ruling (at 14 - 15), and also at the hearing on September 19, 2007 (9/19/07 Tr. 150 - 169). The Applicant has now provided a depiction of property lines, shown on Exhibit 105 but with the disclaimer that "property lines shown on maps are from deed plots and tax map information only." Due to inconsistencies among Exhibits 105 through 111, as well as uncertainty about the basis for the property lines as shown on Exhibit 105, it is still unclear where land "beyond the property line at locations zoned or otherwise

authorized for residential purposes" (360-1.14[p]) begins in the area north of the compost facility.

The January 2006 noise report modeled the predicted noise levels at various receptors. The report states the receptor locations were on the opposite sides of Flatlands Avenue and Fountain Avenue "to account for the public rights of way abutting the western and northern property boundaries" (Exhibit 40, at 8). This places the noise receptor locations about 100 feet farther away from the facility than would be the case if the receptors were located at the facility's property line. In view of the distances involved here, and the noise contours presented in Exhibits 40 and 53, this 100 foot difference could be significant.

On Exhibits 105 through 111, certain locations "beyond the property line at locations zoned or otherwise authorized for residential purposes" are ambiguous because these exhibits are inconsistent among themselves with regard to whether Flatlands Avenue is indeed a city street in the area north of pad 3. Exhibits 106, 108 and 109 all show Flatlands Avenue as ending immediately east of Sheridan Avenue (west of most of pad 3). These exhibits also show no streets at the locations that would be Grant Avenue, Eldert Lane and Forbell Street between Flatlands Avenue and Cozine Avenue. Exhibit 106, however, contains a note stating, "Several unmapped streets exist in the block south of Cozine Avenue and north of Flatlands Avenue. The most important relative to the yard waste facility include: \* Grant Avenue \* Eldert Lane \* Forbell Street." Exhibit 105 shows these street segments as streets, labeled with street names and bordered by property lines as if they are indeed mapped streets. Exhibits 107 and 110 show these street segments as streets, without comment in the notes on these exhibits. It is unclear whether these street segments are indeed city streets or are paved areas within residential developments.

Former section 360-5.4(a)(2)(v) requires that the site plan map show the location of property boundaries and the names and addresses of all contiguous landowners. The Applicant's identification of certain landowners, as depicted on Exhibit 105, was criticized by the intervenors. To some extent, Baykeeper's criticism is answered by combining information from two or more of the recent exhibits. The houses in Queens that are contiguous to Block 4585 were discussed above. Other criticisms, however, accurately point out problems with the maps to which the Applicant has not adequately responded or has not responded at all.

Exhibit 105 depicts two areas as being now or formerly owned by Home Depot, USA, Inc. with an address of "Meadow Street." CHA stated that no street by that name exists in this area, and that these areas are not owned by Home Depot (CHA comments, at 15 and 16).<sup>5</sup> One is north<sup>6</sup> of Vandalia Avenue and west of Fountain Avenue.<sup>7</sup> CHA stated that this first area, in tax block 4586, is designated for residential development within "the Gateway Project" and is not owned by Home Depot. The second area is south of the intersection of Fountain Avenue and Seaview Avenue, and is labeled Block 4586, lot 1. CHA stated this area "is a section of the Gateway urban renewal project that has been set aside as parkland" (CHA comments, at 16). Parks' record map of Spring Creek Park shows this second area as a part of the original Spring Creek Park that is considered to be part of "Park B-371."

The Applicant's June 4, 2008 response stated that no address was provided for Home Depot or for Morgan B. Realty (the owner of the satellite site) because no such information was available. This appears unlikely, in view of the various public records such as deeds, tax information and regulatory records that would be available to the Applicant as sources of address information. The Applicant dismissed Baykeeper's comments about the ownership information as "nitpicking" and did not respond to CHA's assertions about the Gateway project or ownership of the two "Home Depot" parcels.

Block 4580, lot 2, on which much of the compost facility is located, is labeled on Exhibits 105 and 110 as owned by "Department of General Service," while blocks 4584 and 4585 are labeled on that exhibit as owned by Parks and Recreation. Parks'

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<sup>5</sup> The Home Depot lot identified by CHA as appearing on drawing 12 is actually on drawing 11.

<sup>6</sup> CHA described this lot as south of Vandalia Avenue, but the block and lot number cited by CHA and marked as Home Depot is actually north of Vandalia Avenue (see, Exhibit 105, Drawing 7).

<sup>7</sup> An additional long, narrow parcel is shown extending west from Fountain Avenue, south of and parallel to Flatlands Avenue (see, Exhibit 105, drawings 4 and 7), but the Applicant's recent maps provide no ownership information for this parcel nor do they identify it by a street name. Exhibits 107 and 110 identify it as a "mapped, unbuilt street" but it does not appear on the street grid shown in Exhibit 106. This parcel is directly across Fountain Avenue from the compost facility.

record map shows all three blocks as park land. CHA argued that no municipal agency named the "Department of General Service" exists in New York City (CHA comments, at 16). The Applicant did not respond to CHA's comment on this subject. The Applicant's most recent statement as to who owns the compost facility site (i.e., the land on which the compost facility is located) was in the December 14, 2007 letter from Mr. Pejan to me. That letter stated "[t]he site is owned by the municipal corporation the City of New York. The New York City Department of Parks and Recreation ('DPR') is the City agency with primary jurisdiction over the site." The Applicant's witness Robert Lange testified that the New York City Department of City-wide Administrative Services is the property manager for the city and designates some city properties to specific city agencies (5/15/07 Tr. 127 - 128).

An additional parcel that Exhibit 105 identifies as owned by "Department of General Service," but that Exhibit 110 identifies as owned by New York State, is lot 300 of block 4586, the parcel on which the Brooklyn Developmental Center is located. This information is inconsistent between two of the Applicant's recent maps, and it is questionable whether the same entity owns both a portion of Spring Creek Park and the Brooklyn Developmental Center, an institution of the New York State Office of Mental Retardation and Developmental Disabilities (10/10/07 Tr. 130).

Neither Exhibit 110 (ownership information) nor Exhibit 105 indicate the name and address of the owner of the area containing the southern part of the 26<sup>th</sup> Ward auxiliary water pollution control plant.

CHA may submit documentation in support of its statements about the Gateway project and about ownership of lots contiguous to the facility, with such documents to be submitted on or before August 15, 2008. The Applicant is to check its maps and provide a corrected map on or before August 29, 2008.

Baykeeper argued that Exhibits 105 through 111 fail to identify other features that are required to be delineated on site plan maps for compost facilities, including water supply wells, surface water bodies, composting staging and storage areas, directions of site run-on and run-off, ditches, drainage swales and run-off controls. Baykeeper acknowledged that some of these features may not exist and therefore would not be included, but stated that other features do exist but are not described in the terms used in former section 360-5.4(a)(2), making the maps ambiguous (Baykeeper comments, at 10). Baykeeper also stated that surface waters are not delineated as such and that there is

inconsistent information among the Applicant's exhibits with regard to water bodies (Id., at 3 - 4).

The Applicant responded that water bodies are indeed labeled, that Exhibit 109 (Figure 2-8, Land Use) "is an accurate representation of the land uses drawn from [city agency] data" and the fact that land uses overlap a creek does not contradict the delineation of surface water bodies on other maps. The Applicant identified features that are not depicted because they do not exist within the mapped areas, stated that the "compost staging and storage area" was delineated more specifically than is required in part 360, and stated that a detailed description of the drainage plan is provided in section 4.1.8.1 of the engineering report (June 4, 2008 letter, at 3, 5 - 6).

CHA stated that Exhibits 105 and 111 depict finished product screening and storage as occurring at a different location from where these functions actually occurred when the compost facility was in operation and during compost give-back events (CHA comments, at 13). CHA also stated that on-site roads are not identified accurately or completely. The Applicant did not respond to these comments.

With three exceptions, the intervenors' comments discussed in the three paragraphs above do not require changes or additions to the maps. The exceptions are: (1) Ralph Creek, which is within the mapped areas and was identified on the land use map in Exhibit 4, must be labeled; (2) Exhibit 109 (land use) should be changed so that the land use symbols don't obscure the water bodies; and (3) any gates that exist or would be installed in the facility's fence(s) must be identified on all exhibits that constitute the site plan, and any gates that might be used as vehicle entrances to the facility must be labeled as such.

"Compost staging and storage areas" are not identified in these words on Exhibits 105 and 111, but the areas in which the compost operations would take place are identified by their function, such as active compost pads and finished product screening and storage area. Most of the facility, with the exception of things such as the berms and recharge basins, constitutes the "compost staging and storage areas."

Although the finished product screening and storage may be depicted at a different location on Exhibits 105 and 111 from where these functions have occurred in the past, the two exhibits show where the Applicant proposes to conduct these operations if a permit is issued. Nothing prevents the Applicant from

proposing a location for these functions that differs from where they occurred in the past.

The composting and mulching pads are covered with asphalt millings and could function as on-site roads in the sense that yard waste delivery trucks and other vehicles could drive on them during facility operations. The January 2006 noise study considered scenarios in which trucks would queue along the north edge of active compost pad #2, entering at the gates near the corner of Sheridan and Flatlands Avenues. These gates are shown on Exhibit 105 but not on Exhibit 111. Both of those exhibits show only one "facility entrance," north of the security area, and do not show an entrance at Sheridan and Flatlands.

Other than Ralph Creek, the water bodies in the maps' areas are labeled on at least one of the exhibits and the edge of the water is shown by a "stream" symbol on Exhibit 105.

Former 6 NYCRR 360-5.4(a)(2)(vii) required, among other things, that a site plan map show existing and proposed elevation contours. Exhibit 105 shows contour lines, which apparently are the existing contour lines. Because the compost facility has already been constructed, it is possible that the existing contour lines and the proposed contour lines are the same. If so, the Applicant will need to confirm this interpretation. If not, the existing and proposed contour lines will need to be depicted in any areas where the proposed contours would differ from the existing contours.

Former section 360-5.4(a)(2)(vii) also required that site plan maps show the direction of prevailing winds. Exhibits 105 and 111 show an arrow that points approximately from northwest to southeast. The arrow on Exhibit 105 is labeled "prevailing wind, north west (see 2002 facility engineering report)." The arrow on Exhibit 111 is labeled "prevailing wind direction = NW" with a footnote that states, "Based on National Oceanic and Atmospheric Administration, National Climatic Data Center data from July 1, 1996 through June 30, 2001 for winds of 10 mph or greater as measured at JFK airport." Both Baykeeper and CHA objected to inclusion of this information on the exhibits. Baykeeper argued that the testimony and exhibits concerning the application's statements about wind direction demonstrated that the Applicant's conclusions on this issue were wholly unreliable. CHA argued that it is inappropriate for any statement regarding prevailing winds to be included in the Applicant's recent maps, that no basis had been shown for the wind information, and that CHA had not had the opportunity to cross examine the person(s) making the

allegations about wind direction that are shown on the recent maps.

The prevailing wind direction, as shown on the recent maps, represents the Applicant's position on this subject and the map preparer has cited the basis upon which the prevailing wind direction was depicted. This is not, however, the only information in the record on this subject. Exhibits were presented by Baykeeper to contest the Applicant's position about prevailing wind direction. Both Baykeeper and CHA cross-examined the Applicant's witness Phillip Simmons about the engineering report's information on wind direction and the data upon which that was based (see various portions of June 28 and July 11, 2007 transcripts). The testimony and exhibits concerning wind direction, and the parties' arguments about this, will be evaluated in preparing the hearing report. If the Applicant submits any assertion by an additional witness that the wind direction depicted on the recent maps is accurate, that witness's assertion could be tested through cross-examination as well, but the statements in the 2002 engineering report and the choice of what data to use in preparing that report have already been the subject of cross-examination. I will not be requiring the Applicant to change or delete the prevailing wind arrow and related notes as part of the additional submissions required by this ruling. The findings of the hearing report, however, may or may not differ from the Applicant's position on this subject which is relevant to at least two issues being adjudicated.

Exhibit 105 includes notes stating "dense tree cover," "dense brush cover," and "Phragmites" at various places on the compost facility berms and in the area south of the facility. The Applicant has not indicated the basis for these annotations. CHA objected to them and asserted that at least one of these notes is inaccurate (CHA comments, at 13 - 16). The note regarding "dense tree cover," on Drawing 4 and the unnumbered drawing of Exhibit 105, appears to refer to one or two rows of white pines planted on a berm that is about 45 feet wide. These notes will need to be removed unless the Applicant intends to present testimony concerning these notes.

Exhibit 111 (Figure 4-2, General Site Layout) does not contain any scale. The earlier version of this figure, found in Exhibit 4, also did not contain a scale, an omission noted in the supplemental issues ruling (at 14). While dimensions on Exhibit 111 could probably be calculated by comparison with Exhibit 105, a scale is a basic part of drawings such as this one. The scale must be noted or depicted on any revised version of Exhibit 111.

Revised service list

Enclosed please find a revised service list for use in mailing and e-mailing correspondence in this matter. The list was revised to include the names of the new legal interns identified in Mr. Estrin's June 4, 2008 e-mail message.

/s/

Albany, New York  
July 11, 2008

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Susan J. DuBois  
Administrative Law Judge

Enclosures: Exhibit 112 and service list

To: Ramin Pejan, Esq.  
John Nehila, Esq.  
Concerned Homeowners Association  
Ronald J. Dillon  
Daniel E. Estrin, Esq.  
(By e-mail and paper mail)

cc: Drew Bostrom  
Michael Paulsen  
Marc Schwartz  
(by e-mail)

(enclosed exhibit not included with e-mail copies)