STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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 6, 2007

DEC Application No. 2-6105-00666/00001

Background

The above 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 in 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. The New York City Department of Sanitation ("Applicant") submitted a New York City Waterfront Revitalization Program consistency assessment form as part of its application materials.

The draft permit, prepared by staff of the Department of Environmental Conservation ("DEC Staff") contains a general condition stating: "In accordance with Title 19, Part 600.4(c) of the New York Code of Rules and Regulations, the Department hereby certifies that the action described and approved in this permit, if located within the Coastal Zone, is consistent to the maximum extent practicable with the policies and purposes of the New York City Waterfront Revitalization Program" (General Condition 15).

New York/New Jersey Baykeeper ("Baykeeper"), an intervenor party in this hearing, argued that the Applicant's consistency assessment form contained erroneous answers and that the project is not consistent with the New York City LWRP. Baykeeper proposed that this be an issue for adjudication in the hearing.

The August 30, 2004 issues ruling concluded that some of the Applicant's answers to questions on the coastal assessment form were incorrect and that a substantive and significant issue existed for adjudication regarding the project's consistency with the New York City Waterfront Revitalization Program. The ruling

also allowed the Applicant to correct its consistency assessment form (issues ruling, at 32 - 37).

The Applicant submitted a revised form on September 10, 2004. I considered the revised form when preparing the February 8, 2005 supplemental ruling on issues. In the supplemental ruling, I stated that the original issues ruling had taken into account the answers the Applicant should have provided to certain questions on the form; notwithstanding the Applicant's revision of its form, an issue remained concerning whether the project is consistent with the LWRP (supplemental ruling, at 5 - 7). Both the Applicant and DEC Staff appealed this ruling.

The June 14, 2006 interim decision of the Executive Deputy Commissioner discussed the process by which the Department of Environmental Conservation ("DEC" or "Department") is to conduct state review of projects for consistency with approved local waterfront revitalization plans. A state agency is required to make its own consistency determination, in addition to the local agency's review, for actions that are located within the boundaries of an approved LWRP and that have received a negative declaration under the State Environmental Quality Review Act ("SEQRA," Environmental Conservation Law ("ECL") article 8). The interim decision stated that nothing in Executive Law article 42 or the Department of State's regulations requires or otherwise provides for a hearing as part of coastal consistency review by a State agency. The interim decision concluded that the Department's state consistency certification should be reviewed in hearings in the same manner as negative declarations under SEQRA (see, 6 NYCRR 624.4(c)(6)(i)(a)).

The interim decision reversed the ruling that there was an adjudicable issue, directed DEC Staff to complete a State coastal assessment form ("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.

On September 20, 2006, DEC Staff submitted a CAF, prepared on the New York State Department of State's form that differs somewhat from the New York City consistency assessment form. The last paragraph of the supplemental statement that accompanied the CAF contains DEC Staff's 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. In a memorandum dated September 27, 2006, I asked DEC Staff five questions about the CAF and certification, three of

which relate to a draft permit condition that would require the Applicant to improve 20 acres of upland parkland as close as practicable to the project site. In the CAF, DEC Staff had stated this parkland improvement work (the "remediation" or "remediation site") would offset the adverse effects of the project. DEC Staff replied in a letter dated October 6, 2006.

As stated in my September 27, 2006 memorandum, the other parties to the hearing had until October 12, 2006 to comment on the CAF and certification. Concerned Homeowners Association and Ronald J. Dillon (collectively, "CHA") had already submitted comments dated September 25, 2006. Among numerous criticisms of the CAF and certification, CHA stated that the 20-acre remediation or offset project is speculative, that its effectiveness has not been demonstrated, and that no appropriate acreage is identified or available. Baykeeper did not submit comments, but on November 27, 2006 Baykeeper forwarded a copy of an October 31, 2006 Daily News article concerning the Applicant's compost facility located in Soundview Park in the Bronx. The article states the Applicant had not submitted to DEC a park improvement plan, although such a plan is required by the permit for the Soundview facility. CHA's comments also had made similar assertions about the Soundview Park facility.

Discussion

The CAF contains a series of yes-no questions regarding effects and impacts of the project under review. DEC Staff answered "yes" to the questions whether the proposed activity will involve or result in: physical alteration of five acres or more of land located in the coastal area but elsewhere than land along the shoreline, land under water or coastal waters (section C.3.b); and development within a designated flood or erosion hazard area (section C.3.h).[1] DEC Staff also answered "yes" to the question whether the proposed action will be located in or have a significant effect upon an area included in an approved LWRP (section C.4).

DEC Staff answered "no" to the other questions, including whether the proposed activity would involve or result in: "expansion of existing public services of [sic] infrastructure in

[1] On October 6, 2006, DEC Staff explained that this question was answered "yes" because the Applicant's December 2002 Engineering Report for the composting facility described a portion of the site as being within the 500-year floodplain.

undeveloped or low density areas of the coastal area" (section C.3.c); and reduction of existing or potential public access to or along the shore (section C.3.f). DEC Staff also answered "no" to the question whether the proposed activity will have a significant effect on existing or potential public recreation opportunities (section C.2.f). DEC Staff answered "no" to the question whether the proposed activity will be located in, or contiguous to, or have a significant effect upon significant fish or wildlife habitats (section C.1.a).[2]

The CAF included a supplemental statement that began by stating:

> "The project itself will have various adverse effects regarding natural resources (e.g., wildlife habitat, open space, recreational resources, visual impact, and aesthetics). However, these impacts would be adequately offset by the Applicant's proposed 20-acre remediation, which will include soil rehabilitation and the establishment of native plants. This remediation will occur as close as practicable to the Spring Creek composting facility site and will consist of at least 15 contiguous acres."

Much of the remainder of the CAF's supplemental statement presents discussion of the remediation site's characteristics in comparison with those at the project site prior to construction of the composting facility. This discussion concerns one remediation site, although it is unclear whether all 20 acres would be at one site.

Special condition 35 of the draft permit would require the Applicant, within 90 days following commencement of the work authorized by the permit, to submit "a proposal for the soil and habitat improvement of 20 acres of upland parkland as close to the subject facility as practicable. At least 15 acres of such improvement shall be contiguous." Special condition 35 goes on to list categories of information that would need to be included in the proposal, and identifies deadlines for submission of certain notices of intent and for completion of the work.

In 2004, the issues ruling noted that the location of the soil and habitat improvements had not been identified and that it

---

[2] On October 6, 2006, DEC Staff provided a map that shows both the facility boundary and the boundary of a significant coastal fish and wildlife habitat located nearby. The facility is not within the habitat boundary.

was questionable whether 15 acres of upland parkland would be available for this work within Spring Creek Park itself because a large part of the remaining park is tidal wetland (issues ruling, at 15). To date, neither the Applicant nor DEC Staff have identified the location or locations at which this soil and habitat improvement would take place. In response to my September 27, 2006 question about where this work would occur, DEC Staff replied that it had discussed possible locations with the New York City Department of Parks and Recreation ("NYC Parks") Staff. DEC Staff also stated, however, that this discussion was preliminary and no specific location has been determined for the Applicant's remediation project. No party (nor NY Parks) has identified for the record the locations that were the subject of these preliminary discussions.

I also asked DEC Staff whether the Applicant had submitted a description of the remediation work, such as existing conditions at the remediation site(s), soil preparation, species to be planted, and similar information. DEC Staff's October 6, 2006 reply stated that DEC Staff had engaged NYC Parks Staff in general discussions about some of these subjects, but that no City agency has submitted a description of the remedial work or otherwise advised DEC "of final determinations regarding the subjects generally discussed with NYC Parks." DEC Staff's reply noted that while these discussions have been preliminary and general, Special Condition 35 contains specific requirements.

Although the site(s) of the soil and habitat improvement work are unknown, and the remedial work to be done has not been identified, DEC Staff relies heavily on this work in determining that the adverse effects of the compost facility will be offset by the 20-acre remediation. The CAF asserts that the remediation site, compared with the compost facility site, would have improved wildlife habitat, open space, recreational, visual and aesthetic qualities. The CAF even asserts that, "The remediation project would result in the replacement of a landscape dominated by a small number of non-native species (such as Giant Reed, Mugwort, and Ragweed) with a landscape having a variety of native plants, thereby increasing the remediation site's current open space, recreational, visual and aesthetic value."

There is no basis in the record, and apparently no basis in information provided to DEC Staff by the Applicant or NYC Parks, for the CAF's statements about how the adverse effects of the composting facility on coastal policies would be offset by the remedial work. There is also no basis for concluding that the remedial work would occur in or even near the coastal zone, as the draft permit only specifies that this work be done on "upland

parkland as close to the subject facility as practicable." As it stands now, the adverse impacts could occur in one community within the coastal zone and the remediation project could occur in a separate coastal community, or outside the coastal zone altogether.

If the location (or locations) of the remedial work are unknown, there is no rational basis for drawing conclusions about how the existing vegetation at those locations would be improved, nor for drawing similar conclusions about a remediation site's current open space value, recreational value, or visual and aesthetic conditions. The "specific requirements" in Special Condition 35 do not identify what physical actions would be taken in conducting the remedial work (for example, planting red maples of a certain size at particular locations) but instead identify categories of information that the remedial proposal will need to include when it is submitted at some time following permit issuance.

The supplemental statement attached with the CAF stated that, in the absence of the composting facility, the facility's site would continue to be subject to illegal dumping. The statement assumed that the remediation site(s) would not be affected by illegal dumping. The latter assumption cannot be evaluated if the location of the remediation site(s) is unknown. The supplemental statement also does not explain why the Applicant would be unable to clean up and prevent illegal dumping at the compost facility site by other means than leaving the compost facility in place. The supplemental statement's assertion that establishing native plants on the remediation site would facilitate the spread of such plants outside the remediation site itself cannot be evaluated without knowing the location of the remediation site and the general land uses in the area surrounding it.

It is unclear whether a site even exists on which the mitigation work, and environmental improvements, described in the CAF could effectively be accomplished. No party has identified a site or sites, despite this being in question. In as constricted an area as New York City, it cannot be assumed that there is a site available that would meet the description in Special Condition 35 and that, with soil conditioning and planting of vegetation, would provide the environmental amenities described in the CAF addendum. These environmental improvements were relied on by DEC Staff as mitigation in arriving at its determination of consistency.

The offset of impacts, that underlies the CAF and the certification of consistency with the LWRP, is conceptually similar to mitigation of adverse impacts under SEQRA, and to mitigation of the loss of wetland values under the Tidal Wetlands Act (ECL article 25) and the Freshwater Wetlands Act (ECL article 24). Similar concepts have been applied in reviewing an application for a permit for dredging and filling in a river under ECL Article 15 and 6 NYCRR part 608.[3] An additional area of DEC's authority that involves work to improve soil and habitat in response to regulated activities is the Mined Land Reclamation Law (ECL article 23, title 27; see also, 6 NYCRR parts 420 through 422).

As reflected in prior DEC decisions, applications for permits where mitigation or reclamation is involved commonly present detailed information about the location and nature of this work.[4] This information is reviewed prior to a determination of significance under SEQRA and prior to issuance of a permit. In the present case, information of this kind is not in the record or available. In contrast to situations where the Department has approved a draft permit that requires that certain information about mitigation be submitted in the future,[5] it is not at all clear that the intended mitigation would be feasible here. Even if 20 acres satisfying the description in Special Condition 35 are available, the environmental improvements assumed in the CAF may not be feasible at that

---

[3] Matter of St. Lawrence Cement Company, LLC, Second Interim Decision of the Commissioner [September 8, 2004], at 59 - 78.

[4] See, for example, id.; Matter of Hylan-Seaver Mall, Decision of the Commissioner [Sept. 29, 1986]; Matter of John Herbert, Decision of the Commissioner [December 10, 1986]; Matter of Woodrose Associates, Decision of the Commissioner [July 1, 1987]; Matter of Herbert Ellis, Ruling on Issues [March 3, 1998]; Matter of Peckham Materials, Decision of the Commissioner [January 28, 1994]; Matter of Jointa-Galusha LLC, Interim Decision of the Commissioner [May 7, 2002]; Matter of Seneca Meadows, Inc., ALJ Summary Report and Order of Disposition [July 10, 2006].

[5] See, for example, Matter of Oneida-Herkimer Solid Waste Management Authority, Interim Decision of the Commissioner [April 2, 2002], at 10 - 12; Matter of Ungermann Excavating, Inc., Rulings of the ALJ [May 18, 2000].

location. Further, it is unknown whether the mitigation would benefit the coastal zone, as opposed to an inland area.

In the present case, the absence of specific information about the mitigation site(s) and mitigation work precludes a rational determination that the proposed offset will mitigate the impacts that otherwise would hinder achievement of the policies and purposes of the LWRP.

The Interim Decision states that the Department's consistency certification should be reviewed in a hearing in the same manner as a negative declaration under SEQRA (see, 6 NYCRR 624.4(c)(6)(i)(a); Interim Decision, at 24). The coastal zone review process is similar to SEQRA, both procedurally and conceptually. In reviewing a negative declaration, one considers whether the agency "identified the relevant areas of environmental concern, took a 'hard look' at them [citations omitted] and made a 'reasoned elaboration' of the basis for its determination" (H.O.M.E.S. v Urban Development Corp., 69 AD2d 222, 232, 418 NYS2d 827, 832 [4th Dept 1979]); see, 6 NYCRR 617.7(b)). The Interim Decision states that the certification should include a brief statement of the reasons supporting it, "similar to the reasoned elaboration that would accompany a negative declaration under SEQRA" (Interim Decision, at 26). Such an elaboration is based upon having taken a "hard look" at the relevant areas of environmental concern.

In the present case, no one can take a "hard look" at the remedial project and its effectiveness in offsetting adverse effects on coastal policies because neither its location or the work to be undertaken have been identified.[6] The elaboration provided by DEC Staff appears to describe what Staff hopes to see in a remedial project, not what the Applicant has committed to doing.

The existing DEC CAF and certification are not rational. The lack of a "hard look" also constitutes an error of law. The CAF and certification are remanded to DEC Staff for a redetermination.

In conducting this redetermination, DEC Staff should obtain from the Applicant a specific identification of the location or locations at which it proposes to conduct the remedial work, and a specific description of the work that would be done including

---

[6] Compare, Matter of American Marine Rail, Ruling on Issues and Party Status [August 25, 2000], at 10 - 15.

the information identified in Special Condition 35(a) of the draft permit. DEC Staff should then prepare a revised CAF and certification. The proposed remedial work would need to be included as a condition of a revised draft permit, if it is taken into account by DEC Staff in making its revised determination of consistency with the LWRP.

If DEC Staff is unable to obtain the above information from the Applicant, or if after considering this information DEC Staff concludes that the project would substantially hinder the achievement of any policies and purposes of the LWRP, DEC Staff must determine whether the requirements under 19 NYCRR 600.4(c)(1) through (3) have been satisfied. If so, DEC Staff must provide a brief statement of its reasons supporting this conclusion. If not, DEC Staff must provide a statement that it cannot certify that the project is consistent to the maximum extent practicable with the LWRP.

Several specific things about the September 2006 CAF and certification should also be reviewed by DEC Staff in preparing a revised document. The "no" answers to section C.2.f (effect on public recreation opportunities) and possibly to section C.3.f (reduction of public access along the shore) appear to be based upon DEC Staff's position that the remediation project will offset adverse effects of the project on open space and recreational resources. The location of the remediation sites and the work to be done there would be important information in evaluating these answers. The remediation project would not, however, be a basis for a "no" answer to section C.3.c (expansion of infrastructure in undeveloped or low density areas), as this effect would occur at the Spring Creek composting site even if parkland were improved elsewhere in Spring Creek Park.

Ruling: The CAF and the consistency certification are remanded to DEC Staff for further review and revision, as described above.

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

Albany, New York
February 6, 2007

To: Persons on 9/27/06 service list