

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
625 BROADWAY  
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Application for a Solid Waste Management  
Facility Permit Pursuant to Article 27 of the  
Environmental Conservation Law for  
Construction and Operation of a Yard Waste  
Composting Facility in Spring Creek Park,  
Brooklyn, New York

- by the -

**DEPARTMENT OF SANITATION OF THE CITY OF NEW YORK,**

Applicant.

DEC Application No. 2-6105-00666/00001

INTERIM DECISION OF THE EXECUTIVE DEPUTY COMMISSIONER

June 14, 2006

INTERIM DECISION OF THE EXECUTIVE DEPUTY COMMISSIONER<sup>1</sup>

Applicant Department of Sanitation of the City of New York ("DOS") filed an application with the New York State Department of Environmental Conservation ("Department") for a solid waste management facility permit for construction and operation of a yard waste composting facility within Spring Creek Park, in southeastern Kings County (Brooklyn). Various parties to the issues conference in this Departmental permit hearing proceeding filed expedited appeals from an August 30, 2004 Ruling on Issues and Party Status ("Issues Ruling") and a February 8, 2005 Supplemental Ruling on Issues ("Supplemental Issues Ruling") by Administrative Law Judge ("ALJ") Susan J. DuBois.

For the reasons that follow, the ALJ's Issues Ruling and Supplemental Issues Ruling are modified in part and otherwise affirmed, and the matter is remanded to the ALJ for further proceedings.

Facts and Procedural Background

DOS filed an application with the Department seeking a permit pursuant to Environmental Conservation Law ("ECL") article

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<sup>1</sup> By memorandum dated February 8, 2005, then-Acting Commissioner Denise M. Sheehan delegated her decision making authority in this proceeding to then-Deputy Commissioner Lynette M. Stark. The parties were so informed by letter of the same date. On February 2, 2006, Deputy Commissioner Stark was named Executive Deputy Commissioner.

27 and part 360 ("Part 360") of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") to construct a yard waste composting facility at 12720-B Flatlands Avenue, Brooklyn, New York. The application includes requests for three variances from setback requirements specified in Part 360.

The composting facility would consist of a pad of recycled asphalt millings, surrounded by a raised berm planted with screening trees and shrubs, and fencing. The facility would also include stormwater management basins.

Work on the facility was largely complete in 2001-2002, with additional construction in 2003.<sup>2</sup> The New York City Parks Department has been composting yard waste on the site since 2001. DOS wishes to undertake composting operations at levels above the regulatory exemption threshold of 3,000 cubic yards per year (see 6 NYCRR 360-5.3[a][2]), thereby necessitating the current permit application.

DOS is the lead agency for review of the project under the State Environmental Quality Review Act (ECL article 8 ["SEQRA"]). DOS issued a negative declaration on December 17, 2002, determining that the project would not have a significant

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<sup>2</sup> Notwithstanding the circumstance that construction on the site preceded DOS's application for a Part 360 permit, Department staff exercised its prosecutorial discretion and decided to encourage DOS to pursue a permit application rather than commence enforcement proceedings.

environmental impact.

Department staff reviewed the application, determined that the project could be approved with adequate protection of the surrounding environment and with adequate requirements for mitigation of parkland loss, and prepared a draft permit (see Hearing Request, Binder 1 -- NYSDEC Departmental Record, Section 3, tab F). Staff then referred the matter to the Department's Office of Hearings and Mediation Services for permit hearing proceedings pursuant to 6 NYCRR part 624 ("Part 624").

The matter was assigned to ALJ DuBois, who conducted a legislative hearing and issues conference. The ALJ subsequently issued the August 30, 2004 Issues Ruling. In that ruling, the ALJ identified several issues for adjudication, and requested or allowed additional submissions regarding other issues proposed for adjudication. The ALJ also granted full party status to New York/New Jersey Baykeeper ("Baykeeper") and to the Concerned Homeowners Association and Mr. Ronald J. Dillon (collectively "CHA"). The ALJ granted amicus status to the Municipal Art Society of New York and New Yorkers for Parks (collectively "Amici"). She denied party status to Brooklyn Community Board No. 5.

DOS and Department staff filed separate appeals from the August 30 Issues Ruling. Replies to the DOS and Department staff appeals were filed by CHA, Baykeeper, and Amici. CHA also

filed an appeal from the August 30 Issues Ruling, to which DOS filed the only reply.

After the submission of the requested information, the ALJ issued the February 8, 2005 Supplemental Issues Ruling. In that ruling, the ALJ authorized the filing of supplemental appeals. Only CHA filed a supplemental appeal, to which no replies were submitted.

#### Discussion

##### Applicability of Composting Facility Regulations; Status as Inactive Hazardous Waste Site

CHA argues that the regulations governing composting facilities do not apply to the DOS facility as proposed. CHA contends that because the facility will accept horse manure, as well as logs, trees and stumps, the facility should be regulated as a putrescible, hazardous waste processing facility. A yard waste composting facility regulated pursuant to 6 NYCRR 360-5, however, may accept "yard waste and wastes that qualify for exemption or registration under section 360-5.3 of this Part" (6 NYCRR 360-5.7[b][1]). "Yard waste" includes "leaves, grass clippings, garden debris, tree branches, limbs and other similar materials" (6 NYCRR 360-1.2[b][185]). Logs, trees and stumps fall squarely within the definition of yard waste. Wastes that qualify for exemption include "animal manure and associated bedding material" (6 NYCRR 360-5.3[a][1]). Thus, DOS's proposed facility is properly regulated as a composting facility.

CHA also failed to establish that the facility should be regulated as a hazardous waste facility. CHA did not identify any hazardous waste that would be accepted at the facility (see 6 NYCRR part 371), and nothing in DOS's application indicates that it will accept such wastes. In addition, CHA failed to raise an adjudicable issue concerning the site's status on hazardous waste site lists and whether DOS should be required to remediate the site. Accordingly, I agree with and adopt the ALJ's analysis of this issue (see Issues Ruling, at 40-41).

#### SEQRA Issues

During its permit application review, Department staff requested lead agency status for the SEQRA review of the application in a July 31, 2002 notice of incomplete application to DOS. On December 3, 2002, DOS notified the Department that it intended to serve as the lead agency and, on December 5, 2002, Department staff acknowledged DOS's lead agency designation.

At the issues conference, Baykeeper and CHA challenged the designation of DOS as lead agency for the SEQRA review of the application. In her Issues Ruling, however, ALJ DuBois held that issues related to SEQRA would not be adjudicated in this proceeding (see Issues Ruling, at 10). The ALJ noted that the Department is not co-lead agency for purposes of SEQRA review, and no basis existed for transferring lead agency responsibility from DOS to the Department, thereby re-establishing the

Department as lead agency (see 6 NYCRR 617.6[b][6]). The ALJ also noted that DOS, as lead agency, issued a negative declaration. Under these circumstances, Part 624 regulations expressly provide that where a lead agency, other than the Department, has determined that the proposed action does not require preparation of a draft environmental impact statement ("DEIS"), the ALJ will not entertain any issues related to SEQRA (see 6 NYCRR 624.4[c][6][ii][a]).

On appeal, CHA seeks establishment of the Department either as a co-lead agency, or "re-establishment" of the Department as lead agency, for purposes of SEQRA review. In support of its argument that the Department should be co-lead agency, CHA cites to a March 27, 1992 stipulation between the Department and DOS executed in Matter of City of New York v New York State Dept. of Env'tl. Conservation (Supreme Court, Albany County, Index No. 7218/91 ["Stipulation"]),<sup>3</sup> in which the Department and DOS agreed to act as co-lead agencies and conduct coordinated SEQRA review for all solid waste transfer stations permit applications, and recyclables handling and recovery facilities permit applications.

By its express terms, the 1992 stipulation applies to permit applications for "solid waste transfer stations governed

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<sup>3</sup> The 1992 Stipulation is attached as Exhibit A to Baykeeper's Supplement to Petition for Full Party Status and Adjudicatory Hearing (dated 5-11-04).

by [6 NYCRR] subpart 360-11 and recyclables handling and recovery facilities governed by subpart 360-12" (Stipulation, 3). At the time the stipulation was executed, composting facilities such as the one proposed by DOS, were governed, as they are now, by 6 NYCRR subpart 360-5. Thus, by its express terms, the 1992 stipulation does not apply to facilities such as the one under review in these proceedings.

CHA fails to raise any basis for transferring lead agency responsibility from DOS to the Department in this proceeding. Although the Department requested lead agency status in its July 31, 2002 notice of incomplete application, the Department was never established as lead agency. Instead, DOS followed proper procedures for establishing itself as lead agency before the determination of significance was made (see 6 NYCRR 617.6[b]).

Accordingly, because DOS, as SEQRA lead agency, determined that the proposed action does not require the preparation of a DEIS, issues relating to SEQRA are not reviewable in this Part 624 permit hearing proceeding (see 6 NYCRR 624.4[c][6][ii][a]). Thus, the remaining SEQRA issues CHA raises on its appeal are not adjudicable.

#### Compliance with Local Zoning

At the issues conference, Amici, Baykeeper and CHA argued that DOS's proposed composting facility would violate

certain local zoning laws. On its appeal, CHA challenges the ALJ's ruling that the project's compliance with the New York City zoning law and City Charter is not an issue for adjudication (see Issues Ruling, at 19). Among other arguments, CHA cites 6 NYCRR 360-1.11(a)(1) as requiring the Department to consider whether the activity proposed will comply with local zoning ordinances.

I affirm the ALJ's rulings on this issue (see Issues Ruling, at 18-19). It is settled law that the Department lacks the authority under the ECL to adjudicate legal issues concerning compliance with local government zoning, and any attempt to do so would be an arrogation of the Department's jurisdiction (see Matter of Town of Poughkeepsie v Flacke, 84 AD2d 1, 5-6 [2d Dept 1981], lv denied 57 NY2d 602 [1982]; see also Matter of Hingston v New York State Dept. of Envtl. Conservation, 202 AD2d 877, 878-879 [3d Dept], lv denied 84 NY2d 809 [1994]). Instead, issues concerning consistency with local zoning must be decided by the local agency with appropriate jurisdiction, subject to judicial review if necessary (see Matter of 4-C's Develop. Corp., Interim Decision of the Commissioner, May 1, 1996, at 3).

CHA is correct that 6 NYCRR 360-1.11(a)(1) requires that the provisions of each solid waste management facility permit issued pursuant to the Department's regulations "assure, to the extent practicable, that the permitted activity . . . will comply with . . . other applicable laws and regulations," among

other requirements. That obligation is met with respect to local zoning laws and regulations, however, by inclusion of General Condition 5 in the draft permit, which states that DOS "is responsible for obtaining any other permits, approvals, lands, easements, and rights-of-way that may be required for the subject work," and "must comply with all applicable local, State, and federal statutory, regulatory, and legal requirements" (Draft Permit, at 2; see Matter of 4-C's Develop. Corp., at 3). Given the Department's lack of jurisdiction over local land use issues, any further requirement would be impracticable.

#### Alienation of Parkland

Although the ALJ correctly concluded that the proposed project's consistency with local zoning is not an issue for adjudication, she nevertheless concluded that the issue whether the siting of a compost facility at Spring Creek Park constitutes an improper alienation of parkland is adjudicable (see Issues Ruling, at 17). On their appeals, both DOS and Department staff argue that the ALJ erred in ruling that alienation of parkland is an issue adjudicable in Departmental permit hearing proceedings. DOS and Department staff are correct.

As the ALJ correctly noted, the management of parks within the City of New York is a local action. The New York City Parks Commissioner is vested by law with broad powers for the management and improvement of the City's parks (see New York City

Charter § 533; see also 795 Fifth Avenue Corp. v City of New York, 15 NY2d 221, 225 [1965]). Thus, the determination whether a certain use is a proper park use lies, in the first instance, with the City Parks Commissioner (see 795 Fifth Ave. Corp., 15 NY2d at 225). In this case, the City Parks Commissioner, in the exercise of that legal authority, made the initial determination that the proposed composting facility constitutes an appropriate use for Spring Creek Park in the 2001 memorandum of understanding ("MOU") that the City Parks Commissioner executed with DOS (see Memorandum of Understanding, Aug. 27, 2001, Engineering Report, Section 7, Attachment 1).

As the ALJ also correctly noted, the appropriate venue for challenging the City Parks Commissioner's local land use determinations for city parks is the courts, which have the final say over whether a particular land use is an alienation of parkland requiring legislative approval (see, e.g., Friends of Van Cortlandt Park v City of New York, 95 NY2d 623, 630 [2001], and cases cited therein). Where I disagree with the ALJ is in concluding that the Department has the responsibility for assuring that the parties bring the issue to the courts. While it is true that the Department is the "natural resources agency of the State of New York" (Issues Ruling, at 13), nothing in the ECL or other statutes administered by the Department vests the agency with jurisdiction over municipal parks. The ECL and other

statutes do not authorize the Department to review the local land use determinations by the City Parks Commissioner. Nor is the Department charged with an enforcement role with respect to local land use issue in city parks. As with any other local land use issue, challenges to the City Parks Commissioner's local land use determination must be raised by the appropriate parties before the appropriate municipal authorities and, ultimately, the courts, and it is not the Department's responsibility to see to it that the parties do so.<sup>4</sup> Rather, the Department's role in this proceeding is limited to reviewing whether the proposed land use authorized by the appropriate local authority satisfies State statutory and regulatory standards for issuance of a permit administered by the Department -- in this case a solid waste management permit for a composting facility.

Nothing in the two administrative cases cited by the ALJ -- Matter of Matthews (Decision of the Commissioner, May 20, 2004) and Matter of Kroft (Decision of the Commissioner, July 8, 2002) -- compel the conclusion that alienation of parkland is adjudicable in this context. Both of those proceedings involved

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<sup>4</sup> It has been a matter of long standing Department policy to conduct regulatory review of permit applications, even when local laws appear to prohibit or substantially limit a project (see Memorandum from George Danskin to Regional Permit Administrators [1-8-90]). If all statutory and regulatory requirements administered by the Department are met, the Department will issue a permit for the facility and allow the permittee to address matters of local law compliance with the locality.

approvals that fell entirely within the Department's statutory jurisdiction, namely tidal wetlands permits. In Matthews, the applicant challenged the Department's denial of his tidal wetland permit on the ground that such denial impermissibly limited his common law riparian rights. In such a context, it was appropriate for the Department to consider whether the denial of a permit solely within the Department's jurisdiction had the effect so claimed. Similarly, in Kroft, the impact of a proposed project on public access rights was appropriately considered during review of tidal wetlands permit application. In this case, in contrast, the local land use determination challenged by intervenors falls outside the Department's jurisdiction. As with any local land use issue, the Department satisfies its obligation of assuring compliance with other laws and regulations outside the Department's jurisdiction by including a permit condition specifying the permittee's obligation to comply with such law and regulations.

Because intervenors' challenge to the Parks Commissioner's determination to allow composting at Spring Creek Park is a local land use determination outside the Department's jurisdiction and not subject to challenge in a Departmental permit hearing proceeding, the determination to adjudicate the issue of alienation of parkland is reversed.

### Odor, Litter, Dust and Vector Control

In the Issues Ruling, the ALJ held that issues proposed by intervenors concerning odor, litter, dust and vector control impacts are adjudicable (see Issues Ruling, at 25). The ALJ concluded that the scope of these issues included the impacts specified and the related control measures at the facility, both during present operations and proposed operations, and related impacts during DOS's operation of the composting facility formerly located at Canarsie Park, also located in southern Kings County.

On appeal, both DOS and Department staff argued that the ALJ erred in holding that adjudicable issues exist. DOS and Department staff contend that the draft permit and the facility Engineering Report, which is incorporated by reference into the draft permit, contain conditions that fully address these issues. Moreover, they assert that intervenors failed to offer expert testimony that challenges the adequacy of the draft permit conditions or the Engineering Report and, accordingly, their offers of proof are insufficient.

I conclude the ALJ properly applied the substantive and significant test to the factual dispute whether the draft permit measures will adequately control odor, litter, dust and vectors at the facility (see Matter of Amenia Sand and Gravel, Inc., Deputy Commissioner's Second Interim Decision, Nov. 22, 2000, at

4; Matter of Hyland Facility Assocs., Commissioner's [Third] Interim Decision, Aug. 20, 1992, at 2). Thus, I affirm the ruling but with the following clarification.

The ALJ is correct that a proposed intervenor need not offer expert testimony to raise an adjudicable issue. However, where only lay testimony is offered, lay witnesses are competent to testify only concerning the adequacy and effectiveness of control measures already in place, either at the facility at issue or at another facility operated in a manner substantially similar to the subject facility. As noted above, the facility has been used for composting yard wastes. Review of the issues conference record reveals that some of the measures proposed in the draft permit to control odors, litter, dust and vectors have already been implemented at the facility. For example, the record reveals that the facility is already surrounded by a fence to prevent blowing litter. Intervenors' proposed testimony by lay witnesses concerning litter problems during the composting operations that have occurred on the site raises an adjudicable issue requiring further inquiry concerning the fence's effectiveness in preventing litter.

Although intervenors' offer of lay testimony is sufficient to raise adjudicable issues concerning the potential impacts of DOS's operations, the relevancy of such testimony will need to be examined during hearings. To the extent intervenors

can establish that the impacts they seek to prove are caused by the alleged failure of current control measures at the facility, and that those current controls are substantially similar to the control measures imposed in the draft permit, such evidence would be relevant and competent on the issue of the adequacy of the control measures imposed in the draft permit. However, where the draft permit conditions impose control measures that go beyond those currently implemented at the facility, intervenors' lay testimony will be insufficient to challenge those conditions. For that, intervenors would need experts qualified to testify concerning the effectiveness of such control measures. Intervenors, however, have not offered to provide such expert testimony.

Similarly, with respect to DOS's operation of the Canarsie facility, lay evidence concerning the effectiveness of the odor control measures implemented at that facility is relevant in this proceeding only to the extent those odor control measures were substantially similar to the odor control measures proposed in the draft permit. To the extent the control measures proposed in the draft permit differ from the control measures implemented at the Canarsie facility, the lay testimony offered by intervenors will not be relevant.

I disagree with the ALJ, however, that the sufficiency of the City's "311" line as a recourse in the event of a nuisance

condition is an adjudicable issue in this proceeding. The City's "311" line is not required by the ECL or its implementing regulations, and is not proposed as a draft permit condition. Thus, adequacy of the City's "311" line is not relevant to the permit issuance determination, whether raised by DOS in support of the permit, or by intervenors in opposition.

#### Other Record of Compliance Issues

In the August 30, 2004 issues ruling, the ALJ held that DOS's compliance history in general and CHA's allegations of "corrupt activity" were not issues for adjudication (see Issues Ruling, at 27). The ALJ reserved decision, however, on whether CHA's allegations of waste dumping by DOS trucks required adjudication until after the filing of further submissions by the parties.

CHA responded with a letter alleging illegal dumping by DOS trucks at a privately owned transfer station in Brooklyn. DOS objected to CHA's supplemental filing in its appeal brief. The ALJ subsequently adhered to her determination that no record of compliance issues required adjudication. The ALJ held, however, that evidence regarding the DOS's alleged waste delivery activities at the private facility were nonetheless admissible in the context of the alleged odor, litter, dust, and vector impacts (see Supplemental Issues Ruling, at 3).

As noted above, DOS objects to adjudication of issues

concerning the alleged waste dumping at the third-party owned transfer station. CHA argues in its appeal brief and supplemental appeal brief that the ALJ erred in not joining for adjudication the remaining record of compliance issues it raised.

I disagree with the ALJ that evidence concerning the alleged illegal dumping at a third-party owned facility is relevant to this proceeding. Even assuming violations at the third-party owned facility are established, CHA's offer of proof fails to allege control by DOS over that privately-owned facility sufficient to hold DOS liable for those violations. Moreover, CHA's allegations concerning DOS's exercise of prosecutorial discretion in response to complaints about the facilities are insufficient to raise questions concerning DOS's ability to operate its own yard waste composting facility in compliance with applicable statutory and regulatory requirements. The Department's enforcement procedures are also irrelevant to the issue of DOS's compliance history. Thus, I reverse the ALJ's determination that evidence concerning the operation of the privately-owned facility is relevant to the issues of odor, litter, dust, and vector impacts.

With respect to the remaining record of compliance issues sought to be raised by CHA, for the reasons stated by the ALJ, I affirm that no other record of compliance issues require adjudication.

## Noise

In the August 30, 2004 issues ruling, the ALJ, reserving decision on whether adjudicable issues existed concerning noise, requested that DOS supply certain information and noise analyses for review. DOS supplied the requested information and, after comment by the parties and review by the ALJ, the ALJ held that adjudicable issues were presented concerning the project's compliance with 6 NYCRR 360-1.14(p) noise standard for solid waste management facilities (see ALJ Supplemental Ruling, at 7-16).

In its appeal filed before the ALJ's supplemental ruling, DOS argued that its project meets regulatory noise standards. Although given an opportunity to do so, DOS did not file a supplemental brief on appeal specifically challenging the ALJ's supplemental ruling.

I conclude that the ALJ properly applied the substantive and significant standard in determining that noise issues are adjudicable. As the ALJ noted, intervenors identified deficiencies and omissions in DOS's noise analysis that reasonably require further inquiry. Accordingly, I affirm the ALJ's ruling that issues concerning DOS's compliance with the 6 NYCRR 360-1.14(p) noise standards for solid waste management facilities are adjudicable.

In its supplemental appeal brief, CHA argues that the

noise standard for rural areas be applied. I conclude, however, that the ALJ correctly applied the urban standard to this facility (see Supplemental Issues Ruling, at 9). CHA's conclusory submissions are insufficient to raise an issue concerning whether the rural standard should be applied.

Waterfront Revitalization Program Consistency

Where a proposed project is located within the coastal area, and a local waterfront revitalization program ("LWRP") for the area has been approved by the New York State Secretary of State, the Department is required to review the project's consistency with the purposes and policies of the approved LWRP. Specifically, where, as here, a determination is made pursuant to SEQRA that an action will not have a significant effect on the environment, and where the action is within the boundaries of an approved LWRP and is identified by the New York Secretary of State pursuant to Executive Law § 916(1)(a) as an action requiring consistency review, a State agency such as the Department must file a certification with the Secretary that the action will not substantially hinder the achievement of any of the policies and purposes of the applicable approved LWRP and, whenever practicable, will advance one or more of such policies (see 19 NYCRR 600.4[c]). If the action will substantially hinder the achievement of any policy or purpose of the applicable approved LWRP, the State agency must instead certify that (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 (see id.).

The certification filed with the Secretary of State must include, among other things, a brief statement of the reasons supporting certification (see 19 NYCRR 600.2[g][3]).<sup>5</sup> The Department's obligation to conduct consistency review and file a certification with the Secretary of State is in addition to, and separate from, consistency review conducted by any other local or State agency.

The ALJ noted that the approved LWRP applicable to DOS's project is New York City's September 2002 "New Waterfront Revitalization Program" ("NWRP") (see Issues Ruling, at 33-34). The ALJ also noted that ordinarily the Secretary of State identifies State-agency actions subject to consistency review in Section VI of approved LWRPs (see id. at 36-37). The parties failed to provide the ALJ with Section VI of the NWRP. Nevertheless, the ALJ surmised that DOS's project was an action

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<sup>5</sup> For an example of a Coastal Consistency Certification, see the form attached to the July 20, 1992 Departmental memorandum from Lenore Kuwik entitled The UPA Permit Management System & the Coastal Management Program.

identified by the Secretary of State because of the standard condition about waterfront consistency contained in the Department's general permit, and the circumstance that Department staff made a consistency determination for this project (see id. at 37).

Based upon objections raised by Baykeeper, the ALJ held that several of the answers provided by DOS on the New York City Waterfront Revitalization Program consistency assessment form ("WRP CAF") for the project were incorrect. Taking into account the correct answers as provided during the issues conference, the ALJ concluded that substantive and significance issues existed for adjudication regarding the project's consistency with the NWRP (see id.).

The ALJ also provided DOS with the opportunity to revise its WRP CAF. DOS did so and submitted a revised WRP CAF dated September 8, 2004. In her supplemental issues ruling, the ALJ noted the corrections and revisions to the narrative portion of the WRP CAF, but adhered to her determination that adjudicable issues were raised (see Supplemental Issues Ruling, at 7).

On its appeal, DOS argues that the ALJ erred in holding that adjudicable issues are raised concerning the composting facility's consistency with the NWRP. DOS contends that, based upon the revised WRP CAF, it can be determined that the facility will enhance many of the program's goals by generating compost

for the restoration of parkland soil ecology in and around Spring Creek Park, and for the restoration of the quality and function of ecological systems within the local coastal area, including its use as a buffer for Jamaica Bay. Department staff also argues that the ALJ erred in requiring the Department to file the WRP CAF with the Department of State. CHA, in turn, argues that the ALJ should not have allowed DOS to correct the WRP CAF.

Although no party challenges the ALJ's determination that coastal consistency review is required for DOS's application, the ALJ's threshold determination is correct. Inquiry to the Department of State reveals that a Section VI was included as Appendix B to the approved NWRP (see State and Federal Actions and Programs Likely To Affect Implementation, NWRP, Appendix B).<sup>6</sup> The approved Appendix B expressly designates the issuance of a solid waste management facility permit by the Department as an action requiring consistency review (see id. at 9).

I disagree with the ALJ, however, that issues related to consistency review require adjudication. The Department of State's regulations provide that after a State agency receives an application for an approval action located in the coastal area,

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<sup>6</sup> To the extent necessary, I take official notice of the approved Appendix B of the NWRP as a duly authorized and executed administrative determination by the Department of State (see Executive Law § 913[3]; 6 NYCRR 624.9[a][6]).

the agency shall separately complete a State coastal assessment form ("State CAF")<sup>7</sup> prior to the determination of significance under SEQRA (see 19 NYCRR 600.4). When, as here, a determination of nonsignificance is made pursuant to SEQRA, "the [State] CAF is intended to assist State agencies in arriving at their decision as to certification if required by this section" (19 NYCRR 600.4). As noted above, where the action is located in the coastal area within the boundaries of an approved LWRP, certification is required, notwithstanding the determination of nonsignificance under SEQRA (see 19 NYCRR 600.4[c]).

Nothing in Executive Law article 42 or the Department of State's regulations require or otherwise provide for a public hearing as part of coastal consistency review by a State agency, absent a determination of significance under SEQRA. Thus, the Department's obligation to conduct consistency review for this application is administrative and, as with SEQRA, the Department is not required to discharge its obligation to conduct consistency review under a LWRP through the adjudicatory hearing process (see Matter of Hyland Facility Assocs., Commissioner's Third Interim Decision, Aug. 20, 1992, at 4-5).

Although I conclude that a consistency certification in the context of a negative declaration under SEQRA and an

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<sup>7</sup> The State CAF approved by the Secretary of State is separate from the WRP CAF form the City uses to conduct its own consistency review under the NWRP.

applicable LWRP is an administrative determination not subject to administrative adjudication, I nevertheless conclude that the Department's 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]). As with a determination of nonsignificance under SEQRA, sound public policy and administrative efficiency justify early review and correction in the event it is concluded that the Department's consistency certification will not survive judicial review (see Matter of Quail Ridge Assocs., Commissioner's Interim Decision, Dec. 10, 1987, at 2). Thus, the ALJ may review the Department's consistency determination to determine whether it was irrational or otherwise affected by an error of law. If it is concluded that the determination is rational and not affected by an error of law, the ALJ shall not disturb staff's certification.

If it is concluded, however, that the Department's consistency determination is irrational or otherwise affected by an error of law, the determination should be remanded to staff with instructions for a redetermination. Any redetermination of consistency should then be resubmitted to the ALJ for review. Once it is concluded that the new consistency certification satisfies the "rationality/error of law" standard, that certification is subject to no further review in the Part 624 permit hearing proceeding.

In this case, the ALJ held that the original WRP CAF contained multiple errors (see Issues Ruling, at 33-37). Those errors amounted to errors of law. Thus, the ALJ appropriately provided the opportunity for the errors to be corrected and resubmission of the revised WRP CAF for review.

With respect to a redetermination of consistency, in its brief on appeal, Department staff states that based upon the revised WRP CAF, it "reaffirms" the certification made in General Condition 15 of the draft permit. General Condition 15 and staff's reaffirmation, however, provide an insufficient basis upon which to review the rationality of staff's "redetermination." For example, it cannot be determined whether staff concluded that the action will not substantially hinder the achievement of any of the policies and purposes of the NWRP, or whether staff concluded that although one or more such policies will be substantially hindered, the requirements under 19 NYCRR 600.4(c)(1) through (3) have been satisfied. Nor does the certification include a brief statement of the reasons supporting staff's conclusions, as required by the Department of State's regulations (see 19 NYCRR 600.2[g][3]; see also Coastal Consistency Certification Form, supra).

In addition, Department staff has yet to complete a State CAF, as required by the regulations (see 19 NYCRR 600.4). Accordingly, the consistency determination is remanded to staff

for preparation of a State CAF and a revised certification. The revised certification should include the findings required by 19 NYCRR 600.4(c) and a brief statement of reasons supporting certification similar to the reasoned elaboration that would accompany a negative declaration under SEQRA. Once the State CAF and revised certification is prepared, it should be resubmitted to the ALJ and the parties to this proceeding for review.

With respect to Department staff's argument that it is not required to file a CAF with the Secretary of State, staff is correct in its reading of the regulations under the circumstances here. However, the obligation to file the CAF is separate from the Department's obligation to file the coastal consistency certification with the Secretary of State. After it is determined that the new consistency certification is rational and not affected by an error of law, Department staff must file the new certification with the Secretary of State no later than at the time of permit issuance, assuming the permit is ultimately approved.

#### Remaining Issues Raised on Appeal

Upon review of the remainder of the arguments raised by the parties on appeal, I affirm the remainder of the ALJ's Issues Ruling and Supplemental Issues Ruling. With respect to the three requested setback variances, the ALJ held that an adjudicable issue is raised concerning DOS's demonstration under 6 NYCRR 360-

1.7(c)(2)(iii) (see Issues Ruling, at 31). Because that demonstration depends upon resolution of the odor, litter, dust and vector impacts issue, I agree that whether a sufficient demonstration has been made under section 360-1.7(c)(2)(iii) is also adjudicable. I also agree that no adjudicable factual issues regarding DOS's demonstration under section 360-1.7(c)(2)(ii) were raised by intervenors (see Issues Ruling, at 31-32). The ALJ's clarification in the Supplemental Issues Ruling that the Part 360 setback requirements in effect immediately prior to March 10, 2003 apply to this application is also affirmed.

The remaining arguments raised by CHA on its appeal and supplemental appeal not addressed herein are rejected. For the reasons stated by the ALJ, the remaining arguments raised by CHA have been examined and are determined to be either academic, lacking in merit, or otherwise resolved.

Accordingly, this matter is remanded to the ALJ for further proceedings consistent with this interim decision.

For the New York State Department  
of Environmental Conservation

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By: Lynette M. Stark  
Executive Deputy Commissioner

Dated: Albany, New York  
June 14, 2006