STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
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IN THE MATTER OF THE APPLICATION OF
ONTARIO COUNTY, Pursuant to Title 7 of Article 27 of the
Environmental Conservation Law, to modify the solid waste and
air permits at the Ontario County MSW Landfill in the Town of Seneca, New York

Application Nos. 8-3244-00004/00007, 8-3244-00004/00021, and
8-3244-00004/00001
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MEMORANDUM OF LAW AND
RESPONSE TO MOTION TO PRECLUDE

Preliminary Statement

Despite their inability to find anywhere in the petition for party status filed in this matter on behalf of Finger Lakes Zero Waste Coalition (hereafter, "FZWC"), a challenge to the "completeness" of Ontario County's landfill expansion applications, Casella and the County now move to preclude consideration of issues involving the County's Local Solid Waste Management Plan and a draft air permit for the County landfill proposed by regional Department staff because, the movants assert, raising those issues is not designed to test the applications' compliance with Part 360 of the Department's regulations, which mandate minimum requirements for an adequate Plan, or with Title V of the Clean Air Act, which requires an adequate emissions estimation as a precondition to permit issuance. Instead of testing compliance with applicable regulations, and thus seeking to meet the Department's requirement that proposed issues be "significant," (6 NYCRR § 624.4(c)(2)), the movants theorize that the FLZWC petition is no more than a veiled and impemissible "collateral attack" on Department staff's determination that the applications

are "complete." However, no case decision, regulation or statute is identified in the moving papers that would support such a theory, and the movants fail to show they understand the meaning and legal status of "draft" permits or a "completeness determination."

A completeness determination is not a final determination that precludes a petitioner from subsequently raising issues regarding the adequacy of the permit applications, particularly where the issues go to the applicant's failure to meet applicable required elements of its applications, solely because the issues relate to the subjects addressed in the completeness decision. Otherwise, petitioners could raise no issues related to the contents of permit applications. Consistent with this principle, the notice of completeness in the instant case, issued on January 28, 2015, states: "The *draft permits* represent a tentative determination and do not signify approval or endorsement of the proposed project."[1]

Accordingly, the motion goes too far, since if it had any merit, tentative completeness determinations to issue draft permits for public review would be elevated to final determinations, bypassing the Commissioner and the administrative hearing system, and the public would rarely, if ever, be given an opportunity to propose significant issues.

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[1] Notice of Complete Application, Legislative Hearing and Issues Conference, NYSDEC Application Nos. 8-3244-00004/00007, 00001, and 00021, *Environmental Notice Bulletin* (January 26, 2015), available at <http://www.dec.ny.gov/enb/100411.html> (emphases added).

Statement of Facts

The statement of facts regarding the County's Local Solid Waste Management Plan (hereafter, "LSWMP" or "Plan") provided in the joint Memorandum of Law (hereafter, "Joint MOL") is not disputed, except that while FLZWC commented carefully, respectfully and in detail to Ontario County, identifying specific omissions and deficiencies in the County's proposed Plan, compared to the policies set forth in ECL §§ 27-0106 and 0107, and the detailed requirements found in Part 360-15 of the Department's regulations, and focusing in particular on inadequacies in the list of "implementation" items in the then-proposed Plan, the County did not respond to any of those comments.[2] Accordingly, the FLZWC Petition the movants seek to preclude followed.[3]

Regarding the landfill's draft proposed Title V air permit, FLZWC finds nothing to dispute in the movants' fact assertions, which are fairly and adequately supported by Exhibits D through M appended to movants' purported joint counsel[4] Thomas West's affirmation in support of the motion, together with exhibits and documentary references in the petition, with one exception. FLZWC disputes the accuracy of the County's assertion of fact, that the landfill's "permitted flares . . . have the ability to combust all LFG [landfill gas] produced [sic: collected]

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[2] FLZWC, by its president Douglas Knipple, submitted comments to the County on June 24, 2009; November 30, 2011; and February 21, 2012. The 2011 comments are provided as Exhibit D to the FLZWC Petition. The 2009 and 2012 comment letters are appended at the end of this Response.

[3] In addition, conclusions of law made in the movants' Statement of Facts are hereby disputed.

[4] *I.e.*, the Assistant County Attorney jointly with the County's contract partner, contracted to operate the landfill and several ancillary facilities, Casella.

by the Landfill."[5] In the first instance, the volume of landfill gas collected by the landfill is determined by modeling performed under contract by Casella, which is subject to error and should therefore be sufficiently conservative. However, even if Casella's model results are accurate, FLZWC asserts that the landfill's flares have insufficient capacity to control the volume of gas so modeled. This issue is raised under FLZWC's assertion that the landfill is not "well-designed and well-operated," as evidenced by chronic and serious offsite odor problems. *See* FLZWC Petition, 2.[6] The requirement that landfills be "well-designed and well-operated" for purposes of controlling regulated emissions of air pollutants is a basic principle under the federal New Source Performance Standards for landfills, mandated by the Clean Air Act, Section 111, (42 U.S.C. § 7411; 40 CFR Part 60, Subpart WWW (§§ 60.750-59)), and will be discussed further below.

Argument: LSWMP Issues

Central to Casella's and the County's argument is the assertion that FLZWC has not identified any "permitting standards" that would support an issue regarding the County's LSWMP. Joint MOL, 10. However, the movants appear to understand "permitting standards" as performance standards, narrowly construed. They provide no authority for that understanding.

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[5] Kristen Thorsness, Ontario County Assistant County Attorney, Letter to Lisa Schwartz, Regional Attorney, NYSDEC Region 8, dated February 24, 2015, provided as Exhibit K to the West Aff.

[6] The landfill's odor problems, which FLZWC does not seek to raise in this proceeding, (*but see* 6 NYCRR § 360-1.14(m)), is linked to deficiencies in the design and operation of the landfill's gas collection and control system in a recent independent investigation report to the County. *See* SCS Engineers, *Report: LFG Collection System Evaluation, Ontario County Landfill* (April 17, 2014), attached hereto as **Exhibit A**.

The movants then enlarge the concept of completeness under the Department's regulations, understanding that concept to cover all or most substantive requirements for specific applications. Accordingly, the movants understand a completeness determination to determine an applicant's ability to adequately perform as expected under any and all provisions of Part 360 and the ECL (and, presumably, Title V of the Clean Air Act), and to determine that an application meets all or most substantive applicable permitting standards. They also provide no authority for those propositions.

If the movant's understanding of the basic laws and rules governing permit applications, and Part 360's requirements regarding solid waste facility permits were correct, no one could petition the Department on the grounds that a specific permit application includes defective or deficient contents, or omits substantive items for applications required by the applicable regulations, including the omission of affirmative convincing demonstrations that the applicant is capable of and as a practical matter will adequately comply with the permit and its conditions. In other words, according to the movants, once Department staff have issued an interlocutory (interim) completeness determination, there are no or few issues that can be raised because staff agrees the application is acceptable, the applicant agrees to the terms of the draft permit, and there are no issues in dispute between the applicant and staff. Note that cases addressing preclusion based on *res judicata* and collateral estoppel, or untimeliness, are excluded from the scope of this conclusion. With one exception, all the cases cited in the Joint MOL regarding issue preclusion address these latter categories, which are all irrelevant to movants' theory. The one

exception (issued in the Sullivan County Landfill case)[7] is discussed below.

This is hardly the law or practice of the Department. Of those Department permit decisions and rulings on issues and party status in the last two decades that address whether issues as proposed and proffered are "substantive" and "significant", (*see* 6 NYCRR §§ 624.4(c)(1), (2)), and where there are no issues in dispute between the applicant and Department staff, none find that a proposed issue is subject to preclusion simply because Department staff had previously determined the underlying permit application was complete.[8] Only a few address the question directly, or address whether the scope of an issue should be restricted or precluded in part or altogether by a prior completeness determination. These few reference the settled position of the Department allowing petitioners to ground proposed issues on asserted defects, deficiencies, or omissions in permit applications. (This, of course, stops short of questions about whether the burden to demonstrate proffered issues are substantive and significant is met by the petitioner.) These cases will be discussed below.

Preliminarily, however, it should be noted that the scope of a completeness determination is specifically defined in the Department's permit application procedures:

> Complete application means an application for a permit which is in an approved form and is determined by the department to be complete for the purpose of commencing review of the application but which may need to be supplemented during the course of review in order to enable the department to make the findings and determinations required by law.

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[7] As the movants correctly note, (Joint MOL, 11.n.2), the Undersigned represented petitioners in that case.

[8] Specifically, the Undersigned reviewed all Department decisions in the "NY Department of Environmental Conservation–Decisions" library in the online LEXIS service returned with this search: (substantive w/s significant) AND (preclu! w/s issue). The same search can be run in the comparable library in the online Westlaw service.

6 NYCRR § 621.2(f). Thus, a completeness determination is specifically deemed a tentative decision of the Department.

In the case of a solid waste management facility permit application, Part 621 identifies a short list of items the applicant must provide "to determine that the application is complete," and none of the listed items involves a LSWMP. 6 NYCRR § 621.4(m). Thus, a complete Part 360 application by a municipality may include not only a defective LSWMP, it may be missing a LSWMP altogether. Indeed, this has been the history of landfill permitting for Ontario County up to July 7, 2014, when for the first time Region 8 approved a LSWMP provided by the County. *See* West Aff., Ex. C.

In addition, the express purposes of the issues conference should be identified, since those purposes make it clear that, unless previously litigated administratively or in a civil proceeding (these cases are not discussed here), issues are rarely if ever precluded on the basis of the Department's procedural rules. These purposes are expressly set forth in the hearing regulations and are here reproduced in full:

> The purpose of the issues conference is:
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> (i) to hear argument on whether party status should be granted to any petitioner;
> (ii) to narrow or resolve disputed issues of fact without resort to taking testimony;
> (iii) to hear argument on whether disputed issues of fact that are not resolved meet the standards for adjudicable issues set forth in subdivision (c) of this section;
> (iv) to determine whether legal issues exist whose resolution is not dependent on facts that are in substantial dispute and, if so, to hear argument on the merits of those issues; and
> (v) to decide any pending motions.

6 NYCRR § 624.4(c)(2). As is apparent, there is no express preclusion for a proposed intervenor's issues asserting defects, deficiencies, or omissions in a permit application in the

issues conference, which is held following a "notice of complete application", (6 NYCRR § 624.3(b)(1)), and the issuance of a "draft permit." 6 NYCRR § 624.2(m).

In addition, a draft permit is expressly defined as "subject to modification as a result of public comments or an adjudicatory hearing." 6 NYCRR § 624.2(m). This is in accord with the Department's hearing procedures discussed above, which clearly anticipate that permit application deficiencies may be the basis for a proposed issue notwithstanding that the challenged application has been determined to be complete.

Importantly, issues conferences are governing by two competing rules. First, the informal development of issues is deemed important.[9] Another purpose of the issues conference is to focus issues with a view to eliminating those issues that do not qualify for adjudication. Part 624.4(b)(2)(ii). *See also* Part 624.4(b)(5)(ii) (an issues conference should "define those issues as precisely as possible"). However the balance is struck between these two competing goals, neither goal forecloses the ability of petitioners to challenge whether permit applicants have in fact complied with the general and specific requirements for permit applications, not just specific performance requirements.

Thus, an exception is provided in the Department's hearing regulations to the rule that issues based solely on compliance with SEQRA may not be adjudicated when the Department is not the lead agency. In that case the rule does not apply if the Department notified the lead

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[9] *See* ALJ Ruling, *Matter of the Application of the City of New York Department of Sanitation for a Solid Waste Management Permit*, No. 2-6105-00666/00001, 2007 N.Y. ENV LEXIS 10, *34 (February 6, 2007) ("The issues conference serves as a process for identifying issues that are substantive and significant, and therefore require adjudication, not as a means for restricting how a party will develop the record concerning those issues."). *See also* Part 624, Note ("The principal function of the hearing is to resolve disputed issues of fact.").

agency during the comment period on the Draft Environmental Impact Statement ("DEIS") that the DEIS was inadequate or deficient with respect to the proposed issue and the lead agency failed to adequately respond. 6 NYCRR § 624.4(c)(6)(ii)(b). That situation does not describe the present case, but the rule exception nevertheless demonstrates that the hearing regulations contemplate that issues may be adjudicated, and thus a complete application would be before the hearing officer, despite the fact that Department staff had previously notified the lead agency during the comment period on the DEIS that the DEIS was inadequate or deficient with respect to the proposed issue. *Id.*

The ability afforded by the hearing procedures to Department staff to ground an issue for adjudication on deficiencies in the application, notwithstanding that staff previously determined the application complete, has been extended to petitioners by the Department's decisions. "Consistent with prior administrative rulings of this Department, it is clear that a Petitioner can articulate an issue that is both substantive and significant by identifying a material defect or omission in the permit application or its supporting documentation that may adversely affect permit issuance."[10] At issue in the Seven Springs matter was whether a "Linear Adsorption System" (LAS) proposed by the applicant for a SPDES permit could be approved as "best technology available" to achieve required stormwater contaminant runoff control. Petitioners, two towns and a village, proposed as an issue, ultimately accepted for adjudication by this ruling,

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[10] Ruling on Issues and Party Status, *In the Matter of the Application of Seven Springs, LLC, for a State Pollutant Discharge Elimination System (SPDES) Permit*, No. 3-5599-00041/00001, 2002 N.Y. ENV LEXIS 42, *46 (August 23, 2002) (citing Decision of the Commissioner, *In the Matter of Broome County Department of Public Works*, June 11, 1984; and Decision of the Commissioner, *In the Matter of Halfmoon Water Improvement Area*, April 2, 1982)).

that the technology proposed in the permit application was inadequate, and "Department Staff concurred with the position taken by the Applicant" that the proposal was adequate and approvable.[11] Based on the petitioners' offers of proof, the ALJ ruled that additional "empirical data as to the actual in-the-field performance of the proposed LAS" would be required before the permit could be issued, noting that "as is apparent from a plain reading of Section 621.15(b), such additional information can be requested even after Department Staff has determined the subject permit application to be complete."[12]

In the Al Turi Landfill matter, petitioners proposed issues for adjudication (such as the applicant's fitness; project need and alternatives; impacts to groundwater, noise, visual amenities, traffic; and consistency with the State's waste management hierarchy) well after the scoping process on a DEIS, where they failed to raise the same issues. "The ALJ stated it was the Department staff's determination what comprised the DEIS. However, this ruling addressed whether such items raised in scoping had to be included in the DEIS. The ALJ did not find that the intervenor was precluded from raising them in the issues conference based upon the standards in Part 624."[13]

In a Public Service Law Article X siting board review, petitioner East River Environmental Coalition proposed that "the adverse health effects of fine particulate matter

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[11] *Id.*, at *33.

[12] *Id.*, *45 (citing Rulings of the ALJ, *In the Matter of the Application of Al Turi Landfill, Inc.*, June 19, 1998).

[13] ALJ Rulings on Party Status and Issues, *In the Matter of the Application of St. Lawrence Cement Co., LLC for permits to construct and operate a cement manufacturing facility*, No. 4-1040-0001/00001, 2001 N.Y. ENV LEXIS 50, *150 (December 7, 2001) (discussing *Matter of Al Turi Landfill*, op. cit.).

(PM[2.5])" needed to be analyzed independently of a PM10 analysis, without proffering a witness on causation, and that the application's failure to sufficiently address public health impacts on that account should be adjudicated.[14] The ALJ ruled, "Con Edison's and DPS Staff's criticisms [on causation] should not preclude [the petitioner] from presenting its case on this issue, although they may have a bearing on the probative value of the presentation once it has been offered."[15]

Several issues involving the legal status and efficacy of a county's LSWMP were proposed for adjudication in the Sullivan County Landfill matter and failed,[16] but none of those issues are raised in FLZWC's petition. Nevertheless, the analysis of the failed issues in that matter are instructive, in that the analysis serves to distinguish that matter from the instant case and isolate what the real issue is here.

In the Sullivan County Landfill matter an association of homeowners adjacent to the county's landfill, Mountain Lodge Estates ("MLE"), appealed an adverse issues ruling of the ALJ involving a proposed landfill expansion. MLE first directly attacked the expansion application on the grounds that "[the] expansion is not expressly provided for under the existing County SWMP

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[14] Hearing Officers' Rulings, *Application of Consolidated Edison Company of New York, Inc. for a Certificate of Environmental Compatibility and Public Need*, No. 2-6206-00012/000021 (etc.), 2001 N.Y. ENV LEXIS 20, *69-71 (March 2001) (DEC siting board proceeding).

[15] *Id.*, at *71.

[16] *See* Final Decision of the Commissioner, *In the Matter of the Application for Permits for the Phase II Expansion of the County Landfill in the Village of Monticello, Sullivan County by Sullivan County Division of Solid Waste*, No. 3-4846-00079/00027, 2008 N.Y. ENV LEXIS 20, *14-25 (March 28, 2008) (affirming ALJ Ruling on issues). As the joint movants correctly note, the Undersigned represented the petitioner in this matter.

and that the expansion will impermissibly interfere with the County's ability to achieve the recycling goals established under its SWMP."[17] These grounds were analyzed in light of several potentially relevant substantive and procedural issues.

First, the Commissioner ruled that, considered as a direct attack on Department staff's completeness determination, MLE's assertions are precluded by the definition of completeness and the Department's hearing procedures:

> A "complete application" is defined by 6 NYCRR § 621.2(f) to be "an application which is in an approved form and is determined by the department to be complete for the purpose of commencing review of the application." By regulation, the completeness of an application will not be an issue for adjudication (see 6 NYCRR § 624.4[c][7]).[18]

In the instant case, however, as discussed above, FLZWC does not seek to attack Department staff's completeness determination.

Next, the Commissioner ruled that, considered as an attack on the consistency of the expansion proposal with the county's LSWMP, because the expansion was not specifically identified in the Plan, MLE's appeal must fail since the Sullivan County Landfill site met all

> the . . . expansion site exhibits all of the [siting] characteristics set out in [6 NYCRR] 360-2.12(a)(1). Moreover, "Department Technical and Administrative Guidance Memorandum [TAGM] SW-96-08, dated May 3, 2001, 'Review of Local Solid Waste Management Plans,' section III.D ["[i]n accordance with 6 NYCRR 360-2.12(b)(1), inclusion in an approved [local] SWMP is required for both municipal and private sector applicants if the proposed site of the landfill or landfill expansion does not exhibit all of the characteristics required by 6 NYCRR 360-2.12(a)(1)"]).[19]

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[17] *Id.*, at *14-15.

[18] *Id.*, at *18.

[19] *Id.*, at *18.

Here, by contrast, the Ontario County Landfill fails to exhibit all the conditions for an appropriate landfill site under 6 NYCRR § 360-2.12(a)(1). Specifically, as acknowledged all too briefly in the County's application, the expansion site is characterized by less than 20 feet of unconsolidated deposits, as measured from the base of the liner system. *See* 6 NYCRR § 360-2.12(a)(2); Ontario County, Part 360 Applic., Appx. A, at 10.

Subsection 360-2.12(a)(1), governing landfill siting, expressly provides that "new landfills and lateral or vertical expansions of existing landfill" must conform to several listed site characteristics unless the requirements one of the two exceptions under Subparagraph (b) are met. Among the enumerated site characteristics is 6 NYCRR § 360-2.12(a)(1)(v) ("unconsolidated deposits underlying the proposed landfill must either exist or be constructed to be 20 feet or greater in thickness as measured from the base of the constructed liner system"). Accordingly, one of the two Subsection (b) exceptions must apply, otherwise "[a] site selection study will be required." 6 NYCRR § 360-2.12(a). The County has not performed a site selection study.[20] However, the Commissioner has ruled that meeting the siting characteristics referenced under 6 NYCRR § 360-2.12(a)(1), or qualifying for an exception under 6 NYCRR § 360-2.12(b)(1) are not the only choices afforded a Part 360 applicant, as a variance from the exception is also available.[21] If a variance is sought, it is the applicant's burden to "demonstrate that the proposed activity will have no significant adverse impact on the public health, safety or

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[20] *See* Part 360 Applic., Appx. A, at 10 (asserting that the requirement does not apply).

[21] ALJ Rulings, *In the Matter of Towpath Environmental & Recycling Center*, No. 8-3420-00019/00005, 1999 N.Y. ENV LEXIS 36, *73-75 (December 31, 1999), aff'd by Interim Decision of the Commissioner, 2000 N.Y. ENV LEXIS 36 (May 15, 2000).

welfare, the environment or natural resources, and that it will be consistent with the provisions of the ECL and the performance expected from application of Part 360."[22]

However, Ontario County has not applied for a variance from the Subsection 360-2.12 exception. Its Part 360 application is thus deficient on that account. Were the County to so apply, FLZWC would reassert its proposed issue under the reasoning of the *Foster Wheeler-Broome County, Inc.* final decision of the Commissioner, discussed in the Petition.[23] In his final decision in that matter, the Commissioner ruled that, finding the subject solid waste management facility "[did] not comply with the State's solid waste management policy established in ECL § 27-0106," (i.e., the waste management hierarchy making landfilling the least favored method), "for the reasons stated above regarding sizing," he could not certify that "consistent with social, economic and other essential considerations, the proposed [facility would] minimize or avoid adverse environmental impacts to the maximum extent practicable."[24] In other words, because it was oversized in light of the County planning unit's needs, the facility failed to comply with ECL § 27-0106 and on this account could not meet the standards for a variance under Subsection 360-1.7(c)(2). This is precisely one branch of FLZWC's proposed LSWMP issue.[25]

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[22] *Id.*, at *75 (citing Subsection 360-1.7(c)(2)).

[23] *See* FLZWC Petition, 16-26 (citing and discussing Interim Decision of the Commissioner, *In the Matter of the Application of the Foster Wheeler-Broome County and the Broome County Resource Recovery Agency*, No. 7-0334-00023/00001-0, 1990 N.Y. ENV LEXIS 82 (September 19, 1990); Final Decision of the Commissioner (same matter), 1991 N.Y. ENV LEXIS 73 (December 18, 1991)). The centrality of this decision to FLZWC's proffered LSWMP issues is emphasized further *below*, at pages 15-18.

[24] *Id.*, 1991 N.Y. ENV LEXIS 73, at *40-41.

[25] In addition, and alternatively, strict compliance with the performance standards under Part 360 is required where an applicant applies for a variance. 6 NYCRR § 360-1.7(c)(2)(iii). As

Contrary to the movants, the Commissioner's final decision in the *Foster-Wheeler Broome County, Inc.* matter is not just one of the Department's "incinerator cases," where it is true that the facility sizing analysis involves, among other things, a consideration of the minimum waste stream needed to function thermodynamically, distinguishing incinerators from landfills. *See* Joint MOL, 11.n.2. As made clear in the petition, the Commissioner's 1991 decision is a major statement of the Department's policy requiring compliance with New York's solid waste management hierarchy, (ECL § 27-0106), and its regulatory implementation under Part 360, coming on the heels of the Solid Waste Management Act of 1988, (Chapter 70, Laws of 1988, 1988 N.Y. Laws 1966), which "mandated that source separation and recycling programs commence in each municipality within the state no later than September 1, 1992." Norman H. Nosenchuck, *Key Events of the New York State Solid Waste Management Program: 1970-1995*, 7 Alb. L.J. Sci. & Tech. 69, 79 (1996). The 1988 Act promulgated, *inter alia*, ECL § 27-0106 and Gen. Mun. § 120-aa, which requires municipalities to "adopt . . . a local law or ordinance to require that solid waste which has been left for collection or which is delivered by the generator of such waste to a solid waste management facility, shall be separated into recyclable, reuseable or other components for which *economic markets* for alternate uses exist," and specifically defines economic markets as "instances in which the full avoided costs of proper collection, transportation and disposal of source separated materials are equal to or greater than the cost of collection, transportation and sale of said material less the amount received from the sale of said

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relevant here, these standards include the detailed items required for a "comprehensive recycling analysis," (6 NYCRR § 360-1.9(f)), as discussed in the FLZWC Petition, at 8, 12-13, including, *inter alia*, a specifically detailed "discussion of possible future actions in the facility's service area to further the objectives of the State's solid waste management policy identified in section 27-0106 of the ECL". 6 NYCRR § 360-1.9(f)(7).

material." Gen. Mun. § 120-aa(2)(a) (emphases added). In the decision the Commissioner makes it clear that the "method of analysis" he set forth there for determining a proposed sizing issue "may be helpful in determining an appropriate size for landfills as well." Final Decision of the Commissioner (Jorling), *In the Matter of the Application of the Foster Wheeler-Broome County and the Broome County Resource Recovery Agency*, No. 7-0334-00023/00001-0, 1991 N.Y. ENV LEXIS 73, *9 (December 18, 1991). *Cf.* FLZWC Petition, 10.n.14 (citing and quoting same). Shortly after the decision the Department issued a revised version of its guidance document, *Avoided Costs in Solid Waste*, TAGM SW-92-06, revised August 24, 1992, which implements the "economic markets" analysis required under Gen. Mun. § 120-aa(2)(a), informed by Commissioner Jorling's "method of analysis" for sizing solid waste management facilities in compliance with Subpart 360-15 and ECL § 27-0106. *Cf.* Petition, 12, 14-16, 19-20 (citing and quoting *Avoided Costs in Solid Waste*). The movants' attempt to belittle FLZWC's identification of clearly "significant" issues in the County's failure, in its LSWMP, to even consider "sizing" its proposed expansion, or foregoing it altogether,[26] as it is required to do under Subpart 350-15.9(g)(1), the County's failure to provide "a comprehensive recycling analysis for the planning unit, to include those items identified in subdivision 360-1.9(f) of this Part," as it is required to do Subpart 350-15.9(f), and the County's failure to consider how its existing local recycling law and failure to identify other possible local laws it might adopt could foster "economic markets" for specific types of recyclables, as it is required to do under Subpart 360-15.9(m), is no more

[26] After all, the County by contract with Casella reserves 100,000 tons of disposal capacity annually, so there would be no need for an expansion if, by reducing imported waste receipts, Casella extended the life of the existing landfill a decade or more. As indicated in the petition, *eliminating* imports can be expected to add seven decades to the existing landfill's permitted life.

than a cynical rejection of one of the State's and the Department's most central policies. Indeed these policies are arguably informed by the same principle that serves as FLZWC's mission, the goal of "zero waste." FLZWC does not believe (and movants' nowhere point to any evidence to the contrary) that "zero waste" is mandated by the provisions of Part 360 that implement these policies, but rather than "zero waste" is goal that informs the Department's requirements applicable to municipally-owned solid waste management facilities. The movants' cynicism is of a piece with its gratuitous denigration of "[t]he Coalition's dislike for the lease arrangement between Casella and the County, its plea to the Department to interject itself into legislative determinations that are for the County to make, complaints about who prepared the SWMP, New York's overall performance as to recycling, and their societal vision that recycling should be the only waste management option." Joint MOL, 6.n.1. FLZWC believes that any reasonable review of the County's LSWMP, its efforts to comment on the Plan to the County and the Department, and the utter silence of the County in response to those comments will lead to the conclusion that the County is clearly out of compliance with applicable laws and regulations governing municipal solid waste management. Far from "hav[ing] no bearing whatsoever on anything relevant to this permitting proceeding," (Joint MOL, 6.n.1), FLZWC's petition (and its identification with the policies and requirements of the Department in this regard) is pointed directly to issues that are obviously "significant," (6 NYCRR § 624.4(c)(2)), since they are grounded in the requirements of Subpart 360-15, clearly applicable to any consideration as to whether the County's LSWMP–a required component of its application–complies with the "comprehensive recycling analysis" required under Subpart 360-15.9(f), as well as the other requirements of Subpart 360-15 cited above, and "substantive," (6 NYCRR § 624.4(c)(1)(ii)),

since its primary offer of proof, the County's LSWMP itself,[27] clearly suffers from the same poverty of analysis (and implementation) Commissioner Jorling found intolerable. Commissioner Jorling denied a permit in the *Foster-Wheeler Broome County, Inc.* matter not because the matter involved an incinerator, but "on the grounds of excessive size in light of the needs of the county planning unit." FLZWC Petition, 10.n.14 (citing 1991 N.Y. ENV LEXIS 73, *9).

The Part 360 regulations commit the Department to ensuring that "a permit to authorize the construction of a new solid waste management facility or expansion of a facility" under any circumstances will not be issued unless and until the application "describe[s] how the proposed facility is consistent with the State's solid waste management policy identified in section 27-0106 of the ECL." 6 NYCRR § 360-1.10(a). FLZWC has clearly raised with sufficient specificity the failure of the County to so describe how an expansion designed to maintain an annual disposal capacity tenfold greater than the demonstrable needs of the County, in combination with a recycling rate that fails to perform as expected by the standards of Part 360 from any standpoint could be consistent with that State policy.

It is true that the VIII & IX Expansion is identified in the Plan,[28] including a site plan for the expansion project.[29] However, FLZWC has also put at issue whether the expansion is, as factual matter, "consistent with the goals and objectives of such plan," (6 NYCRR § 360-2.12(a)(2)(i)), (which FLZWC supports), as stated in the petition. FLZWC Petition, 3

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[27] FLZWC expects that the County will bring its LSWMP its several appendices to the Plan to the issues conference in an attempt to demonstrate the issues identified in the petition are not substantive.

[28] Ontario County LSWMP, at 8 and 56.

[29] *Id.*, Appx. B.

(identifying "as laudatory goals the development of new programs to divert waste from disposal and to enhance the few such programs that exist in the County"), 5 (asserting that past and present expansions "push the goals of responsible waste planning farther from reach"), 16-17 (identifying the consistency requirement under 6 NYCRR § 360-1.9(e)(iii)), and 19-26 (asserting that the sizing of the expansion is an issue because it is tenfold larger than the maximum capacity the needed for the planning unity, and because the LSWMP lacks any demonstration that the County would or could implement its goals and objectives regarding waste diversion and recycling).

The only support offered in the Part 360 Application for its assertion that the consistency requirement is met is this single sentence:

> Based on site investigations and the historical use of the property as a landfill without significant adverse impacts to human health or the environment, the proposed expansion area meets the siting criteria set forth in Section 360-2.12(a)(2) and does not require a site selection study prior to permitting.[30]

This assertion, by itself, is merely is conclusory and lacks any evidentiary support. Whether the County can point to facts regarding the County's planning efforts, including whether and how it analyzed the required subjects listed in Subpart 360-1.9(f), incorporated by reference into the required contents of a LSWMP set forth in and required by Subpart 360-15 (including but not limited by any means to achieving improved recycling rates), should therefore be developed in the issues conference, where a determination can be made as to whether outstanding issues remain.

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[30] Ontario County, Part 360 Applic., Appx. A, at 10.

Argument: Title V Issues

FLZWC's Title V issues are principally legal issues, as FLZWC does not dispute any fact asserted by Department staff and acknowledged by the applicant regarding the actual relationship between the County landfill and the gas-to-energy plant leased by a non-applicant in the instant proceeding on the landfill site. (Indeed, FLZWC relies on the facts found by Department staff in this regard.) FLZWC proposes that an issue for adjudication is whether the landfill and the plant are under common control such that the two facilities are, as a matter of law, a "single source" of regulated emissions, and therefore the emissions of each facility must be combined or aggregated in order to subsequently determine what federal Clean Air Act air control programs are applicable. There is no dispute that Department Staff have determined the two facilities are not under common control. However, the proposed issue is predicated on FLZWC's assertion that this determination is legally erroneous. Since "determin[ing] whether legal issues exist whose resolution is not dependent on facts that are in substantial dispute and, if so, to hear argument on the merits of those issues" is clearly a legitimate purpose of the issues conference in this matter, (6 NYCRR § 624.4(b)(2)(iv)), and since the movants have as yet offered no basis for concluding that this issue is not significant, movants have failed to show any basis for precluding the proposed issue.

Just as the movants urge the preclusive effect of Region 8's completeness determination, movants' urge that the Department's determination of the "common control" / "single source" issue precludes any consideration of whether that issue is, in this proceeding, substantive and significant. However, the same basic principles underlying the contrary view, as applied to a completeness determination, that interlocutory decisions of the Department fail to displace the

opportunity of a petitioner to challenge the decision upon a proper petition, also apply to Region 8's determination of this issue. The reason for that result is not, as before, grounded (in part) in the regulatory definitions governing the interlocutory decision, (6 NYCRR § 621.2(f)), but is grounded in the regulatory recognition of the tentative nature of the draft Title V permit for the landfill proposed by the Department, (6 NYCRR § 621.4(m)), the regulatory specification of purposes for an issues conference, (6 NYCRR § 624.4(c)(2)), and the Department's policy that a material defect or omission in the permit application or its supporting documentation that may adversely affect permit issuance can be the basis for an issue for adjudication. Ruling on Issues and Party Status, *In the Matter of the Application of Seven Springs, LLC*,, 2002 N.Y. ENV LEXIS 42, *46. Since these rules are fully discussed above, at pages 15-18, that discussion will not be revisited here except to reiterate that Region 8's notice of completeness is expressly tentative as to regional staff's statement of position on the landfill's draft Title V (and logically at least equally so as to permit approval). *See above*, page 2.n.1.[31]

In addition, the movants acknowledge that FLZWC has preserved the common control/single source issue by either (1) timely petitioning USEPA on that issue (and others), (*see* West Aff., Exs. H, I and J), or (2) commenting to Region 8 on the issue with specificity (including but not limited to the specifics in the FLZWC petition) *as to the landfill*, *id.*, Ex. F),[32]

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[31] It should be noted that the 2012 notice of completeness for the GTE plant, (West Aff., Ex. E), is irrelevant to this proceeding. Logically, all the issues raised in FLZWC's petition to USEPA are relevant to this proceeding, since FLZWC's principle Title V issue is that the two facilities are a single source under Title V. However, the final determination of the GTE plant's Title V permit does not finally determine the landfill's Title V modification application, which is a subject of this proceeding.

[32] The Undersigned had not seen this document, a lengthy comment letter by Douglas Knipple on behalf of FLZWC to Region 8, dated August 12, 2012, and accordingly express

or both. In addition, to the extent that questions regarding Region 8's tentative determination as to common control/single source for the landfill have been placed before the public for comment and petitioning, based on the County's still to be determined Title V modification application, there is no logical reason why FLZWC should be precluded from raising an issue directed at such questions in this proceeding.

As noted above, FLZWC's Title V issues are not exhausted by the common control/single source question. The County is also obligated to comply with the "well-designed and well operated" performance standard required under the NSPS Landfills program, also known as the "Landfill Gas Rule." *See* 40 CFR §§ 60.750-59; 56 Fed.Reg. 50978 (October 9, 1991) (and subsequently amended). The NSPS regulation applies to landfills designed to meet or exceed 2.5 million megagrams by mass (approximately 2.76 tons) and 2.5 million cubic meters by volume (approximately 2,025 acre-feet) and that commenced construction, reconstruction or modification, or began accepting waste, on or after May 30, 1991. 40 C.F.R. § 60.750(a). There is no dispute that the NSPS regulation applies to the County's landfill, as the current and draft proposed Title V permits identify the regulation as an applicable requirement.[33]

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appreciation to the movants for providing in their supporting papers. For that reason, and because the Knipple letter clearly goes beyond the substantive allegations in FLZWC's USEPA petition, and meaningfully augments the offer of proof in the FLZWC petition submitted in the instant proceeding, FLZWC hereby requests that it be considered as factual allegations integral to its offer of proof here.

[33] The NSPS Landfill regulations also created a significance level of 50 tpy or more of NMOC for an increase in the potential to emit which subjects a landfill to NSR rules. 61 Fed.Reg. at 9912; *cf.* 40 C.F.R. § 60.754(c). Revisions to the regulations have been promulgated but without changing the substantive requirements of the 1996 EG/NSPS rules. *See* 63 Fed.Reg. 32743, 32749 (June 16, 1998); 64 Fed.Reg. at 9257. In addition to the NAAQS requirements for the six criteria air pollutants regulated under the NSR programs, 188 "hazardous air pollutants" ("HAP," also termed "air toxics") are regulated pursuant to Section 112 of the Act. *See* 42 U.S.C

The NSPS regulations require landfills that exceed the size and NMOC emission thresholds to install a "well-designed and well-operated" landfill gas collection and control system able to collect gas effectively from all areas of the landfill that are at least five years old for active areas or two years old for areas that are finally covered or at final grade. 61 Fed.Reg. at 9907; 40 C.F.R. § 60.755(b). Thereafter, the landfill must measure methane concentrations across the surface of the landfill quarterly and remediate areas where surface methane concentrations exceed 500 ppm. 40 C.F.R. § 60.753(d). Required remediation includes addition of cover materials to seal the landfill surface and additions to the system of gas collecting wells drilled into the landfill's waste mass. 40 C.F.R. § 60.755(c). *See* 61 Fed.Reg. at 9912. In addition, the landfill gas collection and control system must be designed and maintained to meet strictly specified operating parameters, including maintaining negative pressure at each gas well in the system, minimizing the infiltration of atmospheric oxygen or nitrogen into the collected gas, and maintaining a continuous flame in systems using flares to combust the gas. 40 C.F.R. §§ 60.753 *et seq.*; 60.18(c)(2). Proper combustion of the collected landfill gas will destroy 98 percent of the NMOC in the gas. 40 C.F.R. §§ 60.752 (b)(2)(iii)(B), 60.33c(c)(2).

> Landfill pollutants of concern are methane and non-methane organic compounds (NMOC), a fraction of landfill gas containing approximately 100 compounds than can adversely affect public health and welfare. 61 Fed.Reg. 9905, 9906 (March 12, 1996). Approximately 30 hazardous air pollutants ("HAP") regulated under the Clean Air Act can be found in landfill gas. 65 Fed.Reg. 66672, 66675 (Nov. 7, 2000). The majority of emissions of HAP at MSW landfills come from the natural anaerobic (without air) decomposition of municipal solid waste. Typical municipal solid waste contains household and commercial rubbish, paints, solvents, pesticides, and adhesives, which contain numerous organic compounds.

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§ 7412(b). EPA has found that about 30 HAP are included in NMOC emissions from landfills, including benzene, toluene, vinyl chloride and ethyl benzene. *See* 65 Fed.Reg. 66672, 66674-66675 (Nov. 7, 2000).

> During the decomposition process, landfill gas is generated. This gas is primarily composed of methane and carbon dioxide. The organic compounds in the decomposing waste are stripped from the waste by these gases and transported to the surface, or the organic compounds travel underground to other locations prior to their release.

Id. The primary constituents of landfill gas, methane and carbon dioxide, are odorless; however, the fraction of non-methane organic compounds (NMOC) in landfill gas can cause an odor nuisance; NMOC emissions contribute to ozone formation; components of NMOC are hazardous, are known or suspected carcinogens, or cause other noncancer adverse health effects; methane emissions present a well-documented danger of fire and explosion on site and off site, and contribute to global climate change as a major greenhouse gas. *See* 64 Fed.Reg. 9257, 9260 (Feb. 24, 1999).

In order to achieve (and assure) compliance with the NSPS regulation, landfill gas generation rates must be calculated using default values for methane generation over time "published in the most recent Compilation of Air Pollutant Emission Factors (AP-42) or other site specific values demonstrated to be appropriate and approved by the Administrator." 40 C.F.R. § 60.755(a)(1); 6 N.Y.C.R.R. Part 360-2.21(f)(1)(i). Once landfill gas controls are installed, they may be removed only when "the annual NMOC emission rate routed to the control device . . . based upon the site-specific landfill gas flow rate and average NMOC concentration." 61 Fed.Reg. at 9907. Cf. 40 C.F.R. § 60.754(b). Controls may be required "as long as 50 to 100 hundred years for some landfills." 61 Fed.Reg. at 9908.

As noted above, pursuant to NSPS regulations, ongoing compliance is assured by regulating the NMOC fraction of landfill gas indirectly, by requiring large landfills to collect and combust landfill gas, by measuring performance in maintaining the landfill's surface methane

concentration below 500 ppm on a quarterly basis, and by continuously monitoring specified operating parameters of the landfill gas collection and control system. 40 CFR §§ 60.750-59. Specifically, the landfill must measure methane concentrations across the surface of the landfill quarterly and remediate areas where surface methane concentrations exceed 500 ppm. 40 C.F.R. § 60.753(d). Required remediation includes addition of cover materials to seal the landfill surface and additions to the system of gas collecting wells drilled into the landfill's waste mass. 40 C.F.R. § 60.755(c). *See* 61 Fed.Reg. at 9912.[34]

For compliance with the surface methane operational standard, the NSPS regulation allows an exceedence of the surface methane concentration limit, but in that case remediation must follow, followed by a re-scan within 10 days. An exceedence at the time of the re-scan is not a noncompliance incident; rather, further remediation and another re-scan within one month is then required. If the third re-scan exceeds the limit, the landfill is in violation of its permit. 40 C.F.R. § 60.755(c)(4).

The Ontario County landfill exceeded the methane concentration limit at several gas wells in early 2014. *See* Exhibit A hereto. Exceedences continued throughout the period up to the following fall, (*see* Exhibit B hereto), and FLZWC has no indication that remediation efforts have successful to date. The County has almost certainly been in ongoing violation of the "three strikes" rule under 40 C.F.R. § 60.755(c).

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[34] In addition, the landfill gas collection and control system must be designed and maintained to meet strictly specified operating parameters, including maintaining negative pressure at each gas well in the system, minimizing the infiltration of atmospheric oxygen or nitrogen into the collected gas, and maintaining a continuous flame in systems using flares to combust the gas. 40 C.F.R. §§ 60.753 et seq. Proper combustion of the collected landfill gas will destroy 98 percent of the NMOC in the gas. 40 C.F.R. §§ 60.752 (b)(2)(iii)(B).

This proceeding is not, of course, an enforcement action, but the facts alleged above (if true) clearly demonstrate that additional permit conditions will be necessary to bring the landfill into compliance with its Title V permit. Movants' assertions about "issue preclusion" are therefore not only erroneous as a matter of law, they appear to serve the purpose of evading compliance with basic requirements applicable to the landfill. Moreover, once the real, potential emissions of the landfill are properly evaluated in light of the County's practical and foreseeable ability to manage the landfill in a "well-designed and well-operated" manner, emissions are likely to be substantially elevated above those reported in the Title V application based on modeling alone. There can be no doubt that FLZWC is authorized to develop as an issue for adjudication whether the landfill can be so designed and operated, and under what permit conditions the County can provide a reasonable assurance of future compliance.

Finally, the same conclusion applies to the issue of whether the landfill's gas flares have sufficient capacity to control (*i.e.*, burn off the NMOC component in) all the landfill gas expected to be collected. We look forward to developing that issue in the issues conference.[35]

[35] *See above*, pp. 3-4.

Conclusion

In the *Foster-Wheeler Broome County, Inc.* matter, the Commissioner began his decision with words that apply fully to the instant matter, noting at the outset that "[t]his case raises issues that are fundamental to the State's solid waste management laws and policies,"[36] and admonishing:

> It is also clear that the Department must seek and promote better mechanisms for achieving early resolution of issues of state concern that are fundamental to the local solid waste management planning process. Such mechanisms would allow for the accommodation of these concerns while the planning process still has a great deal of flexibility and thus would avoid causing undue disruption or expense. In this regard, attention is drawn to the Department's Organization and Delegation Memorandum #90-39 which addresses a possible vehicle for dealing with this problem, the conceptual review process provided for under the Uniform Procedures Act.[37]

The admonition was not heeded in the instant case.[38] Accordingly the County and Casella find themselves in their present circumstance, having planned poorly (perhaps not at all) for the County's non-disposal waste management needs, and facing potential issues in a costly and time-consuming permit proceeding they, more than any other actor in this tragedy should have foreseen. If the allegations in the FLZWC petition are true, the County's and Casella's motion to preclude FLZWC's issues are an understandable response. However, the gravamen of the

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[36] 1991 N.Y. ENV LEXIS 73, at *1.

[37] *Id.*, at *3-4.

[38] *See above*, footnote 3 and accompanying text; FLZWC Petition, footnotes 73-74 and accompanying text.

motion, for the reasons provided above, has no basis in law or fact. In contrast to challenging Department staff's completeness determination, Petitioners are clearly seeking to go forward to an issues conference and an adjudicatory hearing without delay, in order to test the County's landfill expansion applications' compliance with Part 360 and Title V of the Clean Air Act.

Accordingly, the motion should be denied.

Dated: March 5, 2015

By:_____/s/_____

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LIST OF EXHIBITS

A SCS Engineers, *Report: LFG Collection System Evaluation, Ontario County Landfill* (April 17, 2014)

B SCS Engineers, *Surface Emission Monitoring (SEM) Ontario County Landfill, Stanley, NY* (October 22, 2014)