STATE OF NEW YORK

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application of ONTARIO COUNTY for modification of the Part 360 permit, the Title V permit, and a request for a Part 663 freshwater wetlands permit for its municipal solid waste landfill on Route 5 & 20 in the Town of Seneca, Ontario County, New York.

(DEC Permit Application Nos.: 8-3244-00004/00007, 00001, and 00021)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO PRECLUDE

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PRELIMINARY STATEMENT

The County of Ontario (the "County") respectfully submits this memorandum of law and the accompanying Affirmation of Thomas S. West, dated February 27, 2015 ("West Aff."), in support of this motion. The County seeks to preclude from this permit modification proceeding issues raised by petitioner Finger Lakes Zero Waste Coalition (the "Coalition") relative to (1) alleged deficiencies in the County's local solid waste management plan ("SWMP") (that was adopted last July over opposition by the Coalition); and (2) "common control" issues regarding the Title V permit (that were decided adversely to the Coalition in 2012, and are the subject of a pending appeal to the United States Environmental Protection Agency ("EPA").

The Coalition's asserted issues relative to the SWMP cannot be heard in this proceeding for a number of reasons. At the outset, to the extent the Coalition maintains that the County's Part 360 permit modification application is "deficient" because of the alleged failure to have adopted a comprehensive recycling analysis ("CRA"), this is an impermissible collateral attack on the Department's completeness determination and, by regulation, cannot be adjudicated.

As for the Coalition's criticisms of the SWMP itself—beyond that the asserted issues are recycled, massaged versions of unsuccessful arguments advanced by its counsel in prior landfill permitting proceedings (e.g., relative to recycling, landfill size/waste importation, and compliance with state solid waste management policy)—these issues cannot be heard here. This is a permitting proceeding, and an issue is adjudicable only if it relates to a statutory or regulatory criterion that applies to the underlying project. The adequacy of the SWMP does not relate to any such regulatory requirement, and, therefore, the asserted issues cannot meet the substantive and significant standard for adjudicability. Moreover, the proper forum to have challenged the adequacy of the SWMP was in an Article 78 proceeding before the Supreme

Court after it was adopted by the County or approved by the Department. The time period for that challenge, however, has long expired. Accordingly, any challenge asserting deficiencies in the SWMP is time-barred, and the Coalition cannot circumvent the statute of limitations by attempting to use this permitting proceeding to collaterally attack the County's adoption of the SWMP or the Department's approval of it.

Equally unavailing is the Coalition's attempt to re-litigate the common control issue—namely, whether the County's Landfill and Seneca Energy's Landfill Gas to Energy Facility ("LFGTE Facility") are under common control and thus need to be aggregated for purposes of Title V permitting. Tellingly, the Coalition's filings regurgitate and rehash the very same arguments that they advanced to the Department during the public comment period for the Title V permitting proceeding for the LFGTE Facility. Indeed, the Coalition acknowledges that it "raised this issue previously in the context of permitting for the [LFGTE Facility]," thus admitting that it had a full and fair opportunity to litigate this issue before the Department. The Coalition lost, however, with the Department determining that the two facilities are not under common control. When the EPA did not object during the 45-day review period, the Department issued the Title V permit, thus necessarily deciding the issue. The Coalition's appeal to the EPA on this matter is still pending, but that does not detract from the finality of the Department's determination and the continued viability of LFGTE Facility's Title V permit (unless and until the EPA says otherwise). No facts pertinent to the common control analysis for these two facilities have changed (West Aff. ¶ 44; Exhs. K, L, M); thus, the Coalition is estopped from re-litigating this issue here.

STATEMENT OF FACTS

Solid Waste Management Plan

The facts pertaining to the procedures by which the SWMP was adopted by the County and approved by the Department are undisputed. Specifically, after appropriate notice, public hearings on April 17, 2014, and May 8, 2014, and consideration of public comments, the County issued a negative declaration and findings statement under SEQRA, finding that the SWMP would not have a significant adverse effect on the environment. *See* West Aff., Exh. A. On June 19, 2014, the County officially adopted the SWMP pursuant to Resolution No. 297-2014. West Aff., Exh. B. By letter dated July 7, 2014, the Department officially approved the SWMP. West Aff., Exh. C; *see also* ECL § 27-0107.

As reflected in its Petition for Full Party Status, dated Feb. 25, 2015 ("Coalition Petition"), the Coalition was involved throughout this process, having, among other things, submitted extensive written commentary to the County and the Department during the drafting process for the SWMP. *See* Petition, Exhs. D & E. In its submission to the Department in April 2012, the Coalition criticized the draft SWMP for alleged deficiencies respecting the CRA, importation of garbage, recycling rates, and compliance with state solid waste management policies. Thus, the Coalition certainly participated in the process that ultimately led to the SWMP's adoption and approval.

The Coalition did not, however, challenge either the County's adoption of the SWMP, or the Department's subsequent approval of the SWMP, in any judicial proceeding. Pursuant to the Civil Practice Law and Rules ("CPLR") §§ 217(1) and 7803(3), any judicial proceeding challenging those determinations had to be brought within four months, meaning that the statute of limitations expired no later than in November 2014.

Common Control

In the timeframe between 2009 and 2011, the Department initiated review as to whether the County Landfill and the LFGTE Facility were under common control and, therefore, had to be aggregated for purposes of Title V permitting. After obtaining factual information pertinent to the common control analysis, in January of 2012, the Department determined that the Landfill and LFGTE Facility were not under common control. West Aff., Exh. D (January 5, 2012 Letter, hereinafter the "Aggregation Decision"); *see also* Coalition Petition, at 33-36. The Coalition did not challenge the Aggregation Decision.

Subsequently, Seneca Energy submitted to the Department an application for Title V permit renewal and modification for the LFGTE Facility. The Department deemed that application to be complete in July 2012 and thereafter published notice and opportunity for comment. *See* 6 NYCRR §§ 621.6(g), 621.7(a), (b)(6)-(9), (c), (h), (i)(5). In response, and as the Coalition acknowledges here, it participated fully in the process, providing detailed comments asserting that the LFGTE Facility and Landfill were under common control and detailing each of the factors pertinent to the common control analysis. West Aff., Exh. F; Coalition Petition, at 5 (The Coalition "has raised this [common control] issue previously in the context of permitting for the [LFGTE] Facility"). In its comment letter, however, the Coalition did not request a hearing, issues conference, or adjudication of this issue, as it could have under the governing regulations. *See* West Aff., Exh.F; *see generally*, 6 NYCRR §§ 621.8(a), (b), (c), (g), and Part 624.

After review of the Coalition's comments, on September 11, 2012, the Department issued its responsiveness summary addressing the Coalition's comments. *See* 6 NYCRR §

621.10(a)(5), (e). The Department also adhered to its prior determination that the two facilities are not under common control and issued the proposed permit, subject to the Environmental Protection Agency's ("EPA") 45-day review period. *See* 40 CFR § 70.8(c); *see also* 6 NYCRR § 621.10(a)(5). The EPA did not object to the proposed permit within the 45-day timeframe, and, thus, in accord with the governing regulations, the Department issued the Title V permit. *See* 40 CFR § 70.8(c); 6 NYCRR § 621.10(a)(5). The LGFTE Facility has been operating lawfully pursuant to that permit since its issuance.

In response to the EPA's failure to object to the proposed permit, the Coalition filed a petition with the EPA, alleging that the LFGTE Facility and Landfill are under common control and asking the EPA to re-open this issue. Coalition Petition, at 5; *see also* 40 CFR § 70.8(d); 6 NYCRR §§ 621.10(a)(5), (e). When the EPA did not respond within the 60-day timeframe set forth in statute (*see* 42 U.S.C. § 7661d[b][2]), the Coalition brought a mandamus action in federal district court in September of 2014, seeking to force the EPA to either grant or deny the Coalition's petition. In January of 2015, the parties entered into a settlement agreement, pursuant to which the EPA has until June 30, 2015 to render its decision on the Coalition's petition. Coalition Petition, at 5.

ARGUMENT

POINT I
ALLEGED DEFICIENCIES IN THE SWMP CANNOT BE ADJUDICATED IN THIS PROCEEDING

The Coalition's first proposed issue sets forth a number of arguments which are contradicted by plain regulatory language and administrative precedent, and, in any event, do not present an issue that can be heard in this proceeding. First, relying on 6 NYCRR § 360-1.9(f), the Coalition maintains that (1) a CRA is a prerequisite to approval to expand the landfill, and (2) because the

County did not prepare a separate CRA, the permit application cannot be approved. *See* Coalition Petition, at 9-16. The Coalition also maintains that even if the local SWMP could theoretically satisfy the CRA requirement, the substance of the County's SWMP does not. *See id.*, at 16-26. For these reasons, the Coalition contends that the Part 360 Application for the permit modification is "deficient" (meaning incomplete) and the SWMP is fatally defective and that defect precludes permit issuance or could result in permit modification.[1] As detailed below, the Coalition is in error on the law, and, in any event, has not raised any issue respecting the SWMP that can be considered in this proceeding.

A. The Claim That The Part 360 Application Is "Deficient" Due To Lack Of A CRA Is An Impermissible Attack On The Department's Completeness Determination

The Coalition's assertion that the Part 360 Application is deficient is a veiled assertion that the application is incomplete, but that determination is plainly not adjudicable. *See* 6 NYCRR § 624.4(c)(7); *see also Sullivan Cnty. Div. of Solid Waste*, Interim Decision of Commissioner, 2008 WL 1275464, *1, 6 (Mar. 28, 2008) (rejecting as non-adjudicable SWMP issue where such was a challenge to completeness determination); *Athens Generating Co.*, Ruling on Proposed Issues for Adjudication and Petition for Party Status, 2000 WL 33341186, *8 (Apr. 26, 2000): *N.Y.C. Dep't of Envtl. Protection,* Preliminary Rulings of the Administrative Law Judge, 1994 WL 1720234, *9-10 (Mar. 24, 1994).

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[1] The Coalition Petition is also replete with other statements that have no bearing whatsoever on anything relevant to this permitting proceeding. The 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 (to name just a few), are simply irrelevant in this administrative permit proceeding. *See, e.g.*, Coalition Petition, at 2, 4-5, 9-10.

More specifically, first, the Coalition argues that 6 NYCRR § 360-1.9(f) applies to this permit modification application. 6 NYCRR § 360-1.9 contains separate provisions for "initial permits," "renewal applications," and "modification applications," respectively 6 NYCRR § 360-1.9(a), (b) and (c). Subdivision (f) pertains to CRAs and directs:

> "In the case of applications that are submitted by or on behalf of a municipality for initial permits to construct and operate or to renew a permit . . . for a landfill . . . the applicant must submit as part of a complete application a comprehensive recycling analysis . . . ; or a local Solid Waste Management Plan is in effect that addresses all components of such analysis."

By its plain language, this provision does not apply to the application in this proceeding, which is a for a permit modification for an already existing facility. And, indeed, counsel for the Coalition was involved in the *Sullivan County* landfill expansion proceeding where the ALJ and the Commissioner held that this provision does not apply to applications for permit modifications. *See Sullivan Cnty. Div. of Solid Waste*, Rulings of ALJ on Issues and Party Status, 2007 WL 184673, *11 (Jan. 18, 2007) (stating that Part 360-1.9[f] does not apply, by its plain terms, since this is not an initial permit to construct and operate a solid waste landfill or to renew a permit already issued), *aff'd*, Interim Decision of Commissioner, 2008 WL 1275464, *1, *2, *6, *10 (Mar. 28, 2008).

Although the Coalition acknowledges that this is a permit modification proceeding (*see* Coalition Petition, at 1, 9), it advances two arguments to escape the result that 6 NYCRR § 360-1.9(f) is inapplicable: (1) *Sullivan County* should not apply because there, a CRA had been submitted in earlier years; and (2) because the County's proposed permit modification is a major

project, so that this application should be treated as new, thereby rendering 6 NYCRR § 360-1.9(f) applicable. *See* Coalition Petition, at 11-13, n.17 & n.19. This interpretation, however, is unsupported and belied by the regulatory language. Simply because a project is "major" as opposed to "minor" does not transform a permit modification for an already existing facility into an "initial" permit for a new facility or a permit renewal. Moreover, the rationale in the *Sullivan County* decision is premised on a straightforward application of the regulatory language. Thus, the Coalition's interpretation fails as a matter of law.

In the end, 6 NYCRR § 360-1.8(g) establishes that the Coalition's complaint about the alleged "deficiency" in the Part 360 application is, on its face, a challenge to the Department's completeness determination. This provision directs, in pertinent part:

> "Local solid waste management plan. On or after April 1, 1991 a permit application made by or on behalf of a municipality in a planning unit for the construction of a solid waste management facility shall not be complete until a local solid waste management plan that contains all of the elements, including any required plan modifications or updates, set forth in paragraph (b) of subdivision (1) of section 27-0107 of the ECL and Subpart 360-15 of this Part is in effect for such municipality. . ."

The Department's determination that the Part 360 permit modification application was complete means that it likewise determined that the SWMP contained all the elements required by ECL 27-0107(1) and 6 NYCRR § 360-15. 6 NYCRR § 360-15.9(f) incorporates the CRA requirements that are in 6 NYCRR § 360-1.9(f)(1)-(7). Thus, the determination of completeness is a finding of compliance with the statutory and regulatory requirements for both local SWMPS

and CRAs, and this issue is not adjudicable. *See Sullivan Cnty.*, 2007 WL 184673, *11; 6 NYCRR § 624.4(c)(7).

B. Criticisms Of The SWMP's Adequacy Do Not Relate To Any Permitting Standard And, Therefore, Cannot Be Substantive And Significant

Also not cognizable in this proceeding are the merits of the Coalition's other specific criticisms of the SWMP. The only potential issues in this proceeding concern whether the County's application for the requested permit modification meets applicable statutory and regulatory requirements relating to the construction and operation of solid waste landfills. *See, e.g., Application of Chemung Cnty.*, Rulings of ALJ on Issues and Party Status, 2010 WL 5612197, *34 (Sept. 3, 2010) (stating that an issue can be substantive and significant only if there is a regulatory basis for it); *N.Y.C. Dep't of Sanitation*, Rulings of ALJ on Issues and Party Status, 2009 WL 4931398, *26 (July 22, 2009) (stating that claims which relate to studies in the FEIS cannot be adjudicated in the absence of some connection to a Department permitting standard); *Sullivan Cnty. Div. of Solid Waste*, Interim Decision of Commissioner, 2008 WL 1275464, *8 (Mar. 28, 2008) (stating that an issue cannot be "substantive" if it does not relate to any statutory or regulatory standard; rejecting proposed issue regarding compliance with 40% recycling rate set forth in SWMP where there was no statute or regulation mandating a specific recycling rate).

More specifically, for an issue to merit adjudication in this proceeding, it must be tied to a Department permitting standard, and a potential party proposing the issue must demonstrate that the proposed issue is both "substantive" and "significant." 6 NYCRR § 624.4(c)(1)(iii). An issue is substantive "if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further

inquiry." 6 NYCRR § 624.4(c)(2). An issue is significant "if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit." 6 NYCRR § 624.4(c)(3). Further, where, as here, Department staff have reviewed the application and determined that a component of the project, as proposed or as conditioned by the permit, conforms to all applicable statutory and regulatory requirements, the burden of persuasion is on a potential party proposing any issue related to that project component to demonstrate that the issue is substantive and significant. 6 NYCRR § 624.4(c)(4); *see also Sullivan Cnty. Div. of Solid Waste*, Deputy Commissioner's Interim Decision, 2005 WL 389358, *4 (Feb. 15, 2005).

The Coalition's asserted issues respecting alleged deficiencies in the SWMP do not, and cannot, meet this standard, because these matters do not in any way relate to the permitting standards that apply to the requested permit modification. *See, e.g.*, *N.Y.C. Dep't of Sanitation*, Decision of Commissioner, 2012 WL 3790962, *3, 5 (May 21, 2012) (articulating standard for adjudication; stating "I concur with the ALJ that, to the extent that petitioners' claims are not related to DEC's permitting standards . . . these claims should have been pursued in a court challenge to DSNY's SEQRA review of the SWMP, which has long been completed"); *Application of Chemung Cnty.*, Rulings of ALJ on Issues and Party Status, 2010 WL 5612197, *34 (Sept. 3, 2010) (stating that "[t]he issue of the county's not achieving 40% recycling rate as set forth in the SWMP cannot be substantive . . . A proposed issue must engender sufficient doubt about the applicant's ability to meet statutory and regulatory criteria applicable to the project. . . . However, MLE has not cited any statute or regulation that mandates a specific recycling rate . . . Accordingly, this does not present an issue that is substantive as defined in 6 NYCRR § 624.4[c][2]" [internal citations and quotations omitted]; quoting *Sullivan Cnty. Div. of*

Solid Waste, Interim Decision of Commissioner, 2008 WL 1275464, *8 [Mar. 28, 2008]).[2]

The Department approved the SWMP in July of 2014, and any challenge to its adequacy should have been brought before the Supreme Court (*see* Point I.B, *infra)*, not in this proceeding. This approval occurred after ample involvement by the Coalition. *See, e.g.*, Coalition Petition, Exhs. D & E. Any alleged deficiencies in the SWMP are simply not relevant to the subject matter in this permit proceeding. Thus, this tribunal lacks subject matter jurisdiction over these issues. *See N.Y.C. Dep't of Sanitation*, Decision of Assistant Commissioner, 2009 WL 4931401, *8 (July 27, 2009) (stating "I concur with the ALJ that the alternative Bronx location that Gracie Point seeks to advance does not raise an adjudicable issue, in part due to the Department-approved SWMP that establishes the manner in which DSNY is proposing to locate its solid waste infrastructure"), *aff'g*, *N.Y.C. Dep't of Sanitation*, Rulings of ALJ on Issues and Party Status, 2009 WL 4931398, *37, *44 (July 22, 2009) (rejecting proposed issues regarding facility need, alternatives, and alleged deficiencies in the FEIS for the SWMP; stating "the issues of need and alternatives . . . are tied to revisiting determinations that DSNY made as part of its SWMP. . . . As DSNY argues, there is no legal basis to expand the review of the permit application [for a marine transfer station] to encompass the alternatives proposed by Baykeeper, when DEC has already approved the SWMP—including its reliance of marine-based waste transport . . .").[3]

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[2] Counsel for the Coalition was involved in both the *Sullivan County* and *Chemung County* proceedings, wherein like arguments (i.e., failure to achieve specific recycling rates, inconsistency with state SWMP, issues as to size/waste importation) were rejected as not being adjudicable. In *Sullivan County*, 2007 WL 184673, *38, the ALJ also rejected Mr. Abraham's reliance on incinerator cases to inform the SWMP analysis and the issue of over-sizing a facility. Thus, the ALJ rejected his reliance on *Ogden Martin Systems*, stating that incinerators must be sized thermodynamically, but "such a consideration does not exist for landfills, where waste is burned." In the present filings, Mr. Abraham merely substituted another incineration case (*Foster Wheeler-Broome County*) in place of *Ogden Martin Systems*; but the result is the same – the case is simply not relevant. *See* Coalition Petition, at 10 & n.14, 14-15, 19-24.

[3] *See also Gracie Point Community Council v. N.Y.S. Dep't of Envtl. Conservation*, 92 A.D.3d 123, 131 (3d Dep't 2011) (upholding Department's decision to grant permits to construct marine waste transfer station; finding that Department's reliance on policies contained in Department-approved SWMP was not arbitrary and capricious).

Accordingly, the County's respectfully submits the Coalition's SWMP/CRA issues cannot properly be considered in this current proceeding. *See Sullivan Cnty. Div. of Solid Waste*, Deputy Commissioner's Interim Decision, 2005 WL 389358, *7-8 (Feb. 15, 2005) (rejecting proposed issue regarding management of landfill's remaining disposal capacity; finding that where the Department-approved SWMP contemplated landfilling, "it is not for the Department to determine whether waste importation should continue or to impose limitations on a municipal landfill's service area," and such issues were "outside the scope of th[e] proceeding" for a landfill permit; also stating that once the Department determines that a local SWMP satisfies the statutory requirements, that SWMP becomes the plan in effect for that jurisdiction), *aff'g*, *Sullivan Cnty. Div. of Solid Waste*, Rulings of ALJ on Party Status and Issues, 2004 WL 1701672, *18 (July 20, 2004) (ruling that "[i]ssues about management of the landfill's remaining disposal capacity, to the extent they bear on the County's ability to plan for its waste management future, are outside of the scope of this permitting proceeding, and shall not be entertained. These issues, which include whether or not to import waste to the landfill, are to be determined by the County as the Department-recognized planning unit for solid waste management, and not by the Department itself"; noting this "is not an issue for the Department, because the source of waste—whether it comes from inside or outside the county— has no bearing, by itself, on the environmental impacts of the landfill's operation").[4]

C. Any Challenge To The SWMP's Adequacy Should Have Been Asserted Before The Supreme Court And Is Now Time-Barred

[4] *See also American Marine Rail, LLC*, Ruling of ALJ, 2000 WL 1299571, *73 n.8 (Aug. 25, 2000) (In response to the ALJ's request for information about the revised SWMP, "Deputy Commissioner Allan stress[ed] the independence of the permit review process from the SWMP modification process").

The Coalition's challenge to the SWMP should have been brought before the supreme court in an Article 78 proceeding, be it by challenging the County's negative declaration or challenging the Department's approval of the SWMP. *See* CPLR 7803(3); *see also Seymour v. N.Y.S. Dep't of Envtl. Conservation*, 184 A.D.2d 101, 104-05 (3d Dep't 1992) (upholding Department's approval of county SWMP and according deference to the Department); *Schulz v. N.Y.S. Dep't of Envtl Conservation*, 188 A.D.2d 854 (3d Dep't 1992) (involving hybrid Article 78/declaratory judgment action challenging negative declaration to Department's update to State SWMP). Of course, a four-month statute of limitations applies to such a challenge. CPLR §§ 217(1), 7803(3); *see also Stop-The-Barge v. Cahill*, 1 N.Y.3d 218, 223-24 (2003).

Here, the County issued its negative declaration and findings statement on May 29, 2014, and officially adopted the SWMP by resolution on June 19, 2014. Any challenge to the County's SEQRA review and negative declaration had to be brought within four months—i.e., at the latest, by mid-October 2014. *See, e.g.*, *Stop-The-Barge*, 1 N.Y.3d at 223-24 (four-month statute of limitations applied to conditioned negative declaration and began to run when conditioned negative declaration was final); *Young v. Bd. of Trs. of Vill. of Blasdell*, 89 N.Y.2d 846, 848 (1996) (SEQRA violations are subject to four-month statute of limitations); *Save the Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 202-03 (1987) (stating the same); *J.B. Realty Enter. Corp. v. City of Saratoga Springs*, 270 A.D.2d 771 (3d Dep't 2000) (city approval of public works department application to construct pavilions in park was final when city issued negative declaration and filed written notice of decision approving project); *McNeill v. Town Bd. Town of Ithaca*, 260 A.D.2d 829 (3d Dep't 1999) (seeking to annul enactment of local law amending zoning map; finding that limitations period to claim challenging propriety of SEQRA review was

triggered when board filed negative declaration). Any challenge to the Department's approval of the SWMP in July of 2014 had to be commenced within four months—i.e., November 2014.

However, the Coalition failed to timely challenge the SWMP in the proper forum. Therefore, the Coalition cannot circumvent the statute of limitations by belatedly asserting these claims in this proceeding. *See N.Y.C. Dep't of Sanitation*, Decision of Commissioner, 2012 WL 3790962, *15 (May 21, 2012) (concurring with the ALJ that petitioners' recommendations regarding alternatives did not raise an adjudicable issue due to the Department-approved SWMP that established the manner in which the agency was proposing to locate its solid waste infrastructure; finding that "[p]etitioners' offer of an alternative to the facility, in effect, is a challenge to the SWMP and is untimely").

D. The Coalition's Challenge Amounts To An Improper Collateral Attack On The Department's Approval Of The SWMP

In the end, the Coalition's asserted issues must be rejected because they are nothing more than an impermissible collateral attack on the Department's approval of the SWMP. Whether framed in terms of a general assertion that the County's SWMP is non-compliant with State law or policy, or framed in terms of challenging individual provisions of the SWMP, the Coalition's claims cannot be considered in this proceeding.

First, any claim that the SWMP does not comply with the state SWMP or state waste management policy "was laid to rest by Department approval" of the County SWMP, which review requires that local SWMPs take account of state solid waste management policies. *See Saratoga Cnty. Landfill*, Second Interim Decision of Deputy Commissioner, 1995 WL 775045, *14 (Oct. 3, 1995), *aff'g*, *Saratoga Cnty. Landfill*, Rulings on Party Status and Issues, 1995 WL

1780808, *30-32 (Aug. 1, 1995). Because the Coalition did not seek judicial review of the Department's approval of the SWMP on this (or any other) ground, this is a dead issue and may not be addressed in the permit application review process. *See Saratoga Cnty. Landfill*, Second Interim Decision of Deputy Commissioner, 1995 WL 775045, *14 (Oct. 3, 1995), *aff'g*, *Saratoga Cnty. Landfill,* Rulings on Party Status and Issues, 1995 WL 1780808, *30-32 (Aug. 1, 1995).

The Coalition's other allegations of alleged deficiencies in the SWMP fail for like reason. The Coalition could have commenced a judicial proceeding to challenge the County's negative declaration, the SWMP's substantive provisions, or the Department's approval of the SWMP. It failed to do so, and the statute of limitations on any such challenge has long expired; therefore, the Coalition cannot collaterally attack the final SWMP in this administrative proceeding. *See City of Plattsburgh*, Interim Decision, 2006 WL 3356601, *4-7, 11 n.3-4 (Sept. 12, 2006) (involving staff-initiated proceeding to modify city's phosphorus effluent limit based on EPA-approved total maximum daily load ["TMDL"]; finding that city failed to raise an issue for adjudication in challenging TMDL; stating that to the extent the city was challenging the content of the TMDL, the time to have done so was during its development; noting that the determination could have been challenged directly but was not, and the current administrative proceeding could not be used to collaterally attack the TMDL); *Application of Peter Mitchell*, ALJ Ruling on Issues, 2000 WL 1349802, *3-4 (Sept. 13, 2000) (involving appeal of denial of variance from Lake George Planning Commission regulations; rejecting challenge to rationality of the regulations as being a collateral attack on duly promulgated regulations; stating that the

appropriate forum to have raised that challenge was in state Supreme Court, assuming the statute of limitations had not run).[5]

Accordingly, these issues cannot be considered in this proceeding.

POINT II
THE COALITION IS COLLATERALLY ESTOPPED FROM RAISING THE COMMON CONTROL ISSUE IN THIS PROCEEDING

Equally unavailing is the attempt by the Coalition to re-litigate the issue of whether the County Landfill and the LFGTE facility are subject to common control and, therefore, the air emissions from the two facilities should be aggregated for the purpose of permit review. Because the Coalition already lost on that issue, it is barred from re-litigating that very same issue in this case.

The doctrines of res judicata and collateral estoppel are applicable to give conclusive effect to quasi-judicial determinations of administrative agencies when rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals. *See Ryan v. N.Y. Telephone Co.*, 62 N.Y.2d 494, 499 (1984). Collateral estoppel precludes a party from re-litigating in a subsequent proceeding an issue clearly raised in a prior proceeding and decided against that party. *Id.* at 500. What is controlling under collateral estoppel is identity of the issue that has been necessarily decided in the prior proceeding, such that a different judgment in the second proceeding would destroy or impair rights or interests established by the first. *Id.* at

[5] *See also Adirondack Park Agency v. Bucci*, 2 A.D.3d 1293, 1295 (4th Dep't 2003) (holding that landowners could not collaterally attack administrative determination that driveway crossing wetland violated state statute in subsequent enforcement action, where original determination was never challenged in Article 78 proceeding and the statute of limitations for that challenge had expired); *Cahill v. Harter*, 277 A.D.2d 655, 656 (3d Dep't 2000) (holding that defendants who had failed to bring Article 78 challenge to consent orders and administrative orders could not collaterally attack those orders when the Department later sought to enforce them and collect penalties).

500-01; *see also Choi v. State of N.Y.*, 74 N.Y.2d 933, 936 (1989). Thus, where the decision on the particular issue is necessary to the prior judgment, and the party has lost on that issue after having had a full and fair opportunity to litigate, that party is precluded from re-litigating that same issue in a subsequent proceeding. The proponent of collateral estoppel bears the burden of establishing that the issues are identical and that the issue was necessarily decided in the prior action; but upon that showing, the burden shifts to the party opposing application of the doctrine to prove the lack of a full and fair opportunity to litigate. *Ryan*, 62 N.Y.2d at 501-02; *see also Gersten v. 56 7th Ave., LLC*, 88 A.D.3d 189, 201 (1st Dep't 2011).

Here, the elements of collateral estoppel are squarely met with respect to the common control issue. As the Coalition admits, the proposed issue is identical to that already decided in the LFGTE Facility Title V permit proceeding: namely, whether the LFGTE Facility and Landfill are under common control. *See* Coalition Petition, at 5 (asserting that the Coalition "raised this issue previously in the context of permitting for the [LFGTE Facility]"). In both the Aggregation Decision and the September 11, 2012, determination on the Title V permit application for the LFGTE Facility, the Department decided in the negative—confirming that the LFGTE and the County landfill are not subject to common control—issuing for EPA's review a proposed permit on this basis and a responsiveness summary explaining its rationale (including in response to the Coalition's comments). *See* West Aff., ¶¶ 34, 39-40. When the EPA did not respond within the requisite 45-day timeframe, in accord with the governing regulations, the Department issued the permit. Given the issuance of a permit premised on the underlying "no common control" determination, this determination is certainly a final, binding quasi-judicial determination within the Department's authority, which necessarily decided the common control issue against the Coalition. *See Allied Chem. v. Niagara Mohawk Corp.*, 72 N.Y.2d 271, 276-78

(1988) (administrative decisions will be given preclusive effect in subsequent judicial proceedings where the agency had statutory authority to act adjudicatively and the agency employed procedures sufficient to assure that facts asserted were adequately tested and the issue was fully aired); *see also Gernatt Asphalt Prods., Inc.*, ALJ Ruling, 1999 WL 33283814, *4 (Feb. 24, 1999) (res judicata applies to quasi-judicial administrative proceedings and has long been applied in the Department's proceedings); *cf. State v. Unitized Bldg. Corp.*, 91 Misc.2d 278, 280-81 (Sup. Ct. Dutchess Cnty. 1977) ("The Commissioner of Environmental Conservation, in exercising discretion to issue a permit is exercising a governmental function of a quasi-judicial nature.").

Further, the finality and legally binding effect of that determination are not at all impaired by the Coalition's pending petition before the EPA. *See* 2 N.Y. Jur.2d Administrative Law § 285 ("[A] final administrative determination is not divested of finality ... for purposes of invoking the doctrine of collateral estoppel, merely because the time in which to appeal the determination is still open or an appeal from that determination has actually been taken"); *see also Samhammer v. Home Mut. Ins. Co. of Binghamton*, 120 A.D.2d 59, 64 (3d Dep't 1986) (and citations therein).

Finally, beyond its own admission, the facts demonstrate that the Coalition had a full and fair opportunity to litigate the matter in the Title V permit proceeding for the LFGTE Facility, and the Coalition cannot meet its burden to show otherwise. The Department fully complied with the labyrinth of notice and comment procedures governing applications for Title V permits (*See, e.g.*, 6 NYCRR § 621.6[g], 621.7[a], [b][6]-[9], [c], [h], [i][5]); and, the Coalition submitted extensive factor-by-factor written commentary in August, 2012, arguing that the Landfill and the LFGTE Facility are under common control. West Aff., Exh F. Ultimately, the Department rejected this position in its September, 2012, determination and subsequent issuance

of the permit, and the Department addressed the Coalition's comments in the responsiveness summary. In fact, it is telling that the Coalition Petition simply asserts that the Department's decision is clearly erroneous and then rehashes the very same factor-by-factor analysis700

that it previously advanced before the Department, and which was rejected, in the LFGTE Facility permit proceeding. *See generally*, Coalition Petition, at 26-39; West Aff., Exhs. F, G. Thus, the Coalition had a full and fair opportunity to air this issue.

Moreover, this is so, notwithstanding that the Department did not hold a hearing. *See Gersten*, 88 A.D.3d at 202-03. Significantly, in the Coalition's written commentary on the application, it did not request a hearing on or adjudication of the common control issue, as it could have done pursuant to 6 NYCRR § 621.7(f). *See* West Aff., Exh. F. Having failed to request a hearing or assert a substantive and significant issue, the Coalition cannot complain that it lacked a full and fair opportunity to litigate; and, indeed, its argument and submissions here establish the contrary. *See Gersten*, 88 A.D.3d at 202-03 (holding tenants collaterally estopped from challenging prior agency deregulation order, notwithstanding the agency's decision not to hold a hearing, as that was the result of the tenant's failure to raise factual issues regarding the prior owner's decontrol application; noting statutory/regulatory scheme which afforded tenants the opportunity to contest deregulation orders; stating that petitioners had ample opportunity to challenge the prior deregulation order and "[t]hat [the agency] never held a hearing on the luxury deregulation application is of no moment . . . [as] plaintiffs never asked [the agency] for one"); *see also Application for Broome Cnty. Dep't of Pub. Works*, Decision of Commissioner, 1984 WL 19323, *9 (June 11, 1984) (involving landfill expansion; stating that the burden of establishing the reasonableness of an issue for adjudication in a quasi-judicial proceeding lies with the party raising the issue).

Accordingly, the Coalition already had a full and fair opportunity to litigate this issue before the Department and cannot be given yet another bite at the apple during the Landfill's permit proceeding. Simply put, the LFGTE Facility and the Ontario County Landfill are *not* under common control. Importantly, no facts pertinent to the common control analysis have changed since the Department rendered those prior determinations. *See* West Aff., Exhs. K, L, M. Furthermore, the Coalition has not argued any changed circumstances, but rests its argument on the same facts and positions the Department heard and rejected before. Thus, the proposed issue is identical to that already necessarily decided in the prior proceeding, and the Coalition is collaterally estopped from re-litigating the common control issue here. *See City of Schenectady/Town of Niskayuna*, Decision of Commissioner, 1986 WL 26265, *4 (Jan. 15, 1986) (rejecting city's back-door approach to oppose construction of shopping mall by attempting to use water supply permit procedures to acquire lands for aquifer protection after the same aquifer protection arguments were rejected in a prior administrative proceeding; stating that the Department's "permit procedures were not intended to provide frustrated litigants such a basis for collateral attack upon a final administrative determination").

CONCLUSION

For all of the foregoing reasons, the County respectfully requests that this tribunal grant its motion in its entirety, finding that the Coalition's proposed SWMP/CRA and common control issues cannot be heard in this proceeding.

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