STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
_____X

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

PETITION FOR FULL PARTY STATUS

Application Nos. 8-3244-00004/00007, 8-3244-00004/00021, and 8-3244-00004/00001
_____X

INTRODUCTION

In accordance with 6 N.Y.C.R.R. § 624.5, this Petition is submitted on behalf of Finger Lakes Zero Waste Coalition, Inc. ("FLZWC") in opposition to the above referenced permit modifications, which would increase the design size of the Ontario County Landfill by adding over 40 acres of new landfill area.

FLZWC is an environmental organization incorporated under New York's Not-for-Profit Corporations Law and recognized as a charitable organization under IRC § 501(c)(4). FLZWC's members live in Seneca, New York, the town in which the subject landfill facility is located. FLZWC's mission is to advance the goals of a "zero waste" society in the local community, that is, a society in which no waste is generated for disposal, to avoid or minimize the inherent risks to public health and the environment of waste disposal. To that end, FLZWC has been a vigorous participant in Ontario County's solid waste planning and the Department's permitting for this facility. Under a 2003 lease with Vermont-based Casella Waste Systems, Inc. and its subsidiary New England Waste Services of New York, Inc., ("Casella"), the County has leased operations and the land for operation of the landfill and County recycling facilities. Accordingly, Casella and the County have submitted a Joint Application to modify the landfill's existing permits

under, *inter alia*, Part 360 of the Department's regulations and Title V of the federal Clean Air Act, which program is administered by the Department with oversight by the U.S. Environmental Protection Agency. Under its lease with Casella, the County has taken a back seat to permitting, allowing and benefitting financially from the privatization of the County's landfill. As discussed herein, this has come at the expense of compliance with the waste management planning obligations applicable to municipal landfills, which require municipalities that own landfills to maximize the waste diverted from landfilling by recycling and other means to the maximum extent feasible, and at the expense of air pollution control requirements under Title V. This has also come at the expense of the non-monetary, environmental and health interests of the community, as the landfill has been a chronic source of off-site odor and noise to the residential community that surrounds it. These problems can be attributed to the sheer size of the landfill, as discussed in detail below, some ten times the size needed to dispose of waste generated in the County that is not recycled or otherwise diverted from disposal.

The landfill's odor problems suggest it is not well-designed and well-operated. Its current Title V permit subjects the facility to landfill gas emissions controls intended to maximize the collection of landfill gas and combust the gas to remove at least 98% of the odorous compounds in the gas, which are regulated because they are toxic.

Privatization of the landfill in 2003 has presented issues of landfill expansion without regard to local needs, and disincentives to recycling which otherwise could diminish the need for a county landfill in an environmentally and culturally sensitive location like the central Finger Lakes region. Less than one-tenth of the waste accepted at the landfill comes from the County. The remainder is imported from other counties and out of state. As FLZWC commented to the

County during a review of the current landfill expansion proposal, where the County acted as lead agency under the State Environmental Quality Review Act, which has now concluded, were the landfill managed to serve primarily the needs of County residents and businesses for disposal of nonrecyclable materials, its currently permitted capacity would last at least 70 years.

As discussed further below, despite being required to do so since 1992 under the Solid Waste Management Act of 1988, which amended the Environmental Conservation Law and General Municipal Law by mandating progressively increasing recycling rates for municipal solid waste management facilities, and local source separation laws to achieve that goal, Ontario County Landfill operated without a mandatory Local Solid Waste Management Plan until 2012, when Region 8 approved the first such plan. However, the Plan, which recites 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, in reality is designed to maintain the landfill as a regional facility. In the tension between mandated planning for waste reduction and recycling on the one hand, and the use of the landfill to generate revenue for the County and Casella, revenue has won out. The County's recycling rate is among the lowest in the State and, lacking any assurances that new aggressive waste diversion programs will ever be implemented, the County now claims that it will soon run out of permitted capacity. This claim assumes the County cannot or should not limit the principal use of the landfill as a revenue generator.

Every landfill application in the State must be measured against the State policy of discouraging landfilling and maximizing recycling.[1] The 1988 Act made landfilling the lowest

[1] N.Y. Envtl. Conserv. L. ("ECL") § 27-0106(3).

priority for waste management and mandated recycling,[2] putting most of the burden for diverting waste from land disposal on municipal planning units[3] and directing the Department "to foster and facilitate local planning" for aggressive recycling through further regulations.[4] "Twenty-two years later, the majority of the materials generated are managed by the lowest priority strategy, and the state is still striving to achieve its recycling goals," according to the Department's current (and under the 1988 Act mandated) state solid waste management plan.[5]

The current design expansion proposal is driven by the business goals of Casella and cannot be justified by the needs of the County. Under its lease agreement with Casella, as discussed further below, the County is prohibited from interfering with Casella's business decisions regarding operational planning for the landfill. Were it shorn of this contractual shackle, as noted above, the County could extend the use of the currently permitted capacity of the landfill significantly and turn to meaningful planning for responsible local waste management as, it will be argued, it is required to do by law. For example, the County has enacted a mandatory recycling law, but it remains today a dead letter as the County does not enforce it, and its desuetude is reflected the County's dismal recycling rate. Instead, the current proposal is but

---

[2] Solid Waste Management Act of 1988, Laws 1988 Ch. 70, 1988 N.Y. Sess. Law Serv. 70 (McKinney), amending the ECL to provide that solid waste in the state must be managed in accordance with a hierarchy of priorities in this order: reduce, reuse, and recover for energy all managed waste, and "dispose of solid waste that is not being reused, recycled or from which energy is not being recovered." ECL § 27-0106(1).

[3] ECL § 27-0106(2) ("the basic responsibility for the planning and operation of solid waste management facilities remains with local governments").

[4] ECL §§ 27-0107(2), 27-0109(1).

[5] NYSDEC, *Beyond Waste: A Sustainable Materials Management Strategy for New York State* (December 27, 2010), 19, available at <http://www.dec.ny.gov/chemical/41831.html>.

one of a series of landfill expansions provided for under the lease (this is not last expansion that could be advanced by Casella under the lease), each of which push the goals of responsible waste planning farther from reach. Under a guidance document central to the interpretation of the rules that apply to this issue, it is the Department's responsibility "to consider the extent to which these local laws foster and encourage recycling." It will be argued below that a finding by the Department that the County is *implementing* these laws to achieve this goal is a prerequisite to approval of the requested permit modification. Because the Department cannot make this finding, it cannot approve the request at this time.

A second substantive and significant issue to be detailed below is whether the County's Title V permit is in reality a sham, because the permit fails to consider combined emissions of the landfill and an onsite energy plant to which the collected emissions are piped for combustion and thereby chemical destruction. FLZWC has raised this issue previously in the context of permitting for the energy plant, and a request to USEPA to object to the Title V permit for the energy plant for failure to consider the landfill and the energy plant as a single source. Doing so would require that maximum potential emissions of both facilities be combine to determine what air pollution control program apply. Our petition to EPA regarding the energy plant is pending, and EPA has agreed to respond to its allegations and resolve that issue by June 30, 2015.[6] We raise this issue here because it applies to the landfill, and bcause it is inappropriate to advance a modification of the landfill's Title V permit to allow increased emissions without addressing the

[6] Accordingly, an Order "to stay all proceedings" pending completion of the settlement agreement has been granted in an action brought by FLZWC against EPA for failure to timely respond to its petition. Order, *Finger Lakes Zero Waste Coalition v. McCarthy*, Index No. 14-CV-6542 (W.D.N.Y. February 4, 2015) (Siracusa, J.). The Order is provided with this Petition as **Exhibit A**.

issue.

The air pollutants contained in landfill gas are regulated under several programs under the Clean Air Act, and Title V of the Act requires all applicable control requirements to be brought together under one permit in order to enable the public to become informed about the potential adverse impacts emissions could cause and be assured that maximum feasible control technologies are applied to minimize such impacts. When, as we argue is the case here, two facilities are under common control, the law requires that their separate Title V permits include liability for the control requirements imposed on each facility.

Landfills in particular are obligated to both collect and control their emissions. However, in this case the County and Casella seek to be relieved of liability for how the landfill gas they collect is controlled. They want their control obligations to stop at the open valve that controls gas flow to the energy plant, as if the end fate of the gas could be placed out of mind. Whether they are allowed to do this is an important issue because the odorous component of landfill gas, about one percent of the gas (the rest is methane and carbon dioxide, and should be in roughly equal parts) is highly toxic. That is why control programs apply to landfills. However, if responsibility for control of toxic emissions is severed between two facilities that are in reality operated as a single source, the prospect is raised that control obligations will slip through the cracks between the two, at the expense of public health and the environment.

A third and final issue involves the ability of the landfill to comply with the numerical noise limit under Part 360 of the Department's regulations, which applies at the landfill property line where, on the other side, residential use is allowed.[7] FLZWC has been allowed to

[7] *See* 6 NYCRR § 360-1.14(p).

supplement its petition by March 10 to address this issue.

Information required by 6 NYCRR Part 624.5(b)(1)

Part 624.5(b)(1)(i)

FLZWC is represented by:

Gary A. Abraham, Esq.
170 No. Second St.
Allegany, New York 14706
Telephone (716) 372-1913
Fax (716) 372-1913

Part 624.5(b)(1)(ii)

The environmental interest of FLZWC in this proceeding is basic to its mission, to advocate for sound management of solid waste in the community informed by a policy to maximize the diversion of wastes from disposal, which is inherently environmentally risky. As set forth in the ECL and Part 360 regulations and guidance implementing these laws and regulations, this is also the policy of the Department.

Part 624.5(b)(1)(iii)

The primary interest relating to statutes administered by the Department is FLZWC's interest in the proper implementation and enforcement of New York's Environmental Conservation Law ("ECL"), Article 1; Article 3; Article 27, Title 9; ECL Article 19; ECL Article 15; and ECL Article 70; and the Department's regulations that implement these statutes, specifically 6 NYCRR Parts 200, 201, 202, 208, 212, 231, 360, 617, 621 and 624. Accordingly, the members of FLZWC have a substantial interest in the manner in which the Department carries out its responsibilities under, and its implementation of the state and federal environmental statutes noted above.

Part 624.5(b)(1)(iv)

FLZWC is requesting full party status, in opposition to the permit modification requested by the applicant.

Part 624.5(b)(1)(v)

The precise grounds for FLZWC's opposition include offers of proof discussed further below that the County cannot comply with the following applicable requirements:

1. The requirement to submit a comprehensive analysis and plan of action to achieve recycling goals identified in County's approved plan, including but not limited to the requirement to adopt and enforce local laws to facilitate implementation of plans to achieve progressively increased recycling rates. *See* 6 NYCRR §§ 360-1.9(f), 360-15.9.
2. Emission controls under Parts 360, 201, 202, 208 and 231, and the federal Clean Air Act and regulations either implemented by these Parts or applicable independently. *See* 40 C.F.R. §§ 50, 52.
3. Noise limits for landfills under Part 360. *See* 6 NYCRR § 360-1.14(p).

Accordingly, FLZWC proposes the following issues for adjudication.

ISSUES PROPOSED FOR ADJUDICATION

1. The County's Part 360 Application is deficient in that it lacks a mandated comprehensive recycling analysis, and the development of such an analysis would likely affect the size of the landfill expansion and the term of the draft modified Part 360 permit.

Introduction

Under the ECL and Part 360, municipally owned landfills and landfill expansion projects must be included in an integrated system of waste planning with the goal to minimize waste for disposal.[8] Among other things, the municipal solid waste management plan must include a robust "comprehensive recycling analysis" under Subdivision 360-1.9(f).[9] Under Subdivision 360-1.11(h) commercial landfills are obligated to accept waste only from "planning units" (one or more municipalities) "capable of implementing a regional solid waste management program" that minimizes waste by implementing the mandated planning measures.[10] The Department has issued guidance under these two subdivisions stating: "The Department interprets its responsibilities under applicable law and regulation to require itself to exercise its permitting authority in such a manner as to ensure that municipalities undertake recyclables recovery programs that are as aggressive and change-forcing as economically and technically practicable."[11]

In this case the applicant's lease with Casella creates dramatic disincentives to undertake

---

[8] ECL §§ 27-0106, 27-0107; 6 NYCRR § 360-15.9. ECL § 27-0107(2) delegates to the Department responsibility for promulgating regulations "for the implementation of this section".

[9] 6 NYCRR § 360-15.9(c).

[10] 6 NYCRR § 360-1.11(h).

[11] Technical Administrative Guidance Memorandum ("TAGM") SW-98-12, *Recyclables Recovery Programs and Percentage Recoveries* (May 3, 2001), at 2.

recyclables recovery programs, as the landfill is already ten times the size needed for the municipality (a county), and the percentage of waste recycled by the County is in the single-digits.[12] Under the lease, royalties to the County are tied to the volume of waste disposed.[13] These disincentives are embodied in the applicant's local solid waste management plan, which lacks any meaningful comprehensive recycling analysis. Because as discussed below, a comprehensive recycling analysis is a prerequisite to approval of the County's application to expand its landfill, the Department cannot permit the expansion.

In addition, were the County to comply with its obligation to perform a comprehensive recycling analysis the expansion proposal would result in an oversized facility, a result that is not permitted under the mandated planning requirements.[14] In addition, even if the County is given an opportunity to justify an expansion in light of such an analysis, the Department may determine that a shorter permit term than proposed is appropriate, in order to gauge progress in implementing changes to the County's waste management system called for by the analysis.

---

[12] Ontario County, *Final Solid Waste Management Plan* (March 2014), (hereafter, "LSWMP"), 42, 48 (showing that in 2011, except for construction and demolition debris, 6.98% of the County's waste is recycled, 88.55% was landfilled).

[13] *Id.*, 7 (showing that under the lease the County receives a portion of the landfill's gross revenue from tipping fees), and 41 (showing that in-County waste accounts for only 8.8% of waste disposed in the landfill).

[14] Interim 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, 1990 N.Y. ENV LEXIS 82, *1-2 (September 19, 1990). The Commissioner's Final Decision in that matter denied a permit to the proposal, a solid waste incinerator, on the grounds of excessive size in light of the needs of the county planning unit. *See* 1991 N.Y. ENV LEXIS 73 (December 18, 1991), at *9 (noting that the Commissioner's "analysis may be helpful in determining an appropriate size for landfills as well").

Applicable rules

A Part 360 application by or on behalf of a municipality[15] must contain a "comprehensive recycling analysis" ("CRA") or a local solid waste management plan ("LSWMP") must be "in effect that addresses all components of such an analysis."[16] Subpart 360-15 requires: "An application for an initial permit must include all applicable information identified in this Subpart and other Subparts of this Part pertaining to the type of facility for which the permit is being sought."[17]

In 2007, in *Matter of the Application of the Sullivan County Division of Solid Waste*, ALJ Buhrmaster ruled that "6 NYCRR 360-1.9(f), which requires a CRA as part of a municipality's application for an initial permit to construct and operate a solid waste landfill or to renew a permit already issued . . . does not apply . . . to modify an existing permit, to in effect allow the landfill's expansion."[18] However, in that case a CRA had been previously submitted and approved over a decade earlier. Department Staff commented on the modification application:

---

[15] *See* 6 NYCRR § 360-1.2(a)(21).

[16] 6 NYCRR § 360-1.9(f) (preamble). *See also* 6 NYCRR § 360-1.8(g) (requiring that when a county applies for a solid waste management facility in its planning unit, "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 [be] in effect").

[17] 6 NYCRR § 360-15.9(a)(1). In addition, an application to modify a landfill permit "must be treated as a new application" if the modification involves an "[e]xpansion of the disposal operation beyond the limits of the solid waste authorized by the existing permit." 6 NYCRR § 360-1.8(e)(1).

[18] Rulings of the Administrative Law Judge on Issues and Party Status, *In the Matter of the Application of the Sullivan County Division of Solid Waste*, No. 3-4846-00079/00027, 2007 N.Y. ENV LEXIS 2, *29 (January 18, 2007).

> Comment — 3.0 Comprehensive Recycling Analysis — Regulations stipulate that CRA must be submitted *unless it has been previously submitted and approved by the department.* The CRA was submitted and approved in 1993. Compliance reports have been utilized to update the plan in intervening years. The result has been a document that is large and not readily understandable by the reviewers or the public. Please include in the submission relevant sections of the document for Department and public review.[19]

Staff's comment is consistent with the Department's guidance on the review of CRAs: "This TAGM on Avoided Costs in Solid Waste is intended for those municipalities which do not now have an approved Comprehensive Recycling Analysis (CRA), or which seek to cease recycling a material previously included in an approved CRA."[20] Accordingly, Subdivision 360-1.9(f) should be interpreted to require a CRA where none was previously submitted and approved by the Department, and the ALJ Ruling in the Sullivan County Landfill matter should be distinguished and found inapplicable here.

The required components of a CRA set forth in Part 360 include:

- identification of the specific types of recyclables "generated within in the facility's service area," and a projection of future waste composition "for the expected life of the project"[21]

- identification of waste reduction efforts including, at a minimum, "residential

---

[19] NYSDEC Region 3 Staff Comments, re: Sullivan County Landfill Phase II Expansion, November 19, 2004, excerpted and attached here as **Exhibit B**. The Author represented intervenors in that matter, and the excerpted document is taken from the case file.

[20] TAGM SW-92-06, *Avoided Costs in Solid Waste*, revised August 24, 1992, at 1. applies.The guidance is designed to assist municipal planning units in determining "the cost savings a municipality achieves by not having to dispose of recyclable materials as solid waste," and thereby satisfy the municipality's CRA obligations. *Id.*

[21] 6 NYCRR § 360-1.9(f)(1)(i).

source separation and collection"[22]

- an evaluation of current "recyclables recovery programs," both public and private[23]

- "[i]dentification of available and potential markets for recovered recyclables"[24]

- identification of proposed new source separation and recycling programs[25]

- an indication of how the new programs would be implemented, providing "a schedule with specific dates for implementation of the selected program (including dates to attain specified, progressively increasing percentages of the waste stream that will be recovered as recyclables)[26]

- affirmative actions "to maximize, to the extent practicable, the development and enhancement of economic markets for recyclables recovered within the service area under local laws or ordinances adopted or to be adopted under *section 120-aa of the General Municipal Law*"[27]

- a "legal/institutional analysis" of such laws as well as laws that could constrain increased recycling,[28] and

- future actions that implement the hierarchy of solid waste management methods under ECL § 27-0106, under which waste disposal is the least desirable method, including "a determination that the facility has been properly sized, taking into account the potential for recyclables recovery and expanding the facility's service area."[29]

---

[22] 6 NYCRR § 360-1.9(f)(1)(iii).

[23] 6 NYCRR § 360-1.9(f)(2).

[24] 6 NYCRR § 360-1.9(f)(3).

[25] 6 NYCRR § 360-1.9(f)(4).

[26] 6 NYCRR §§ 360-1.9(f)(5), (5)(ii).

[27] 6 NYCRR §§ 360-1.9(f)(5)(iii).

[28] 6 NYCRR § 360-1.9(f)(6).

[29] 6 NYCRR §§ 360-1.9(f)(7), (7)(ii).

More than two decades ago Commissioner Jorling, interpreting the Solid Waste Management Act of 1988, which created the solid waste management hierarchy policy and mandated CRAs for municipal planning units and local laws under General Municipal Law Section 120-aa requiring residential source separation and recycling, noted that the State's policy under the Act is that "facilities should not be sized to create economic incentives that would divert solid wastes that can be recycled to other less desirable forms of waste management."[30]

The Department's guidance on determining the costs savings of comprehensive recycling calls for "a total system analysis . . . to calculate the cost savings on a per ton basis" by, in general, comparing a baseline cost of the solid waste management system to the cost of a system that maximizes recycling and materials recovery.[31] The guidance is intended to provide a framework for implementing General Municipal Law Section 120-aa, which requires local laws mandating source separation of recyclable materials when economic markets exist for such materials, based on an analysis of the "full avoided costs" of managing such materials compared to the cost of disposal. When the cost of managing recyclables for disposal is equal or greater than the cost of managing the materials for sale, the municipality must plan and implement enforceable recycling programs for each type of recyclable material for which the analysis shows avoided costs in this sense could be achieved utilizing, among other tools, local laws mandating recycling.[32] Under Part 360, when reviewing a CRA the Department is required to "consider the

---

[30] *In the Matter of the Application of the Foster Wheeler-Broome County and the Broome County Resource Recovery Agency*, 1990 N.Y. ENV LEXIS 82, * [NEED CITE].

[31] TAGM SW-92-06, at 8-10.

[32] TAGM SW-92-06, at 1-2. *Cf.* Gen. Mun. L. § 120-aa(2)(a).

extent to which these local laws foster and encourage recycling."[33]

Under the *Avoided Costs in Solid Waste* guidance, where existing recycling efforts would occur without regard to improvements in the system, including where certain waste streams are already required by law to be recycled or recovered (such as lead acid batteries, yard waste, glass, metals, household hazardous waste, tires, and electronics waste), such materials should be excluded from those that could be recycled or recovered because economic markets for those materials presently exist and would not be created by the proposed improved system.[34] In other words, recycling of those materials is either already required or recyclable markets already exist. To be counted part of the improved system, the CRA must demonstrate that the planning unit can realistically market recyclables that are not currently diverted from disposal.[35]

In addition, depending on the Department's evaluation of the County's commitment to implementing a CRA, once developed and approved, the Department may determine that the permit term should be less than 10 years. While the maximum term of a Part 360 permits is 10 years, when determining the term of Part 360 permit the Department must take into account "the extent of the commitment to implement a recyclables recovery program and to develop and enhance economic markets for recyclables recovered within the proposed service area under local laws or ordinances adopted or to be adopted under *section 120-aa of the General Municipal*

---

[33] TAGM SW-92-06, at 1-2 (citing 6 NYCRR § 360-1.9(f)(5)(iii)).

[34] *Id. See also* Interim Decision of the Commissioner, *Matter of the Application of the Foster Wheeler-Broome County and the Broome County Resource Recovery Agency*, 1990 N.Y. ENV LEXIS 82, at *125-134 (hearing report).

[35] *See id.*, at *129 (requiring the CRA to include "proof of the likelihood of [a] sustainable higher recycling rate").

Law."[36] Here, the maximum permit term has been adopted in the proposed draft Part 360 permit modification.

Ontario County has failed to perform a comprehensive recycling analysis

The County has not developed a comprehensive recycling analysis and its LSWMP does not include the equivalent of a CRA, and therefore its Part 360 application is deficient.[37] Despite this deficiency, the County's LSWMP adopts "increase recycling at County facilities" as a goal.[38] Under Part 360, engineering reports required for all applications must "demonstrate that the project is consistent with the applicable goals and objectives of solid waste management plans in the proposed service area of the facility and of the New York State Solid Waste Management Plan in effect at the time of permit application," and must " describe how the proposed facility is consistent with the State solid waste management policy identified in *section 27-0106 of the ECL*."[39] However, the engineering report included with the County's application provides no such demonstrations and is thus deficient on these grounds. These deficiencies would be remedied were the County to prepare an approvable CRA, as it is obligated to do. The Department has held that, once "the CRA [is] found acceptable," "ensuring the enforceability of

---

[36] 6 NYCRR § 360-1.11(d).

[37] 6 NYCRR § 360-1.9(f). *Cf. Matter of the Application of the Foster Wheeler-Broome County and the Broome County Resource Recovery Agency*, 1990 N.Y. ENV LEXIS 82, *1 (noting that the CRA components set out in Subpart 360-1.9(f) constitute "*application requirements* related to the issue of plant size and economics") (emphases added).

[38] Ontario County LSWMP, at 58. This by itself, of course, is insufficient to comply with the County's obligation to perform a comprehensive recycling analysis. In particular, as discussed below, the County's LSWMP fails to demonstrate how it can achieve this goal.

[39] 6 NYCRR §§ 360-1.9(e)(iii), (iv). Section 27-0106 is the state hierarchy of waste management methods.

the recycling conditions is a prerequisite to project approval."[40] Accordingly, once the County provides a CRA, FLZWC looks forward to commenting on its adequacy. However, we anticipate that, under the circumstances, an approvable CRA would not justify the present landfill expansion proposal, as discussed below.

In 2009, the County initiated development of its LSWMP, considering the County as the planning unit. By then, it had committed to a 25-year lease with Casella, which includes a commitment to a series of landfill expansions without regard to the County's planning obligations under the ECL and Part 360.[41] The current expansion proposal is provided for in the 2003 lease. Under the lease, Casella is the sole operator of the County's landfill and any recycling facilities,[42] the County may not legislate in the area of solid waste management in any way materially adverse to Casella's interests,[43] must repeal all local legislation inconsistent with Casella's control of landfill planning and landfill and recycling operations,[44] and is obligated to cooperate with Casella's efforts to obtain any permits or permit modifications.[45] Arguably, therefore, compliance with the County's obligations to adopt local laws promoting or creating

---

[40] Final Decision of the Commissioner, *Matter of the Application of the Foster Wheeler-Broome County and the Broome County Resource Recovery Agency*, 1991 N.Y. ENV LEXIS 73, *133-134.

[41] *See* Ontario County, *Operation, Management and Lease Agreement*, dated November 25, 2003, at Para. 3.3. A copy of the lease agreement is attached here as **Exhibit C**.

[42] *Id.*, Para. 2.2

[43] *Id.*, Para. 4.3

[44] *Id.*, Para. 4.6

[45] *Id.*, Paras. 3.2 and 4.1.

markets for recyclable waste streams under General Municipal Law Section 120-aa is precluded by the lease.

In 2009 the County delegated responsibility to Casella to prepare the LSWMP but by June 2010 criticism of that approach led the County to assign the work to its Planning Department. However, within months the Environmental Quality Committee of the County legislative branch removed the Planning Board from the assignment and re-assigned the work to Barton and Loguidice (B&L) on Casella's recommendation. B&L works for Casella preparing application documents and compliance reports at all four of its landfills in New York. In addition to the County's LSWMP, B&L prepared the FEIS and the Part 360 application materials for the current expansion proposal.

On July 7, 2014 Region 8 approved the County's LSWMP. The basis for the approval is a single sentence stating that the Plan "contains a substantive consideration of the elements set forth in Section 27-0107.1 of the New York State Environmental Conservation Law (ECL)."

This summary approval is insufficient to shield the County from the criticism that the current landfill expansion proposal is not identified in a LSWMP that *contains* the elements required by ECL § 27-0107(1)(b) and the relevant implementing rules under Part 360. Most importantly, neither the LSWMP nor the County's Part 360 application contains "a comprehensive recycling analysis for the planning unit, including those items identified in subdivision 360-1.9(f) of this Part," as required under Subpart 360-15.[46] Specific components required for a CRA or its equivalent were identified in FLZWC comments to the County on

[46] 6 NYCRR § 360-15.9(f).

November 30, 2011.[47] However, those comments were rejected and the LSWMP was not revised to include the requirements.

FLZWC's detailed criticisms of the County's planning efforts, however, should not divert attention from the fundamental failure of the County's LSWMP to demonstrate how it will increase its recycling rate and reverse the disincentive to landfilling to which it has been and is currently committed. In fact, the current request to expand has nothing to do with needs of the County planning unit; it is driven by incentives to increase revenue at the expense of the County's recycling obligations.

Permit denial is warranted in this case under the Department's precedents for failure to size the landfill appropriately

Commissioner Jorling's analysis of comprehensive recycling analysis and planning requirements under the Solid Waste Management Act of 1988, as implemented under Part 360, in *Matter of Application of Foster Wheeler-Broome County, Inc. and The Broome County Resource Recovery Agency*, referenced above, applies in this case because the facts parallel that matter in several respects. Although that matter involved a solid waste incinerator project, as previously noted, the Commissioner clarified that the method of analysis he adopted there applies to landfill facilities.[48] That matter, as here also, involved a joint permit application by a municipality and a commercial business. Commissioner Jorling's analysis applied to a municipally owned solid waste disposal facility where the county was the planning unit, also as in the instant case.

The context for his 1991 Final Decision, establishing a "method of analysis" for the issue

---

[47] Provided here as **Exhibit D**.

[48] *See above*, footnote 14.

of facility size, triggered by the applicability of the 1988 planning requirements to municipal applicants, was the Commissioner's Interim Decision:

> In my Interim Decision, the issue of plant size was identified for adjudication because of concerns that an oversized facility would tend to create financial disincentives to pursuing aggressively a waste reduction and recycling program or to seeking garbage from service areas not identified in the permit application. As outlined there, the first objective of this adjudication is to determine an appropriate size for the incinerator for the waste shed to be served by the plant. From that point, other reasons to support a decision to build a larger plant must be identified and justified.[49]

In this case, since the planning unit is Ontario County, it unclear how the service area for the proposed landfill expansion could justifiably extend beyond the County.

According to Ontario County's Local Solid Waste Management Plan, in the 1980s the County was part of a regional planning unit in which it joined Yates County, Wayne County and Seneca County, but in 1988 the County withdrew from that planning unit and Ontario County now is its own planning unit.[50] According to its LSWMP, Ontario County is a "regional landfill,"[51] but the LSWMP provides no explanation as to how that role serves the planning unit. Since the neighboring counties have their own planning units and, in several cases, their own landfills, ("High Acres Western Expansion and Mill Seat (Monroe County), Seneca Meadows (Seneca County), and Steuben Sanitary (Steuben County)"),[52] it would seem on its face that

---

[49] 1991 N.Y. ENV LEXIS 73, *9.

[50] Ontario County LSWMP, at E-1.

[51] *Id.*, 15.

[52] *Id.*, 41.

accepting nearly 80% of its waste from other counties[53] puts the Ontario County Landfill in direct competition with these neighboring landfills, creating an incentive to expand and a corresponding disincentive to reduce waste for disposal not only in Ontario County, but in the neighboring planning units. However, if the applicable solid waste planning and minimization requirements of the ECL and Part 360 apply, under Commissioner Jorling's approach reasons to support a decision to build a larger landfill facility than the planning unit needs, assuming a progressively increasing rate of waste diversion from disposal options must be identified and justified. However, no such need is identified or justified in the Plan.

Since the Broome County facility was part of a county planning unit, "for purposes of the sizing analysis" Commissioner Jorling looked first to "the size of the current waste stream being generated in Broome County."[54] The County's LSWMP acknowledges that "Ontario County does not have a method for obtaining solid waste and recycling quantity reports from local governments within Ontario County or from neighboring planning units."[55] Commissioner Jorling specifically rejected this as a rationale for an inadequate CRA.[56]

The Commissioner next looked to the "issue of projecting the size and composition into

---

[53] *Id.*

[54] 1991 N.Y. ENV LEXIS 73, *14.

[55] Ontario County LSWMP at, 15.

[56] 1991 N.Y. ENV LEXIS 73, *17 ("As part of any approval for this facility or other solid waste project in Broome County, I will require that a more comprehensive survey of recycling in the private sector be undertaken so that future decisonmaking can benefit from those results. Despite the reservations expressed by the Co-Applicants, I am confident that either the Agency or the County has adequate authority to require the private sector to provide this information.").

the future," finding that county's population "near stable or slightly declining."[57] In the case of Ontario County, population growth of 1.7% is expected from 2015 to 2020 and from 2020 to 2025 at a rate of 1.5%.[58] This supports a similar finding as in Commissioner's Jorling's analysis, "that the composition of the current wastestream is not likely to change significantly."[59]

Next, the Commissioner considered whether a demonstration that the recycling rate goals adopted in the LSWMP and CRA prepared by Broome County could be achieved was provided in these documents, considering that "these questions are the principal purpose of subjecting the CRAs and [L]SWMPs to public review."[60] Since the applicant had "not provided substantive evidence on supplemental [recycling] programs or on ways to make programs that are already proposed more effective," the Commissioner "require[d] that plans for the development of these programs be added to the CRA and SWMP and that they be implemented to the extent practicable."[61] Where recycling programs identified in the LSWMP and CRA were rejected in these documents, the Commissioner required that the plans "establish why a greater amount of recycling is impractical."[62]

In the instant case, recycling rate goals by type of recyclable material are provided in an appendix table to Ontario County's LSWMP, but the goals are on their face overly optimistic and

---

[57] 1991 N.Y. ENV LEXIS 73, *15.

[58] Ontario County LSWMP, 18.

[59] 1991 N.Y. ENV LEXIS 73, *15.

[60] 1991 N.Y. ENV LEXIS 73, *18.

[61] *Id.*

[62] 1991 N.Y. ENV LEXIS 73, *19.

no basis is provided as the table has no notes or other annotation, and the text of the plan fails to disclose how these goals were determined.[63] For example, paper diversion rates are projected to reach 28.56% by 2014, 33.50% by 2015, 40.11% by 2017, and 73.67% by 2023. Metals diversion rates are projected to reach 33.32% by 2014, 34.24% by 2015, 43.22% by 2017, and 74.25% by 2023. Plastics diversion rates are projected to reach 6.85% by 2014, 13.64% by 2017, and 29.58% by 2023.

Since no explanation accompanies the table, it is unclear whether private recycling efforts that would occur without County involvement are relied on to reach these projections, in which case the diversion rate would not result from "the development and enhancement of economic markets for recyclables" by the County.[64] More importantly, as noted previously, in the body of the Plan the County admits it lacks the ability to obtain the information apparently reported in the table.[65] Accordingly, the County has "not provided substantive evidence on supplemental [recycling] programs or on ways to make programs that are already proposed more effective," as called for under Commissioner Jorling's decision.[66]

Next, the Commissioner looked for assurances in the LSWMP and CRA that the recycling programs identified would in fact be implemented. Implementation of existing and new programs could be ensured only by including "an enforceable commitment" to achieve the stated

---

[63] Ontario County LSWMP, Appx. I, 4 ("Municipal Solid Waste (MSW) Combined Composition and Projections"), available at <www.co.ontario.ny.us/documentcenter/>.

[64] 6 NYCRR § 360-1.9(f)(5)(iii). *See also above*, text at footnote 33.

[65] *See above*, footnote 55.

[66] 1991 N.Y. ENV LEXIS 73, *18.

goals in the permit:

> Accordingly, any permit that is issued to the Agency or the County will have to reflect an enforceable commitment to achieve higher levels of recycling for these programs. The analysis of facility size that follows will presume achievement of these higher levels as well.
>
> I expect that, in future reviews of CRAs and SWMPs for other projects, the focus will be on the substantive measures that can be taken to add to or expand programs and the ways in which the implementation details for these programs can better be defined. This type of critique provides assurances that all opportunities for recycling are exhaustively considered and that those that are adopted are well thought out and implementable. On the other hand, adjustments to plans that involve no more than a change in the projected recycling rate provide little confidence that real achievement will be produced.[67]

In the instant case, Ontario County's LSWMP suffers from the same criticisms. As previously noted, the LSWMP admits that Ontario County lacks information on the quantity of solid waste and recyclables from local governments within the County or neighboring Planning Units."[68] Accordingly, the County's LSWMP provides no basis for estimating either the existing or future recycling rate in the County. As a result, Ontario County's LSWMP falls short of credibly identifying recycling goals that could be criticized.

Commissioner Jorling denied a permit in the Foster Wheeler-Broome County, Inc. and Broome County Resource Recovery Agency matter because, based on "the needs for waste management in the Broome County waste shed," he found the proposed facility would be oversized by about 45%,[69] and accordingly "does not comply with the State's solid waste

---

[67] 1991 N.Y. ENV LEXIS 73, *19-20.

[68] *See above*, text at footnote 55.

[69] 1991 N.Y. ENV LEXIS 73, *28-29.

management policy established in ECL § 27-0106."[70] Ontario County's LSWMP lacks sufficient information to determine the minimum facility size necessary. The kind of sizing analysis conducted in Foster Wheeler-Broome County, Inc. and Broome County Resource Recovery Agency matter is accordingly not possible.

It is, however, a fairly simple matter to determine that the proposed expansion of the landfill far exceeds the needs of the County's waste shed. Based on the County's current and proposed Part 360 permits, the landfill is permitted to accept 917,694 tons of waste per year.[71] The County contracts for 100,000 tons of that capacity,[72] presumably an upper-bound estimate of the County's needs for disposal after private waste collection and hauling, much of which is landfilled outside the County. Conservatively, therefore, the County needs about one-tenth of the current and requested additional capacity of the landfill.

During the development of the County's LSWMP, FLZWC commented extensively to the County[73] and, subsequently to the Department[74] on the failure of the LSWMP to provide more than aspirational goals, its lack of any identification of how new programs would be financed, how such programs effectiveness would be measured, the lack of specificity of the recycling goals identified in the plan, and above all the absence of any demonstration that the identified

---

[70] 1991 N.Y. ENV LEXIS 73, *40.

[71] Both permits allow an average of 2,999 tons per day, six days per week, excluding six holidays, or 306 days X 2,999 tons.

[72] Ontario County LSWMP, 7.

[73] Exhibit D hereto.

[74] Provided here as **Exhibit E**, and incorporated by reference in this Petition.

goals would ever be implemented.

A review of the County's LSWMP reveals that the plan relies on several programs–never assessed quantitatively for their effectiveness nor assessed for their potential enhancement–proposed or operated by private or non-profit organization unaffiliated with the County that would go forward anyway, regardless of the Plan's aspirations. In addition, the County's LSWMP nowhere analyzes the effectiveness of existing or desired waste diversion programs. As Commissioner Jorling noted, "It is easy to project high recycling rates or to describe ambitious recycling plans; it is far more difficult to implement successfully a recycling program."[75]

Clearly, the County's LSWMP lacks the equivalent of a comprehensive recycling analysis. Accordingly, a permit should be denied until the County prepares a draft CRA and makes it available for public comment. A permit denial with instructions to do so should specifically require the CRA to include a sizing analysis, as part of a demonstration as to how any newly proposed modification of the County's Part 360 permit assures increased recycling and advances the State's hierarchy of solid waste management methods under ECL § 27-0106.

2. The County has failed to overcome the presumption, applicable when two facilities are sited on one site, that the landfill and its onsite gas-to-energy plant are operating under common control, with the result that new emissions estimations must be provided before a Title V permit modification can be approved.

The Ontario County Landfill utilizes an onsite gas-to-energy ("GTE") plant independently owned by Seneca Energy II ("SE") to control non-methane organic compounds ("NMOC") in the

[75] 1991 N.Y. ENV LEXIS 73, *26.

landfill gas collected by the landfill in order to achieve compliance with control requirements set forth in a draft air permit. NMOC comprises about one percent of the collected gas and, due to the toxicity of this fraction of the gas stream, must be chemically destroyed by combustion to achieve the control requirements. SE utilizes several internal combustion engines to generate electricity by combusting the methane component in the gas. Combustion of the gas by SE also serves to destroy the NMOC component.

Control of NMOC in landfill gas is required by the New Source Performance Standards program (NSPS), a federal program under the Clean Air Act delegated to the Department by the U.S. Environmental Protection Agency (EPA). The landfill may generate more gas than can be utilized by SE. Accordingly, open air flares have been installed at the landfill in order to combust gas volumes that exceed SE's capacity. However, operation of SE's plant and the landfill's flares generate carbon monoxide which, if emitted at "major source" levels, is regulated under the Prevention of Serious Deterioration program (PSD), another CAA program. New Source Review (NSR), another CAA program, potentially applies to the landfill if volatile organic compounds (VOC), some of which are in the NMOC component, exceed regulatory thresholds. In addition, the National Emissions Standards for Hazardous Air Pollutants program (NESHAP) and maximum achievable control technology (MACT) standards under the CAA apply to landfill emissions at major source levels. Finally, greenhouse gas emissions, including carbon dioxide and other pollutants evaluated in terms of CO_2 equivalency, are regulated under the CAA if emitted at major source levels.

Under Title V of the CAA, all applicable air pollution control requirements must be collected under one operating permit, in addition to any other required permits. Title V operating

permits "are meant to accomplish the largely procedural task of identifying and recording existing substantive requirements applicable to regulated sources and to assure compliance with these existing requirements."[76] In this case, the proposed Draft Title V permit for the Ontario County Landfill is deficient in that it fails to include control requirements triggered by the aggregated or combined emissions of the landfill and the SE plant, and failure to consider the aggregated emissions has resulted in a deficient applicability analysis to determine which CAA program requirements should be included in the permit. The principal basis for these failures is Region 8's determination that SE and the landfill are not under "common control." However, EPA's decisions and a Commissioner's decision in response to a declaratory judgment petition submitted by the Seneca Meadows Landfill dictate a contrary result.

If SE and the landfill are determined to be under common control, the landfill's estimation of the maximum potential to emit regulated pollutants ("PTE") must be revisited, since PTE is the basis for determining whether an emissions source is "major" under potentially applicable CAA programs. Under common control, the landfill and SE would be deemed a single source. If the two facilities constitute a single source, without recalculating emissions there will be no assurance that the permittee is operating in compliance with applicable air pollution control programs, a fundamental requirement of Title V permits.[77]

---

[76] *EPA White Paper for Streamlined Development of Part 70 Permit Applications* (July 10, 1995), at 1.

[77] CAA Section 504(a), 42 U.S.C. § 7661C(a) (Title V permits must contain "conditions as are necessary to assure compliance with applicable requirements"). This requirement is implemented by 40 C.F.R. § 70.6(a)(3), which requires "monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance," and by 40 C.F.R. § 70.6(c)(1), which requires all Title V permits to contain "testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of

"Common control" determinations under CAA Title V are well-developed and have been applied to the relationship between a landfill and an onsite gas-to-energy plant

Under Title V, the potential to emit from two or more facilities will be considered and permitted in the aggregate as a single source of emissions if the facilities are adjacent or contiguous, share a common major industrial classification (Standard Industrial Classification Manual (SIC) code prefix), and are under common control.[78] The aggregated sources will be considered a single "major source" if (a) they fit the definition of "major source" provided in section 112 of the Act,[79] the definition of "major stationary source" provided in section 302 of the Act,[80] or the definition of "major stationary source" provided in part D of title I of the Act,[81] and (b) they are "located within a contiguous area and under common control."[82]

As discussed further below, the Department and the applicant agree that the Ontario County Landfill and the onsite Seneca Energy II gas-to-energy plant (SE) are contiguous and share the same SIC code. Accordingly, the only questions in dispute are whether they are also under common control and, if so, whether their combined potential to emit regulated air pollutants is "major". Because Region 8 has determined that the two facilities are not under common control, an estimation of aggregated potential emissions has not been provided.

---

the permit."

[78] CAA Section 501(2), 42 U.S.C. § 7661(2); 40 C.F.R. §§ 70.2, 71.2 (defining "major source").

[79] 42 U.S.C. § 7412.

[80] 42 U.S.C. § 7602.

[81] 42 U.S.C. §§ 7501-7515. *See also below*, footnote 86.

[82] 42 U.S.C. § 7661(2); 40 C.F.R. §§ 70.2, 71.2.

Title V does not define "common control." However, the term "common control" is discussed at length in a September 18, 1995, letter from William A. Spratlin, Director of the EPA Region 7 Air, RCRA, and Toxics Division, to the Iowa Department of Natural Resources. The Spratlin letter states that "common ownership is not the only evidence of control," and goes on to identify seven types of questions or factors that a permitting authority should consider in determining whether, for purposes of the CAA, facilities are under common control:

> Do the facilities share common workforces, plant managers, security forces, corporate executive officers, or board of executives?
>
> Do the facilities share equipment, other property, or pollution control equipment? What does the contract specify with regard to pollution control responsibilities of the contractee? Can the managing entity of one facility make decisions that affect pollution control at the other facility?
>
> Do the facilities share common payroll activities, employee benefits, health plans, retirement funds, insurance coverage, or other administrative functions?
>
> Do the facilities share intermediates, products, byproducts, or other manufacturing equipment? Can the new source purchase raw materials from and sell products or byproducts to other customers? What are the contractual arrangements for providing goods and services?
>
> Who accepts the responsibility for compliance with air quality control requirements? What about for violations of the requirements?
>
> What is the dependency of one facility on the other? If one shuts down, what are the limitations on the other to pursue outside business interests?

> Does one operation support the operation of the other? what are the financial arrangements between the two entities?[83]

Where "one company locat[es] on another's land," there is a presumption of common control.[84] The factors listed above relate to the nature of the relationship between the landfill and GTE plant, and are considered if the applicant seeks to overcome the presumption.[85]

Although the Spratlin letter is nonbinding guidance, EPA has consistently followed the analytical approach set forth in that letter, including in situations that involve an interconnected landfill and gas-to-energy facility.[86]

For example, EPA Region 2 found that the Al Turi Landfill in Orange County, New York, and an onsite gas-to-energy (GTE) plant were under common control because, among other things, the facilities are interdependent; the GTE facility is obligated to purchase whatever quantity of landfill gas the landfill chooses to send it and, at the time of the determination, was in fact receiving 100% of its fuel from the landfill; and the landfill's income is connected to the

---

[83] Letter from William A. Spratlin, Director, EPA Region 7 Air, RCRA, and Toxics Division, to Peter R. Hamlin, Chief, Air Quality Bureau, Iowa Department of Natural Resources, September 18, 1995, at 1-2. This and all other EPA Title V determination letters cited below are available by searching EPA's online "Title V Policy & Guidance Database" at <http://www.epa.gov/region07/air/search.htm>.

[84] *Id.*, at 1.

[85] *Id.*

[86] *See, e.g.*, Letter from Judith M. Katz, Director, Air Protection Division, U.S. EPA Region 3, to Gary E. Graham, Environmental Engineer, Virginia Department of Environmental Quality, "Re: Common Control for Maplewood Landfill, also known as Amelia Landfill, and Industrial Power Generator Corporation," dated May 1, 2002; Letter from Makeba A. Morris, Chief, Technical Assessment Section, U.S. EPA Region 3, to Terry Godar, P.E., Air Permit Manager, Virginia Department of Environmental Quality, February 11, 1998, available at <http://www.epa.gov/region07/air/title5/t5memos/lndfllr3.pdf>.

GTE facility's revenues in the form of royalties.[87] According to this Region 2 determination:

> As stated in Director Spratlin's letter, a positive answer to only one or more of the seven factors is enough to establish common control between two facilities. Thus, even though two facilities may not have common officers, plant managers or workforces, they may still be under common control.[88]

In 2009, in another landfill-GTE case, EPA Region 2 found common control because the "many types" and "large numbers of agreements existing relative to [the Landfill] and [the GTE facility] . . . further demonstrate the control relationships that exist between the landfill and the companion GTE operations."[89] Specifically, EPA Region 2 found common control because the parent company of the landfill controlled the transfer or encumbrance of the GTE plant's stocks; Landfill gas would be the GTE plant's only fuel; the landfill is contractually barred from selling Landfill gas to unrelated entities; and the landfill and the GTE plant would share tax credits made available for GTE facilities.[90] Previously EPA Region 2 noted that, based on a common control determination, both the landfill and GTE plant would be subject to preconstruction permitting under the PSD program (for carbon monoxide emissions), since emissions associated with the addition of internal combustion engines at the GTE plant would be aggregated with emissions

---

[87] Letter from Jane M. Kenny, Regional Administrator, U.S. EPA Region 2, to Erin M. Crotty, NYSDEC Commissioner, "Re: EPA's Review of Proposed Permit for Al Turi Landfill, Permit ID: 3-3330-00002/00039, Mod 1," July 8, 2004, available at <http://www.epa.gov/region7/air/title5/t5memos/alturi.pdf>.

[88] *Id.*

[89] Letter from Ronald J. Borsellino, Acting Director, U.S. EPA Region 2, to Scott Salisbury, President, Manchester Renewable Power Corporation/LES and Lawrence C. Hesse, President, Ocean County Landfill Corporation, May 11, 2009, available at <http://www.epa.gov/region07/air/nsr/nsrmemos/ocl-mrpc.pdf>.

[90] *Id.*

from flares at the landfill:

> If they are determined to be a single source under common control, then [the landfill] will join [the GTE plant] in being subject to Prevention of Significant Deterioration (PSD) requirements as a result of the significant modification that NJDEP is processing for [the GTE plant]—the addition of new engines at [the GTE plant]. This may affect permit limits for emissions from existing flares and from any expansion of the landfill design capacity.[91]

It is important to note that, in these cases, if common control is found, whether the separate facilities are issued separate Title V permits or a single permit is irrelevant. In either case, liability for compliance for the combined emissions must be included in the Title V conditions for each facility's permit.[92]

The Spratlin letter has been adopted by the Commissioner in a 2011 declaratory judgment ruling, specifically for landfill-GTE cases.[93]

Region 8's common control determination for the Ontario County Landfill and the onsite Seneca Energy II GTE plant does not comport with these principles. Moreover, as discussed further below, in making its determination Region 8 recognized this fact.

The Department's common control determination for Ontario County Landfill and the onsite GTE plant is clearly erroneous.

In 2010, the Department wrote to SE indicating that it was considering "whether to have

---

[91] Raymond Werner, EPA Region 2, Letter to David J. Shaw, Air Resources Div., NYSDEC, *Re: Common Control Determinations in the Permitting of Landfills and Companion Gas-To-Energy Operations*, July 18, 2006, at 2 (attached hereto). Note that the Werner reproduces the seven relationship factors in the Spratlin letter. *Id.*, at 4.

[92] Borsellino letter, at 4 (*above*, footnote 89).

[93] Commissioner's Decision, *In the Matter of the Petition of Seneca Meadows, Inc. for a Declaratory Ruling*, (September 9, 2011), available at <http://www.dec.ny.gov/regulations/77083.html>.

an inclusive TV [Title V] Permit with separate energy facilities under the same permit as the landfill or to allow separate TV facility permits."[94] However, this was a false choice since, as noted above, a determination that two facilities are under common control does not require that "the same permit" be issued to both.[95]

In 2011, in the context of SE's proposal to modify its Title V permit in order to add three internal combustion engines to the eight engines previously operated at the facility, Region 8 acknowledged that

> EPA is not in agreement that the Landfill and the Landfill Gas to Energy facilities are not under common control. Since the Administrator of EPA may prevent issuance of any Title V Facility Permit, these facilities must be considered a single facility for PSD/NSR purposes.[96]

Accordingly, NYSDEC listed three subjects for which it sought additional information from SE to complete its application: a combined baseline analysis that combines SE's eight operating IC engines with the landfill's emissions; "[s]ufficient information to establish that the addition of the four Caterpillar 3520 internal combustion engines to be added [subsequently reduced to three] is an independent project, separate from any future expansion of the Ontario County Landfill that may be proposed"; and any changes to the landfill gas collection system needed to facilitate SE's expanded capacity.[97]

On May 23, 2011, in the context of Ontario County's proposal to NYSDEC to be the

---

[94] Michele Kharroubi, NYSDEC, email to David Derenzo, July 7, 2010.

[95] Borsellino letter, at 4 (*above*, footnote 89).

[96] Roger McDonough, NYSDEC, Letter to Peter Zeliff, SE, January 7, 2011, p. 1.

[97] *Id.*

"lead agency" for purposes of reviewing the currently pending proposal to construct a new 40 acre landfill expansion under SEQRA, the County noted that the landfill expansion would increase electricity generation at SE: "The construction of an additional Landfill Gas to Energy Facility may require an upgrade to the electrical utility lines currently servicing the existing facility due to the increase in electricity generation."[98] The Department responded that modifications to the Title V permits for both SE and the landfill would be required and would be reviewed by NYSDEC together.[99]

On November 10, 2011, SE responded to the first two subjects in Region 8's January 7, 2011 information request, stating that its goal is to maintain separate applicable requirements for emissions control: "The intention of permitting this as a single facility was to maintain a clear separation of permit compliance liability for compliance conditions specific to each of the separately managed and operated facilities."[100] However, as noted above, if the two facilities are under common control, permit compliance liability for emissions controls cannot be separated and made entirely specific to each facility. Instead, each facility's separate Title V permit must include conditions imposing liability for the control of both facilities' combined emissions.[101]

At about the same time as SE's response, Region 8 requested information from Casella regarding SE's Title V modification application, asking whether SE's representations regarding

---

[98] Karen DeMay, Clerk, Ontario County Board of Supervisors, letter to Kimberly Merchant, Deputy Regional Administrator, NYSDEC, May 23, 2011, Attachment at Item 17.

[99] Kimberly Merchant, NYSDEC, Letter to Karen DeMay, Ontario County Board of Supervisor, June 22, 2011.

[100] Emily Zambuto, IES, email to Michele Kharroubi, NYSDEC, November 10, 2011.

[101] *See above*, footnote 86.

the landfill are accurate. Specifically, Region 8 asked whether the landfill and SE share a workforce; and asked for an explanation of contractual arrangements between the two facilities providing that SE may repair and restore the landfill's gas collection system in the event landfill gas flow is interrupted, including "who is in charge of correcting and maintaining the flares and well field (gas collection and control system) in such situations."[102] Casella initially responded by email, identifying natural gas lines located nearby that could be utilized by SE should Landfill gas flow be interrupted, but also noting that natural gas lines are not connected to SE.[103] Casella provided no information on what design changes would be necessary for SE to connect to the lines, the length of time such changes would take or whether SE would agree to such changes.

On December 22, 2011, Casella responded at greater length to Region 8's January 7 and November 9, 2011 information requests, in part as follows:

> Casella confirms that the following facts set forth in the [SE Title V modification] Application are accurate:
>
> • The Landfill has the two-digit SIC Code, 49. To Casella's knowledge, the GTE Facility also shares this SIC Code.
> • The SIC Code for the Landfill is 4953.
> • The GTE Facility is constructed on property leased directly from Ontario County.
>
> The Landfill and other ancillary structures are constructed on land leased directly to Casella. The properties are contiguous.[104]

On January 5, 2012, Region 8 wrote to SE, determining that SE and the landfill are not

---

[102] Michele Kharroubi, NYSDEC - Jerry Leone, Casella, email exchange, November 9-10, 2011.

[103] *Id.*

[104] David G. Carpenter, General Counsel, Casella, Letter to Michele Kharroubi, NYSDEC, December 22, 2011, p. 1.

under common control and accordingly "will continue to be treated as two separate facilities."[105] In its response to public comments Region 8 clarified that its determination was based principally on the lack of common ownership:

> There is no indication of common ownership between Seneca Energy II, LLC (Seneca Energy), Ontario County and Casella Waste Systems of Ontario, LLC (Casella). The two facilities (the landfill and the landfill gas-to-energy (GTE) facility) are owned and operated by separate entities, with no common parent or subsidiaries. The landfill owner, Ontario County, is a municipality. The GTE facility owner, Seneca Energy, is a private business entity operating its facility on land leased from the County. The landfill operator, Casella, is a separate corporate entity and part of a publicly traded company. None of these entities share personnel or officers. The fact that the Gas Assignment Agreement (GAA) allows emergency repairs to be made to the collection system owned by Ontario County for purposes of mitigating liability does not indicate a common workforce as set forth in EPA's "Spratlin" guidance letter, nor does it establish common control.

This remains the basis for Region 8's determination that the current Ontario County Landfill expansion proposal should be considered as a separate emissions source, without regard to emissions from the GTE that is responsible for control of the landfill's emissions.

However, the rationale provided relies on several factors that are irrelevant to common control determinations under the applicable rules, including the lack of common ownership, ownership of the landfill by a municipality, and lack of a common workforce. For example, since "common control can be established in the absence of common ownership," it is insufficient to overcome the presumption of common control when a GTE is located on land owned by the

[105] Thomas L. Marriott, Regional Air Pollution Control Engineer, NYSDEC, Letter to Emily Zambuto, SE, January 5, 2012.

landfill.[106] In fact, the seven factors set forth in the Spratlin letter are not considered, rendering the common control determination conclusory, and without support.

The County, as SEQRA lead agency, has relied on Region 8's rationale without considering any factors relevant to the relationship of the landfill to SE: "Per NYSDEC letter dated January 5, 2012, the facilities operate under separate ownership and are considered not to be under common control."[107] Accordingly, the County and Region 8 have departed from EPA Region 2 and the Commissioner's established method for analyzing a landfill-GTE common control relationship.

Several factors support a common control determination in this case. First, Casella and SE share equally tax credits available to GTE facilities.[108] Second, gas generated by the landfill is SE's only fuel. Without substantial (and unplanned) physical changes SE cannot, as a practical matter, run on natural gas or another alternative fuel.

Third, SE is obligated to return to Casella treated landfill gas from SE's facility at "a steady flow of up to 150 standard cubic feet per minute . . . at no cost."[109] The treated landfill gas provided by SE powers a boiler serving the landfill office building.[110]

Fourth, an exclusive relationship is reflected in the County's assignment of gas rights to SE:

---

[106] Borsellini letter, at 2, *above*, footnote 89.

[107] FEIS, III-14.

[108] "Gas Assignment Agreement," § IV and Schedule A.

[109] "Excess Gas Utilization Agreement," Section 1 and "Gas Assignment Agreement," §§ II(E), III.

[110] "Emissions Calculation Discussion," pp. 4-5.

> Assignor agrees that Assignee may utilize the Gas for the operation of an expanded Electricity Project. Gas not utilized by Assignee in the Electricity Project shall be flared in accordance with appropriate federal, state and local laws at the expense of Assignor. Assignee will at all times operate the Electricity Project in substantial compliance with applicable environmental laws and regulations and will make a good faith effort to maximize the economic benefits of the electricity project for the benefit of both the Assignee and Assignor provided, however, that the Assignees reasonable business judgment with respect to the Electricity Project's operation shall be binding upon the Assignor.[111]

Thus, in addition to an exclusive gas utilization relationship, SE's judgments as assignee as to "substantial compliance with" applicable rules is binding on the landfill (assignor).

Fifth, an exclusive relationship is also reflected in the agreement between Casella and SE to mutually indemnify the other in the event of any breach of the agreement.[112]

Sixth, the landfill and SE operate in functional interdependence.[113] Where a landfill GTE system is "located on the landfill property and will be used exclusively to collect emissions from the landfill and to control those emissions through energy recovery," the landfill and the gas collection and control system are functionally interdependent and therefore deemed to be under common control.

---

[111] "Gas Assignment Agreement," § I(B).

[112] *Id.*, paras. 7 and 8; "Gas Assignment Agreement," § VII.

[113] Recently, EPA's utilization of indicia of a "functional interrelationship" between facilities was rejected for purposes of determining adjacency. *Summit Petroleum Corp. v. United States Environmental Protection Agency*, 690 F.3d 733 (6th Cir. 2012) (vacating an EPA determination that a combination of natural gas extraction wells and a geographically distant sweetening plant could be aggregated into a "major source" for purposes of the CAA). However, where two facilities are physically adjacent, as here, operational interdependence can be considered for purposes of determining common control. This approach has been EPA's longstanding policy. *Cf.* 62 Fed.Reg. 30,289 (June 3, 1997) (proposing to incorporate the support facility test into the Title V program).

Conclusion

The maximum potential for a single source to emit regulated air pollutants is the basis for determining what CAA programs apply to the source. In this case, such emissions must be calculated or estimated for the landfill and the onsite GTE plant for each regulated pollutant expected to be emitted by each because the two facilities are under common control. Determinations must then be made as to whether major source thresholds for each respective pollutant could be exceeded. If so, the applicable control requirements must be incorporated into the Title V permits for each facility. In addition, conditions must be incorporated into the permits that assure compliance with the applicable requirements. Region 8 has not performed these estimation and applicability analyses correctly because it has determined erroneously that the two facilities are not under common control. Accordingly, FLZWC and the public are unable to comment on the proposed Draft Title V permit for the Ontario County Landfill. Once the proper analyses are completed and a revised proposed draft Title V permit is prepared for public comment, FLZWC looks forward to commenting on the revised permit.

CONCLUSION

On the basis of its offers of proof and its identification of substantive and significant issues,[114] the Petitioner respectfully requests it be granted full party status.

Dated: February 25, 2015

By: _____

Gary A. Abraham
Attorney for Petitioner FLZWC
170 No. Second St.
Allegany, New York 14706
(716) 372-1913

Copies to:

Lisa P. Schwartz, Esq.
Assistant Regional Attorney
NYSDEC Region 8
6274 East Avon-Lima Road
Avon, NY 14414

Kristen Thorsness
Assistant County Attorney
Ontario County
Ontario County Courthouse
27 North Main St.
Canandaigua, NY 14424

Thomas S. West, Esq.
The West Firm
677 Broadway, 8th Floor
Albany, NY 12207-2990

[114] 6 NYCRR § 624.5(d)(2)(ii).

LIST OF EXHIBITS

A Order, *Finger Lakes Zero Waste Coalition v. McCarthy*, Index No. 14-CV-6542 (W.D.N.Y. February 4, 2015) (Siracusa, J.)

B NYSDEC Region 3 Staff Comments, re: Sullivan County Landfill Phase II Expansion, November 19, 2004

C Ontario County, Operation, Management and Lease Agreement, dated November 25, 2003

D Finger Lakes Zero Waste Coalition, by Douglas Knipple, President, Letter to Ontario County Board of supervisors, Environmental Quality Committee, dated November 30, 2011

E Finger Lakes Zero Waste Coalition, by Douglas Knipple, President, Letter to David Vitale, Director, Bureau of Permitting and Planning, NYSDEC, dated April 23, 2012