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At a Special Term of the Albany County Supreme Court, held in and for the County of Albany, in the City of Albany, New York, on the 11th day of December, 2009.

PRESENT: HON. PATRICK J. McGRATH
JUSTICE OF THE SUPREME COURT

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
SAVE THE PINE BUSH, REZSIN ADAMS, JOHN WOLCOTT, LYNNE JACKSON, SANDRA CAMP, RUSSELL ZIEMBA, SHARON CASTERLIN, PAULA SPRATT, SALLY CUMMINGS, CLAIRE NOLAN, GRACE NICHOLS, JAMES A. TRAVERS III, and TIM TRUSCOTT,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

DECISION AND ORDER
INDEX NO. 8897-09
December 11, 2009

-against-

The NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and the CITY OF ALBANY,

Respondents.

APPEARANCES: PETER HENNER, ESQ.
For the Petitioners

HON. ANDREW M. CUOMO.
Attorney General for the State of New York
(LISA M. BURIANEK and LORETTA SIMON, ESQS., of Counsel)
Assistant Attorneys General
For Respondent Department of Environmental Conservation

NIXON PEABODY, LLP
(RUTH E. LEISTENSNIDER, ESQ. of Counsel)
For Respondent City of Albany

McGRATH, PATRICK J. J.S.C.

Petitioners commenced the instant CPLR Article 78 proceeding seeking review of several permits and a license issued by respondent Department of Environmental Conservation (hereinafter DEC) to respondent City of Albany which authorized the expansion and continued use of the Rapp Road landfill within the environmentally sensitive Albany Pine Bush for a period of several more years. The petition alleges that the DEC violated its own regulations governing applications for landfill permits by failing to conduct an adjudicatory hearing and processing an incomplete application for the permits, that DEC failed to comply with the State Environmental Quality Review Act (SEQRA) by failing to take a hard look at realistic alternatives, failing to mitigate impacts, failing to consider the odor problems associated with the past operation of the landfill and failing to consider the impact of taking 15 acres of Pine Bush habitat, that the permits issued fail to comply with regulations applicable to Solid Waste Management Plans, endangered species, variances with respect to principal aquifers and daily cover, slopes on closed landfills, leachate management plans, contingency and environmental monitoring plans and seismic analysis. The petition further alleges that payment of a mandatory $10 per ton fee for habitat restoration by the City constitutes an unconstitutional gift of public funds. Petitioners have also moved for injunctive relief.

The standard of judicial review applicable herein is limited. This Court may not substitute its judgment for the determinations of DEC (*see Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]; *Matter of Eastern Niagara Project Power Alliance v State Dept. of Envtl. Conservation*, 42 AD3d 857, 859 [3d Dept 2007]; *Matter of Plante v New York State Dept. of Envtl. Conservation*, 277 AD2d 639, 641 [3d Dept 2000]; *Matter of City of Rensselaer v Duncan*, 266 AD2d 657, 659 [3d Dept 1999]). Rather, it may only grant petitioners relief upon a showing that the determinations were arbitrary and capricious, an abuse of discretion or contrary to law (*id.*). Moreover, the permits and license involved herein clearly involve technical expertise, and, as such, the determinations are entitled to great deference (*see Flacke v Onondaga Landfill Sys.*, 69 NY2d at 363; *Matter of Citizens' Envtl. Coalition, Inc. v New York State Dept. of Envtl. Conservation*, 57 AD3d 1279, 1281 [3d Dept 2008]; *Matter of Town of Preble v Zagata*, 263 AD2d 833, 835 [3d Dept 1999]). In addition, an article 78 proceeding is summary in nature. The petitioners must in the first instance submit "factual allegations of an evidentiary nature or other competent evidence tending to establish [their] entitlement to the requested relief" (*Matter of Rodriguez v Goord*, 260 AD2d 736, 736-737 [3d Dept 1999]; *see also Matter of Barnes v La Vallee*, 39 NY2d 721 [1976]; *Matter of Vandermark-Crayne v New York State Dept. of Civ. Serv.*, 225 AD2d 979 [3d Dept 1996]). Conclusory assertions without factual support are insufficient (*see Matter of Sour Mtn. Realty v New York State Dept. of Envtl. Conservation*, 260 AD2d 920, 923-924 [3d Dept 1999]).

DEC issued permits for solid waste management, air pollution control, freshwater wetlands and water quality and a license for endangered/threatened species on June 25, 2009. These permits allowed the City to expand the footprint of the existing landfill by 15 acres and to overfill a portion of the existing landfill giving the landfill approximately six more years of

operating capacity at current intake levels. Of the new area of the footprint, seven acres were already in use for the transfer station and other improvements associated with the operation of the landfill. As such, the permits authorized the use of eight acres of undisturbed pine bush habitat. The permits contain a number of special conditions intended to mitigate the impacts of operating the landfill in this sensitive area. The permits expressly prohibit any future application to continue or expand operation of the landfill after the challenged extension reaches its capacity. This prohibition is further bolstered by the requirement that the City grant conservation easements with respect to all of its land surrounding the landfill, which should prevent any expansion even if the DEC were to allow a variance from the permit prohibition. Moreover, in exchange for the eight acre taking of undisturbed land and the elimination of a pedestrian easement in the area, the City will be required to purchase approximately 13 acres of equivalent quality pine bush land and grant it to the State for preserve purposes. As an additional condition of the permits, the City is required to restore and or enhance approximately 250 acres of pine bush land, including restoring a mobile home park to prime habitat and going significantly beyond normal landfill closure requirements by covering the closed landfill with additional cover designed to foster and encourage pine bush species of plants and animals and by planting or seeding such plant species. This habitat restoration will link the main portion of the Pine Bush Preserve with the eastern portion around Rensselaer Lake, thereby significantly improving the effectiveness of the preserve. The cost of such habitat restoration is expected to be approximately $18 million and will be funded indirectly by income from the landfill operation. It further appears that the endangered/threatened species license is addressed only to the restoration activity, as there was no evidence submitted to DEC establishing that the landfill operation will have any direct impact upon such species.

The first cause of action of the petition alleges that DEC violated its own regulations applicable to the issuance of permits by failing to conduct an adjudicatory hearing and by processing the application before it was complete as the Solid Waste Management Plan did not comply with DEC regulations. Pursuant to 6 NYCRR § 621.2 (a), an

> "[a]djudicatory hearing means a trial type proceeding which provides the opportunity for an Administrative Law Judge to hear a case and recommend a decision to the commissioner on the basis of evidence, including direct testimony and cross examination provided under article 3 of the State Administrative Procedure Act, section 70-0109 of the Environmental Conservation Law (ECL), section 621.8 of this Part and Part 624, Permit Hearing Procedures, of this Title."

The regulations, at 6 NYCRR § 621.8 (b) provide:

> "where any comments received from members of the public or other interested parties raise substantive and significant issues relating to the application, and resolution of any such issue may result in denial of the permit application, or the imposition of significant conditions thereon, the department shall hold an adjudicatory public hearing on the application."

Subdivision (d) thereof states:

> "Mere expressions of general opposition to a project are insufficient grounds for holding an adjudicatory public hearing on a permit application. In order to raise substantive and

significant issues, written comments expressing objection or opposition to an application must explain the basis of that opposition and identify the specific grounds which could lead the department to deny or impose significant conditions on the permit."

While 6 NYCRR part 621 does not contain any definition of "substantive" or "significant," 6 NYCRR § 624.4 (c) (2) states:

"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) (3) provides:

"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."

DEC determined that since petitioners did not submit any expert evidence or other evidentiary proof sufficient to raise a triable issue of fact, no adjudicatory hearing was warranted. Petitioners contend that they were never given notice of the requirement to submit such proof. However, the Court finds that DEC's construction of the regulations to require evidentiary support in order to create "sufficient doubt" is neither arbitrary nor capricious (*see Matter of Eastern Niagara Project Power Alliance v State Dept. of Envtl. Conservation*, 42 AD3d 857, 859 [3d Dept 2007]). Moreover, petitioners were represented by counsel during the legislative hearing portion of the permit application review. Based upon the record in *Matter of Eastern Niagara Project Power Alliance v State Dept. of Envtl. Conservation* and petitioners' allegations, the same attorney represented the petitioners therein and must have been aware of the requirement. Petitioners seek to distinguish *Matter of Eastern Niagara Project Power Alliance v State Dept. of Envtl. Conservation* on the ground that such determination was based upon federal preemption of all issues because electricity generation was involved. However, the decision clearly stated that water quality issues were not preempted and limited its discussion of the right to an adjudicatory hearing to such water quality issues. As such, the decision is clearly applicable to the circumstances of this proceeding. Furthermore, it is questionable whether petitioners have been aggrieved by the determination not to hold an adjudicatory hearing. While petitioners have submitted conclusory statements that they would have been able to submit a proper offer of proof of expert testimony at an issues conference, they have had considerably more time to prepare their submissions on the instant proceeding. However, they have still failed to submit any expert evidence in support of their claims. Petitioners have also failed to submit any authority for their conclusory claim that the requirement of submitting evidentiary support before being entitled to an adjudicatory hearing violates due process. The principal of requiring a showing of a triable issue of fact before being entitled to a hearing is very familiar to the judiciary. There is no reason why it should not be applicable in the administrative context. It is therefore determined that the determination not to hold an adjudicatory hearing was neither arbitrary nor capricious nor was it contrary to law.

Petitioners also contend that DEC should not have considered the landfill permit application complete unless and until a proper solid waste management plan was approved and in effect. The regulations, at 6 NYCRR § 360-1.9 (e) (4) (v) require the application to be supported by an engineering report which demonstrates that the facility is consistent with the solid waste

management plan in effect for the municipality.[1] DEC determined that the instant application was not consistent with the solid waste management plan in effect because such plan did not provide for a further expansion of the Rapp Road landfill. DEC required the city to prepare a new plan. A proposed plan was found to be "approvable" prior to DEC's determination that the application was complete. Thereafter, DEC approved the solid waste management plan even though it specifically called for a new plan within 1 ½ years rather than resolving all of the issues within the current plan.

> DEC's regulatory definitions provide at 6 NYCRR § 621.2 (f):
> "Complete application means an application for a permit which is in an approved form and is determined by the department to be complete for the purpose of commencing review of the application but which may need to be supplemented during the course of review in order to enable the department to make the findings and determinations required by law."

Such regulation specifically authorizes DEC to proceed with processing an application even though some aspect of it needs to be supplemented. The regulation provides a rational basis for DEC's determination to treat the "approvable" solid waste management plan as being in effect for the purposes of processing the application.

Furthermore, the unique circumstances of this case indicate that it was reasonable to approve a solid waste management plan which did not resolve all issues and which required the City to submit a plan which fully addressed all of the issues within 1 ½ years. The prior long term solid waste plan of the Albany New York Solid Waste Energy Recovery System (ANSWERS), now known as Capital Region Solid Waste Management Partnership Planning Unit (CRSWMP), of which the City is a member, relied upon the use of a new site in the Town of Coeymans for the regional landfill. At the time the site was chosen, in part for its impervious clay soils, the land was in agricultural use and did not have any significant wetlands. However, the actual use of the site for a landfill was delayed for years by numerous lawsuits. In the interim, the agricultural use was terminated. The record indicates that because of the clay soils, which render the site appropriate for a landfill, there was little drainage, resulting in numerous wetland species of plants colonizing the site. DEC has now characterized the site as not viable as a landfill because of these wetlands. This recent development necessitates a new solid waste management plan which does not rely upon the Coeymans site for the near future. The City has not been able to identify a new suitable location for a regional landfill. However, the capacity of the then permitted Rapp Road landfill was expected to be reached before the return date of this proceeding. Such extraordinary circumstances provide a rational basis for the DEC's approval of an interim solid waste management plan which included a requirement for an expedited update of the plan. It is therefore determined that the first cause of action is without merit.

The second cause of action alleges that the DEC failed to comply with SEQRA in that it failed to take a hard look at the adverse environmental impacts of the project and failed properly

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[1]The regulation cited by petitioners, 6 NYCRR § 360-1.9 (g) is not applicable.

to mitigate them. On review of an administrative determination on SEQRA grounds, the

> "relevant question before the court is 'whether the agency identified the relevant areas of environmental concern, took a "hard look" at them, and made a "reasoned elaboration" of the basis for its determination' (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417; *see, Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 396-397; *Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359, 363-364; *see also, Matter of Niagara Recycling v Town Bd.*, 83 AD2d 335, 340-341, *affd* 56 NY2d 859). While the judicial review must be genuine, 'the agency's substantive obligations under SEQRA must be viewed in light of a rule of reason' and the degree of detail with which each environmental factor must be discussed will necessarily vary and depend on the nature of the action under consideration (*Matter of Jackson v New York State Urban Dev. Corp., supra*, at 417)." (*Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 688 [1996]).

The petition alleges that DEC failed to consider any realistic alternatives, including the "no action" alternative, that it failed fully to mitigate adverse impacts, that it failed to consider the odor issues associated with operation of the landfill and that it failed to consider the impact of taking 15 acres of pine bush habitat on the Karner Blue butterfly.

The supplemental final environmental impact statement prepared by the City and approved by DEC considered a number of alternative sites for a landfill. Petitioners object that it merely repeated consideration of sites already rejected in prior solid waste management plans and landfill extension applications, as well as the site in Coeymans which has been determined not to be viable. However, as noted above, there has been a significant and recent change in the condition of the Coeymans site, which rendered it unviable. The City has not had a sufficient opportunity to find a new alternative site following the development of wetlands on the Coeymans site, and given the imminent reaching of capacity at the Rapp Road landfill, it does not appear that there are any alternate sites which could be approved and placed into operation before the current landfill reaches capacity. Furthermore, petitioners have not offered any proof that there are any viable sites which should have been considered. Thus, applying the rule of reason, it is determined that DEC sufficiently considered alternate sites.

Petitioners contend that DEC also failed to consider the "no action" alternative, which would entail transporting all of the local waste to sites in the western part of the state. The record shows that DEC did in fact consider such alternative. There was significant discussion of the substantially increased costs of transporting the waste, the environmental impacts of transporting the waste such a distance and the lack of any individual landfills with sufficient daily capacity to accept all of the local waste. While petitioners contend that there are landfills with recently approved increases in capacity, they have failed to submit any proof that any of them have the daily capacity to accept an additional 1,000 tons of waste. Furthermore, such "no action" alternative would not include the habitat restoration and enhancement measures included as a special condition of approving the expansion. It is also unlikely that the City would be able voluntarily to fund such measures if its solid waste disposal costs nearly doubled and it stopped receiving income from operating the landfill. It is therefore determined that DEC took a hard

look at all reasonable alternatives to the expansion in compliance with SEQRA.

Petitioners contend that DEC failed to mitigate the adverse environmental impact by failing to impose additional restrictions suggested by petitioners during the public comment period. Petitioners proposed a number of different methods of limiting the daily intake of waste which would extend the life of the current expansion. Petitioners have assumed that the City will seek and be granted yet another expansion once the new expansion has reached its capacity. However, as noted above, the current permits specifically prohibit any further expansion. Such prohibition is substantially guaranteed by the mandatory conservation easements which the City must grant. It was therefore appropriate for DEC to consider that no further expansion will be allowed. Moreover, it would be arbitrary and capricious to impose a condition the only basis for which is a possible intentional violation of the express terms of the permit. It further appears that the primary adverse environmental impacts of the landfill are caused by its daily operation and that such impacts will be substantially mitigated upon closure and completion of the habitat restoration plan. Petitioners have failed to offer any evidentiary proof that reducing the daily intake will have a significant mitigating effect on the day to day impacts. It is also appropriate for DEC to assume that the landfill will be operated until it reaches its permitted capacity. As such, it appears that the environmental impacts upon the pine bush habitat will be mitigated by shortening the period of time during which the landfill is operated and achieving closure and completion of the habitat restoration plan as soon as possible.

Furthermore, the petitioners have failed to establish the source of much of the waste which is being disposed of in the landfill. Petitioners appear to consider that only waste which is picked up and hauled by municipal entities is appropriate. However, a significant portion of residential and all of the commercial waste from the City is picked up and hauled by private contractors. In addition, many of the municipalities within the CRSWMP do not provide pick up and hauling of waste to their residents, but rather rely upon private contractors. It thus appears that the proposed reduction in waste intake would be inconsistent with the CRSWMP solid waste management plan, which is intended to provide for solid waste disposal for all of the municipalities within the unit regardless of whether they provide pick up and hauling services. There was therefore a rational basis for rejecting the proposed mitigation measure.

Petitioners also contend that DEC should have imposed a stricter timetable for the development of a final long term solid waste management plan. However, the permits already require the CRSWMP to submit a final plan within 1 ½ years and to commence the design phase and apply for permits for the chosen long term option within 2 ½ years from issuance of the permits. Petitioners have failed to offer any support for the claim that the CRSWMP could complete such involved tasks in any less time. They have thus failed to show that any further mitigation with respect to this aspect is possible or reasonable.

Finally, petitioners contend that DEC should have required the City to fund an independent environmental monitor to scrutinize the operation of the landfill. However, there are already regular inspections and monitoring by the landfill operators and the DEC. Moreover,

the permits contain a number of provisions to control odors, including a citizen complaint system with enforcement capabilities. Petitioners have failed to offer any evidentiary support for the claim that an independent environmental monitor would have any significant effect on the level of adverse environmental impacts associated with operation of the landfill. It is therefore determined that petitioners have failed to establish that DEC did not take a hard look at and consider reasonable mitigation measures.

The petition alleges that DEC failed to take a hard look at odor problems associated with the landfill. However, the record shows that DEC clearly considered the issue. DEC discussed the past history of odor problems, as well as the measures already taken to correct the major sources of the problem. The permit requires cover to be applied twice each day, rather than the standard once per day. There are also a number of additional requirements for operation of the landfill gas electricity generating equipment, including diverting the gas to flares whenever there is a significant problem with the system. In addition, the City is required to set up a complaint response system. Four verified complaints within any three day period will result in a temporary reduction of the daily limit of waste which may be accepted. As such, there was a rational basis for the determination that odor impacts would be mitigated to the maximum extent practicable.

Finally, the petition alleges that DEC failed to consider the impact of permanently taking 15 acres of habitat which is critical to the Karner Blue butterfly. Such claim ignores the fact that seven of those acres were already fully developed with a waste transfer station and associated landfill improvements. Moreover, DEC found that the eight acres of undisturbed land was not prime pine bush habitat, with no rare species and little likelihood that any rare species would actually utilize such land. While petitioners claim that DEC has under-estimated the quality of this parcel, they have failed to provide any factual basis or evidentiary support for the claim. It further appears that the taking will not be permanent, as the eight acres will be restored to pine bush habitat upon closure of the landfill. Moreover, the adjacent mobile home park will be restored to high quality pine bush habitat, thereby providing an effective actual link for pine bush species, rather than the theoretical, but relatively useless link, provided by the eight acres in question. In short, petitioners have failed to offer any proof that the expansion will have any adverse impact on the Karner Blue butterfly.

Petitioners have also argued that respondents failed to consider the cumulative impacts of prior expansions and the instant expansion. Such issue was never raised in the administrative proceedings. "[T]he doctrine of exhaustion of administrative remedies requires that judicial review of administrative action be limited to a consideration of the issues actually raised before the administrative agency making the determination (*see, Matter of Clowry v Town of Pawling*, 202 AD2d 663, 664; *Aldrich v Pattison*, 107 AD2d 258, 267-268; *Matter of Celestial Food Corp. of Coram v New York State Liq. Auth.*, 99 AD2d 25, 26-27)" (*Matter of Roggemann v Bane*, 223 AD2d 854, 856 [3d Dept 1996]; *see also Matter of Kaufman v Incorporated Vil. of Kings Point*, 52 AD3d 604, 607 [2d Dept 2008]; *Matter of O'Donnell v Town of Schoharie*, 291 AD2d 739, 742 [3d Dept 2002]). As such, the issue has not been preserved for judicial review and is not properly before the Court. In any event, SEQRA's primary purpose is to require

environmental review as early as possible to avoid commitments which entail adverse environmental impacts (*see Matter of Defreestville Area Neighborhood Assn. v Town Bd. of Town of N. Greenbush*, 299 AD2d 631, 635 [3d Dept 2002]). Depending upon the circumstances, consideration of cumulative impacts of future development plans is either mandatory or permissive (*see Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven*, 80 NY2d 500, 512 [1992]). However, SEQRA is fundamentally prospective in nature. The regulations, at 6 NYCRR § 617.7 (c) (2) refer to simultaneous or subsequent actions. There is no requirement that DEC consider the cumulative impact of prior development absent a claim of segmentation, which has not been raised herein. It is therefore determined that respondents complied with the provisions of SEQRA.

The third cause of action alleges that DEC failed to comply with its own regulations with respect to several issues. This cause of action repeats claims that the solid waste management plan fails to comply with 6 NYCRR part 360, that the City has failed to conduct a proper landfill siting study and that the landfill will contribute to the taking of a threatened and endangered species and destruction of its habitat. These issues have already been addressed and found to be without merit.

The petition alleges that DEC should not have granted variances for siting a landfill over a principal aquifer and for the use of Posi-Shell as daily cover. The regulations governing variances provide at 6 NYCRR § 360-1.7 (c) (2):

> "Every application for a variance must:
> (i) identify the specific provisions of this Part from which a variance is sought;
> (ii) demonstrate that compliance with the identified provisions would, on the basis of conditions unique to the person's particular situation, and to impose an unreasonable economic, technological or safety burden on the person or the public; and
> (iii) demonstrate that the proposed activity will have no significant adverse impact on the public health, safety or welfare, the environment or natural resources and will be consistent with the provisions of the ECL and the performance expected from application of this Part."

The permit application identified the specific provisions involved. With respect to siting the landfill over a principal aquifer, the preceding discussions have shown unique circumstances and conditions as well as significant economic burdens if the landfill expansion was not approved. The record further shows that essentially all of the ground water pollution produced by the landfill is coming from the original unlined portion which has not been used for many years. The newer double lined sections have not been the source of any significant releases. It is thus likely that the expansion will not be a source of groundwater pollution. Furthermore, the aquifer has very limited utility as a water source due to its low yield and poor quality water. In addition, any significant use of the water would have a negative impact upon the water table and much of the pine bush vegetation. The record therefore provides a rational basis for granting the variance with respect to locating the landfill over an aquifer.

With respect to Posi-Shell, such material is in common usage at landfills for daily cover.

It is a cement based product which is sprayed on and hardens to stabilize and cover the solid waste. It substantially extends the life of a landfill as it is applied in a thin layer, rather than taking as much as a foot of landfill space for compacted soil cover. DEC and the City have had experience with the use of Posi-Shell and it has been shown to be safe, effective and economical. Petitioners have failed to offer any evidentiary showing that there are any problems associated with the use of Posi-Shell. Rather, the petition merely repeats the speculative comments made during the administrative proceedings that the use of Posi-Shell may contribute to odor problems. No factual support for such claims is provided. Petitioners have therefore failed to establish that there was no rational basis for either variance.

The petition also alleges that the landfill permit authorizes slopes steeper than 33% in violation of 6 NYCRR § 360-2.15 (k). While the petition mentions an expert consultant, the consultant is not identified nor have petitioners submitted any proof from such expert on this issue. Moreover, the petition does not identify the location of the alleged excessive slope or provide any computations indicating how petitioners determined that the slopes would exceed 33%. DEC has provided an affidavit from a licensed engineer indicating that all slopes on the approved plan are 33% or less. Petitioners have therefore failed to establish that the permits authorize excessive slopes.

The petition also contains conclusory, unsupported allegations of regulatory violations with respect to leachate analysis, contingency plans, monitoring plans and seismic analysis. The comments made during the administrative proceedings referred to in the petition were all specifically addressed in the supplemental final environmental impact statement and respondents have submitted expert affidavits opining that the application and permits are in full compliance with the regulations. Petitioners have not indicated the specific manner in which the application and permits violate the regulations and have not shown any facial violations. Petitioners have thus failed to meet their burden with respect to any of these issues. It is therefore determined that the third cause of action is without merit.

The fourth cause of action alleges an unconstitutional gift of public funds in the form of a subsidy to commercial waste haulers who use the landfill. Such claims are based upon the fact that the City has chosen to pay the mandatory $10 per ton set aside for funding of the habitat restoration plan out of general funds or bond proceeds rather than increasing the cost of tipping fees or otherwise directly charging those who use the landfill. Petitioners have mischaracterized the fee as a cost of depositing waste in the landfill rather than as a cost of operating the landfill. However, it is functionally indistinguishable from costs such as operating bulldozers and leachate pumps, applying Posi-Shell or the per ton payments to the Albany Pine Bush Preserve Commission. In order to state a cause of action for an unconstitutional subsidy to commercial waste haulers petitioners would be required to allege and offer proof that the landfill was operating at a loss. Petitioners have not made any such allegations, and, in fact, have alleged that the primary reason for the City's desire to continue operation of the landfill is that it makes a considerable profit. Accordingly, the fourth cause of action is also without merit.

Since all of the substantive causes of action of the petition have been found to be without merit, the fifth cause of action which seeks an award of attorneys fees, as well as the request for injunctive relief, have been rendered academic. The Court also does not need to address the City's claim that the proceeding is barred by laches.

Accordingly, it is

ORDERED AND ADJUDGED that the instant petition is dismissed.

This shall constitute the Decision, Order and Judgment of the Court. This Decision, Order and Judgment is being returned to the Attorney General's Office. All original supporting documentation is being filed with the County Clerk's Office. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Petitioner is not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

SO ORDERED AND ADJUDGED.

ENTER.

Dated: February 5th, 2010
Albany, New York

PATRICK J. McGRATH
Supreme Court Justice

Papers Considered:

1. Order to Show Cause dated October 22, 2009; Verified Petition, dated October 15, 2009, with annexed Exhibits A-R.
2. Answer of Respondent DEC, dated November 24, 2009, with annexed Exhibits 1-27; Affidavit of William Clarke dated November 23, 2009; Affidavit of David Vitale dated November 23, 2009, with annexed Exhibits A-C; Affidavit of Thomas R. Reynolds dated November 23, 2009; Affidavit of Gary J. McPherson

dated November 23, 2009; Affidavit of Vincent K. Fay dated November 23, 2009 with annexed Exhibits A and B; Affidavit of David Lasher dated November 23, 2009; Affidavit of Brian Maglienti dated November 23, 2009.

3. Answer of Respondent City of Albany, dated November 24, 2009.
4. Affidavit of Warren A. Harris, IV, dated November 23, 2009, with annexed Exhibit A.
5. Affidavit of Bradford D. Burns dated November 23, 2009, with annexed Exhibits A-C.
6. Affidavit of Michael O'Brien dated November 24, 2009, with annexed Exhibits A-C.
7. Affidavit of Willard A. Bruce dated November 24, 2009, with annexed Exhibits A-J.
8. Affidavit of Christopher R. Einstein dated November 24, 2009, with annexed Exhibit A.