NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

CASE 04-F-1178 - Petition of AES NY, L.L.C. for Clarification or Amendment of the Certificate of Environmental Compatibility and Public Need Issued December 29, 1978, in Case 80002, as Amended, filed in C 80002.

NOTICE OF SCHEDULE FOR FILING EXCEPTIONS

(Issued December 12, 2006)

Attached is the Recommended Decision of Presiding Examiner Rafael A. Epstein and Associate Examiner James T. McClymonds in this proceeding. Briefs on exceptions will be due in hand to the undersigned and all active parties on December 29, 2006. Briefs opposing exceptions are not contemplated.

JACLYN A. BRILLING
Secretary

NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

CASE 04-F-1178 - Petition of AES NY, L.L.C. for Clarification or Amendment of the Certificate of Environmental Compatibility and Public Need Issued December 9, 1978, in Case 80002, as Amended, filed in Case 80002.

RECOMMENDED DECISION

BY

PRESIDING EXAMINER RAFAEL A. EPSTEIN

AND

ASSOCIATE EXAMINER JAMES T. McCLYMONDS

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APPEARANCES: See Appendix

RAFAEL A. EPSTEIN, Presiding Examiner and
JAMES T. McCLYMONDS, Associate Examiner:

I. INTRODUCTION

A. Summary

In this Recommended Decision, we conclude that the Board on Electric Generation Siting and the Environment (the Board) should adopt, in most respects, the "Proposed Findings" and "Proposed Ordering Clauses/Certificate Conditions"[1] accompanying a Joint Proposal which the parties have negotiated and submitted as their proposed resolution of the issues contested in the above proceeding concerning landfills at the Somerset Generating Station.[2] Our recommendations are intended to obviate the evidentiary hearing that the Board directed us to conduct, in its order instituting this phase of the proceeding (Hearing Order).[3]

B. Procedural Background

AES NY, L.L.C. (AES) operates the Somerset Generating Station, a 675 megawatt coal-fired electric generating plant in the Town of Somerset, Niagara County. The plant was constructed pursuant to a Certificate of Environmental Compatibility and Public Need (Certificate) originally issued to N.Y.S. Electric & Gas Corporation (NYSEG), AES's predecessor in interest, in 1978.

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[1] The parties have submitted these provisions as Appendices B and C, respectively, accompanying the Joint Proposal.

[2] Exh. 15.

[3] Case 04-F-1178, Order Directing Holding of Discretionary Evidentiary Hearing (issued January 27, 2005).

It commenced operation in 1984.[4] In 1999, the Board amended the 1978 Certificate to authorize installation of a Selective Catalytic Reduction (SCR) system for air pollution control. At the same time, as conditions of the 1999 amended Certificate, the Board issued an order (1999 Amendment Order) adopting the provisions of the parties' Memorandum of Understanding (MOU) concerning solid waste disposal at the plant site.[5]

The site includes 198 acres of landfill area in three subdivisions designated as Solid Waste Disposal Area (SWDA) I, II, and III. By adopting the MOU's terms, the Board established a requirement that "ammoniated" coal combustion byproducts (CCBs) created during operation of the SCR system would be deposited only in SWDA III in a manner consistent with the Department of Environmental Conservation (DEC) landfill regulations in Part 360 of Title 6, New York Codes, Rules, and Regulations (6 NYCRR Part 360). The use of SWDA III for this purpose was expected to satisfy Part 360 because SWDA III's intended design included, among other features prescribed in the regulations, a double composite liner system. However, in a compliance filing pursuant to the order granting the 1999 amended Certificate, AES proposed to deposit SCR-generated CCBs in SWDA II, which was being constructed in phases[6] with only the single liner system specified in the original Certificate and the 1999 amended Certificate.

AES's proposed reliance on SWDA II's single liner was a source of concern to the other parties, one or both of whom have

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[4] Case 80002, N.Y.S. Electric & Gas Corp., Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued December 29, 1978). The parties to the MOU were NYSEG, AES, staff of the Department of Environmental Conservation (DEC), and staff of the Department of Public Service (DPS). The plant was known as the Kintigh Generating Station.

[5] Case 98-F-2005, N.Y.S. Electric & Gas Corp. and AES NY, L.L.C., Order Amending Certificate (issued April 26, 1999).

[6] The SWDA II phases at issue in this proceeding are those subsequent to Phases A and B, which already have been constructed.

taken the position that AES's proposal would violate the 1999 amended Certificate provision confining ammoniated CCBs to SWDA III; that heavy metals and other contaminants generally render the plant's wastes too hazardous to be deposited over a single liner; and that the CCBs' potential environmental harm is aggravated if the SCR system's use of ammonia (to reduce the generating plant's nitrogen oxide emissions) incidentally introduces ammonia into the CCBs. In response, AES argued (among other things) that the CCBs intended for SWDA II should not be deemed "ammoniated" within the meaning of the MOU--and therefore were not relegated to SWDA III by the terms of the 1999 amended Certificate--unless the CCBs' ammonia concentration exceeded two parts per million (ppm).

The Public Service Commission (PSC), statutorily obligated to review AES's compliance filing in accordance with the standards prescribed in Public Service Law (PSL) §146(2), observed that SWDA II (in contrast to SWDA III) was not designed in full compliance with 6 NYCRR Part 360. Moreover, the PSC found no sufficient evidence of any intention, under the MOU as incorporated into the 1999 amended Certificate, that CCBs produced during SCR operation could be deposited in SWDA II if their ammonia concentration remained below a specific threshold (such as two ppm). The PSC therefore concluded that AES's proposed use of SWDA II would violate the terms and conditions of the 1999 amended Certificate, unless AES obtained explicit permission by a further Certificate amendment or by some other means.[7]

AES responded by petitioning the Board for clarification or further amendment of the 1999 amended Certificate, to establish that an ammonia concentration of two ppm or less is or ought to be the criterion for determining whether SWDA II is an adequate disposal site for ammoniated CCBs

[7] Case 98-F-2005, supra, Order Accepting Compliance Filing in Part (issued April 28, 2004), pp. 8-9.

produced by the SCR system.[8] On considering the petition and responsive comments, the Board determined that the 1999 amended Certificate and the Amendment Order adopting it were too ambiguous to sustain AES's request for "clarification." The Board said it therefore denied that request.[9]

Turning to AES's alternative proposal--that the use of SWDA II for CCBs with an ammonia concentration within two ppm be authorized not by means of a clarification but by means of a Certificate amendment--the Board noted that the applicable law and regulations[10] would mandate an evidentiary hearing if the proposed amendment were likely to materially or significantly increase environmental impacts. The Board found the record inconclusive on that issue and therefore directed, as an exercise of its discretion, that we conduct an evidentiary hearing.[11] The Board, referring to the findings it must make under PSL §146(2) as preconditions for approval of a certificate amendment, identified four factual questions that would have to be examined on the record.[12] (In the discussion that follows, the Board's four questions are recited in the context of the relevant provisions of §146(2), rather than sequentially.)

The Examiners initially assigned to conduct the hearing[13] convened a prehearing conference, followed by a

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[8] Case 04-F-1178, Petition for Clarification or Amendment of the Certificate of Environmental Compatibility and Public Need Issued December 9, 1978, in Case 80002, as Amended, filed September 30, 2004.

[9] AES does not necessarily concede that the Board's determination amounted to a denial. Transcript pages (Tr.) 270-271. In the present posture of the case, however, AES's asserted entitlement to a clarification (rather than a denial) is moot at least until the Board issues its decision.

[10] PSL §143(2) and 16 NYCRR 1000.15(a).

[11] Hearing Order, pp. 8-9.

[12] Id., p. 9.

[13] DPS Administrative Law Judge J. Michael Harrison, as Presiding Examiner for this case; and DEC Chief Administrative Law Judge McClymonds, as Associate Examiner. Effective December 1, 2005, upon Judge Harrison's retirement, Judge Epstein succeeded him as Presiding Examiner for this case.

procedural ruling which authorized discovery and set a schedule for prefiled testimony.[14] Full public notice was given of the prehearing conference and all subsequent proceedings, but no comments or other input were received from members of the general public. The Examiners denied a motion by the Town of Somerset (Town) that they direct AES to create a fund to support intervenor participation, on the ground that it was not statutorily authorized and would not appreciably enhance the record resulting from intervention by DEC staff.[15]

AES filed direct testimony on June 28, 2005, and the Town and DEC staff each filed responsive testimony on February 7, 2006. In the interval between those filing dates, the Town moved for a Siting Board order revoking the 1999 amended Certificate, or prohibiting further on-site disposal of ammoniated CCBs pending resolution of the issues in this proceeding.[16] On reviewing the Town's motion as well as argument by DEC staff in support and AES in opposition, the Examiners decided there was not yet a record basis on which to determine the motion. They therefore consolidated the Town's motion into the current proceeding.[17]

A series of additional prehearing conferences and procedural rulings were necessitated by the parties' numerous disagreements concerning discovery, procedural deadlines, the scope of the testimony, and whether argument on threshold legal

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[14] Case 04-F-1178, prehearing conference, Albany, March 16, 2005, pursuant to Notice issued February 23, 2005; Ruling on Procedural Issues (issued March 18, 2005).

[15] Case 04-F-1178, Ruling on Request to Compel the Provision of an Intervenor Fund (issued April 29, 2005).

[16] Complaint filed September 30, 2005.

[17] Case 04-F-1178, Procedural Ruling (issued November 9, 2005).

issues should precede other phases of the litigation.[18] The parties report that they also were engaged intermittently in settlement discussions in February, March, May, and June of 2006.[19]

During the prehearing conferences, Examiner McClymonds invited the parties to address whether AES's litigating position was tantamount to a claim that the use of SWDA II proposed in its September 2004 petition would qualify for approval pursuant to a variance, through the process authorized in 6 NYCRR 360-2.14(a), of the requirements otherwise imposed by 6 NYCRR Part 360.[20] In response to that inquiry, AES supplemented its rebuttal by filing additional testimony on April 7, 2006 on whether its proposal would satisfy the requirements of §360-2.14(a).

The processes described above culminated in a negotiated Joint Proposal executed by AES, DEC staff, and the

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[18] In addition to informal telephone conferences among the Examiners and parties, transcribed procedural conferences were held by telephone March 3 and 15, 2006. Issues other than those resolved in conferences were decided in Case 04-F-1178, Rulings on Requests for Extension (issued June 21 and July 12, 2005); Ruling on Requests for Postponement (issued August 22, 2005); Ruling on Request for Trade Secret Protection (issued September 15, 2005), which followed (and preceded) extensive litigation of discovery issues; Miscellaneous Rulings (issued October 18, 2005); Procedural Rulings (issued November 9, 2005 and January 3, 2006); Ruling on Town of Somerset's Discovery Motion (issued January 23, 2006); and Ruling on Discovery Schedule (issued January 27, 2006). When the parties filed a negotiated Joint Proposal and we suspended the litigated hearing process, various motions to preclude portions of the prefiled testimony had been held in abeyance pending the outcome of negotiations. One of the preclusion motions, by DEC staff, also moved in the alternative that AES's September 2004 petition be dismissed or that issuance of this Recommended Decision be stayed. All such unresolved procedural motions now remain in abeyance until the Board decides whether to adopt the Joint Proposal's terms. See Tr. 251-253.

[19] To preserve confidentiality, we received no information on the substance of the discussions. The alternative dispute resolution process was facilitated by DPS Administrative Law Judge Robert R. Garlin, until his death on March 29, 2006, and DEC Administrative Law Judge Edward Buhrmaster.

[20] Procedural Conference, March 3, 2006, Tr. 115 et seq.

Town, representing their agreement as to how the Board should resolve the contested issues. The parties submitted the Joint Proposal July 9, 2006, and offered it for our review in an evidentiary hearing in Albany on July 11, 2006.[21] In addition to the Joint Proposal, all prefiled testimony and exhibits were entered into the record. Thus they are now available to the Board at least as evidence of undisputed background facts; the parties' initial litigating positions; and the facts and reasoning needed to determine whether the Board, pursuant to 6 NYCRR 360-2.14(a), may properly grant variances from the general requirements of Part 360 so as to authorize the use of SWDA II in the manner specified in the Joint Proposal. The hearing record comprises 944 transcript pages and 160 exhibits.

At the hearing, we questioned the parties' representatives about their proposals. Cross-examination by parties, and rulings on the admissibility of contested testimony, were waived by the parties and deferred indefinitely. According to the Joint Proposal, the parties reserve the option of repudiating it should the Board decide not to adopt the proposed terms in their entirety.[22] In that event, the record compiled at the July 11, 2006 hearing (including all pending motions previously filed) would serve as a starting point for resumption of adversarial hearings.

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[21] The hearing had twice been postponed in the expectation that an agreement was imminent. Case 04-F-1178, Notices issued May 19, June 15, and July 5, 2006. The July 11 hearing in Case 04-F-1178 was preceded by a hearing at the same date and location, on a separate record, before Examiner McClymonds in a DEC Department Initiated Modification proceeding (DIM) in the matter of Permit ID No. 9-2938-00003/00002. DEC staff initiated the DIM on the basis that certain terms on which the SCR installation had been authorized in the Somerset Station's 1999 Air State Facility permit had erroneously not been carried forward in the facility's current Title V air permit. The parties indicated at both hearings that the feasibility of a comprehensive negotiated outcome would depend on the results of both proceedings. We anticipate that, should the Board adopt our recommendations, the DIM would be resolved separately pursuant to DEC's standard settlement procedure.

[22] Joint Proposal, ¶I.

II. SUMMARY OF THE PROPOSED TERMS

The Joint Proposal includes basic proposed terms as follows, together with proposed findings and Certificate conditions (i.e., ordering clauses) consistent with the proposed terms.[23]

By adopting the proposed terms including the associated findings and Certificate conditions, the Board would authorize AES to use SWDA II for disposal of any CCBs with an ammonia content of two ppm or less, regardless of whether the CCBs are a byproduct of SCR operation.[24] Such use of SWDA II would become mandatory when SWDA I reaches full capacity.[25] New phases of SWDA II developed prospectively would be deemed to satisfy the criteria applicable by variance, pursuant to 6 NYCRR 360-2.14(a), from the strict requirements of 6 NYCRR Part 360. As explained below, the proposed variance would include an agreed upon liner design, and related features, in future phases of SWDA II.[26]

In all other respects, SWDAs I, II, and III would remain subject to PSL Article VIII, the 1999 amended Certificate, and the provisions of 6 NYCRR Part 360 in effect when the

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[23] The accompanying text summarizes the Joint Proposal as a convenience in explaining why adoption of the proposed terms would resolve the contested issues. However, for an authoritative statement of the proposed terms, one must rely on the Joint Proposal itself and its appendices.

[24] Joint Proposal, ¶II.A. Prospective new phases of SWDA II would be constructed with the new liner design identified in the Joint Proposal as part of the "Modified Liner Design." Phases A and B of SWDA II, which already have been constructed, would not be retrofitted. According to the nomenclature in the Joint Proposal, retention of the existing liners in Phases A and B also would constitute part of the Modified Liner Design.

[25] Id., ¶II.B.

[26] Id., ¶II.C.

prospective phases are constructed.[27] The Joint Proposal presupposes that, as long as newly produced CCBs' ammonia content remains within two ppm, development of SWDA III would await the exhaustion of capacity at SWDA II (which might take about 20 years, depending on the rate of production of CCBs and the extent to which they might be diverted into beneficial uses rather than deposited in the landfill). The Joint Proposal therefore prescribes no design for SWDA III, other than acknowledging that the design must comply with Part 360 as of the time of construction.[28] The Board, or the PSC and DPS staff acting on the Board's behalf to the extent prescribed in Article VIII, would retain "jurisdiction, including decision-making, clarification, interpretation, amendment and enforcement" in administering the three SWDAs.[29]

Despite that reservation of PSC and DPS staff authority, the Joint Proposal's terms if adopted would provide that DEC staff "will serve in an advisory role" to DPS staff concerning SWDA II.[30] Additionally, the Joint Proposal's terms incorporate verbatim those provisions of the 1999 MOU which require DPS Staff to (a) seek DEC's advice and recommendations regarding ongoing management of SWDAs I and II;[31] (b) defer to DEC's expertise regarding landfills and regarding the Environmental Conservation Law (ECL) and regulations issued

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[27] Disposal of CCBs whose ammonia content exceeds two ppm is not addressed in the Joint Proposal, and therefore would continue to be governed by the MOU and the 1999 amended Certificate. Thus, on-site disposal of such CCBs would have to await construction of SWDA III, and off-site disposal would have to comply fully with conditions established in the 1999 amended Certificate and the 1999 Amendment Order. See Case 98-F-2005, supra, Amendment Order at 17, 19.

[28] Tr. 294-297.

[29] Joint Proposal, ¶II.E.

[30] Id., ¶II.G.

[31] Id., ¶II.F.i.

thereunder, in connection with SWDA III;[32] and (c) seek DEC's advice regarding conformance with applicable law and regulations, with respect to SWDA III.[33]

Other 1999 MOU provisions expressly incorporated into the Joint Proposal are those requiring that AES conform any future modifications of SWDA III to regulations then in effect,[34] and file certain periodic reports on SWDA III to DEC and DPS simultaneously.[35] Additionally, the parties explained at the July 11, 2006 hearing that the Joint Proposal is intended to preserve the 1999 MOU's provisions that, for SWDAs I and II, "DEC will defer to the provisions" of PSL Article VIII and the Certificate, and "DPS acting through the Siting Board" will monitor regulatory compliance.[36]

Indeed, the parties explained, they intend that the Joint Proposal carry forward all the 1999 MOU's provisions (except ¶5, confining ammoniated CCBs to SWDA III, which of course is inconsistent with the Joint Proposal).[37] Yet the Joint Proposal, as drafted, carries forward some MOU provisions expressly while retaining others only by implicit agreement expressed at the hearing. To prevent any future misconception that portions of the 1999 MOU omitted from the Joint Proposal were thereby intended to lapse, we recommend that the Board modify proposed ordering clause (Certificate condition) No. 7 to expressly incorporate all the 1999 MOU's provisions except ¶5.

Adoption of the proposed terms would conclude the litigation of several related matters. First, as noted above, a

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[32] Id., ¶II.F.ii.a. This and subsequent provisions of the Joint Proposal refer to the role of "DPS," which we recommend the Board construe as synonymous with "DPS staff."

[33] Id., ¶II.F.ii.b.

[34] Id., ¶II.F.ii.c.

[35] Id., ¶II.F.ii.d.

[36] Case 98-F-2005, supra, Amendment Order, App. A, initial ¶1 and ¶2; Tr. 360-362.

[37] Tr. 356-357; Case 98-F-2005, supra, Amendment Order, App. A, ¶5.

motion is pending in which the Town seeks revocation of the 1999 amended Certificate or alternative relief. The Town has agreed that, upon adoption of the Joint Proposal's terms, the Board may deem the Town's motion withdrawn.[38] Second, by petition filed December 20, 2005, AES seeks permission to expand the use of SWDA I or SWDA II beyond the limits currently allowed in the Certificate, so as to avoid opening new phases of SWDA II during the pendency of this proceeding.[39] Adoption of the Joint Proposal's terms would result in dismissal of the December 20, 2005 petition as moot.[40] Finally, although the Joint Proposal does not so state, the parties explained at the July 11, 2006 hearings that the Joint Proposal is intended as part of a comprehensive negotiated resolution of both this proceeding and the DIM proceeding before the DEC regarding AES's Title V air permit.[41] A Board decision adopting the terms of the Joint Proposal in this proceeding would allow further steps toward DEC administrative approval of the negotiated resolution proposed in the DEC proceeding.

The proposed terms include the following purported limitation on the Joint Proposal's relevance in future proceedings:

> None of the terms or provisions of this Joint Proposal and none of the positions taken herein by any party shall be referred to, cited or relied upon in any fashion as precedent or otherwise in any other proceeding before the Siting Board, the PSC or any other regulatory agency or before any court of law for

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[38] Joint Proposal, ¶II.H.; Tr. 385.

[39] The petition initially was docketed in this proceeding, and was addressed through notice and comment without being consolidated with the matters being heard by the Examiners. Case 04-F-1178, Notice Soliciting Comments (issued December 23, 2005). It subsequently was transferred to a new docket, Case 05-F-1658, Petition of AES Eastern Energy, L.P. to Amend its Certificate of Environmental Compatibility and Public Need to Authorize the Reopening and Expansion of Solid Waste Disposal Area I at the AES Somerset Facility Filed in Case 80002.

[40] Joint Proposal, ¶II.I.

[41] See note 21, above.

> any purpose, except as shall be necessary to effect and/or enforce the terms and provisions of this Joint Proposal or any prior order of the PSC or Siting Board regarding the Facility.[42]

This provision, while perhaps appropriate to a consent decree submitted for approval by a supervising tribunal, is inapt in this case where the Joint Proposal is intended only to describe a decision that the Siting Board is asked to reach on its own initiative.

In response to our questions at the hearing, DEC staff and AES acknowledged the difficulty of explaining how invocation of this case as precedent could be waived by the Board, by other parties uninvolved in this proceeding, or by DEC staff in proceedings with other parties. The strongest defense of the proposed language appeared to be that the Joint Proposal's terms would be distinguishable in any future proceeding because they are highly fact-specific and because the Somerset Station is the only remaining plant governed by the original version of Article VIII.[43] However, since parties seeking to limit the precedential value of this case in future proceedings could invoke those distinguishing factors, the proposed language quoted above is unnecessary; and it is a potential source of mischief in purporting to limit the Board's and DEC staff's use of precedent. We therefore recommend that the Board exclude the quoted passage from among the Joint Proposal's terms that the Board otherwise adopts.

III. COMPLIANCE WITH ARTICLE VIII CRITERIA

A. Overview

The Certificate authorizing construction of the Somerset Station was granted by the Siting Board pursuant to the version of PSL Article VIII that expired January 1, 1979. Consequently, the Joint Proposal acknowledges that Article VIII remains applicable to a facility's ongoing operations including

[42] Joint Proposal, ¶1.

[43] Tr. 285-294.

certificate amendments such as the parties advocate here. Specifically, PSL §146(2) requires that the Board find and determine:

> (a) the public need for the facility and the basis thereof;
>
> (b) the nature of the probable environmental impact, including a specification of the predictable adverse effect on the normal environment and ecology, public health and safety, aesthetics, scenic, historic, and recreational values, forest and parks, air and water quality, fish and other marine life and wildlife;
>
> (c) that the facility (i) represents the minimum adverse environmental impact, considering the state of available technology, the nature and economics of the various alternatives, the interests of the state with respect to aesthetics, preservation of historic sites, forest and parks, fish and wildlife, viable agricultural lands, and other pertinent considerations, (ii) is compatible with public health and safety and (iii) will not discharge any effluent in contravention of the standards adopted by [DEC], or in case no classification has been made of the receiving waters associated with the facility, will not discharge any effluent that will be unduly injurious to the propagation and protection of fish and wildlife, the industrial development of the state, and public health and public enjoyment of the receiving waters;
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> (d) that the facility is designed to operate in compliance with applicable state and local laws and regulations issued thereunder concerning, among other matters, the environment, public health and safety, all of which shall be binding upon the applicant, except that the board may refuse to apply any local ordinance, law, resolution or other action or any regulation issued thereunder or any local standards or requirement which would be otherwise applicable if it finds that as applied to the proposed facility such is unreasonably restrictive in view of the existing technology or the needs of or costs to consumers whether located inside or outside of such municipality. . . .;
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> (e) that the facility is consistent with long-range planning objectives for electric power supply in the state, including an economic and reliable electric system; and for protection of the environment;
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> (f) that the facility will serve the public interest, convenience and necessity [subject to conditions concerning determinations by the New York Power Authority]; and

> (g) that the facility is in the public interest, considering the environmental impact of the facility, the total cost to society as a whole, the possible alternative sites or alternative available sources of energy, as the case may be, both within the state and elsewhere and the immediacy and totality of the needs of the people of the state for the facility within the context of the need for public utility services and for protection of the environment.

Accordingly, in its January 27, 2005 order instituting a hearing, the Board adapted the statutory criteria quoted above in the form of four enumerated questions to which "consideration must be given" in the evidentiary hearing.[44]

Just as Article VIII empowered the Board to grant or deny a certificate application subject to such terms, conditions, limitations, or modifications as necessary to satisfy the substantive criteria of PSL §146(2) for issuance of a certificate, §146(2) similarly authorizes the Board to impose conditions on a certificate amendment if necessary to maintain a certificated facility's compliance with the §146(2) criteria. We recommend that the Board adopt the Joint Proposal's terms as proposed by the parties and that it adopt (except as specified below) the parties' proposed findings, based on two considerations.

First, we conclude that the resulting Certificate amendments would permit affirmative answers to the Board's four enumerated questions in the Hearing Order. Second and more fundamentally, both the Hearing Order and PSL §146(2) require that we consider not merely whether the proposed amendments would satisfy the criteria identified in the Board's four specific questions but also whether the amendments would comply generally with §146(2) in all relevant respects.

We therefore have examined whether the evidentiary record adequately shows that adoption of the parties' proposed findings and certificate amendment would comply with all relevant criteria in §146(2). We conclude that it does, and that the

[44] Hearing Order, p. 9.

Board therefore should adopt the parties' proposals, except to the extent described below.

B. Need Vis-à-Vis Environmental and Economic Costs (§146(2)(a) and (e))

The issue of "need" for a generating facility is part of the statutory framework whereby §146(2) seeks to balance the public's interest in operating the facility, versus the types of environmental and economic cost addressed elsewhere in the statute. This mandatory balancing exercise appears especially clearly in the "need" and "planning" provisions of §146(2)(a) and (e). Similarly, the balancing of need and environmental impacts provides at least the background of each of the Board's four questions; and it becomes directly salient in the Board's question

> 3. Whether, if the proposed amendment were granted, the operation of the facility would be compatible with the public health.[45]

By posing that question, the Board disavows any presumption that the generating station should even be allowed to operate at all.

Implicit in Question (3), as in the Board's other questions, is the assumption that the need for the facility remains no less compelling than when the Board initially found need sufficient to justify issuance of the original Certificate. No party explicitly argued the contrary. At times, however, the import of the Town's presentation seemed to be that the addition of the SCR system had altered the plant's waste stream in such a way as to preclude continued operation of the facility in a manner consistent with the public health, unless AES resorted to off-site disposal of those CCBs which are ammoniated by operation of the SCR. The Town's premise, when combined with AES's testimony that off-site disposal would be impractical or prohibitively expensive, arguably implied that the generating station is unable to operate consistently with the public health

[45] Id.

because air quality conditions and standards have required use of the SCR system for annual periods longer than might have been anticipated when the system was installed.[46]

In effect, the parties' proposed Certificate amendments would allow the plant to operate compatibly with the public health insofar as the amendments would remove the supposed dilemma, outlined above, of having to choose among using the SCR system to meet air quality standards; or shutting down the SCR system to avoid an insuperable waste disposal problem; or shutting down the generating plant to avoid the air quality impact of operating it without the SCR system.

Any of these results would be contrary to the public interest insofar as the plant is needed. However, they all can be avoided, and the public interest therefore would be served, by adopting the parties' proposals for the Modified Liner Design in future phases of SWDA II, for the two ppm ammonia criterion, and for newly defined monitoring requirements to detect adverse impacts on water quality, and other related provisions of the Joint Proposal.

AES's testimony prepared for litigation included evidence intended to show that the single liner approved for SWDAs I and II in 1979 and 1999 remains an appropriate technology regardless of any subsequent changes in the nature of the waste stream due to SCR operation; that the CCBs are so impervious that their ammonia content will not leach into groundwater; that even if it did, ammonia concentrations in the CCBs would be less than two ppm and therefore would have no significant adverse impact; and that negative results from monitoring stations establish that the disposal methods currently used at SWDAs I and II have

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[46] As noted in the Board's December 2005 Hearing Order, the extent to which the SCR system operates may have been affected by DEC's acid deposition regulations effective August 17, 2004. Id. We share the parties' view that the regulations' effects need not be examined on this record, because the Joint Proposal is intended to address the disposal of all CCBs with a given ammonia content regardless of what regulatory regime may affect their production. Tr. 375-379.

sufficed to prevent any adverse effects on surface waters or groundwater.

There was opposing testimony that the plant's existing single liner systems no longer conform with the technology minimally acceptable for industrial waste disposal in New York; that the CCBs are not inherently resistant to leaching of ammonia, and there is no specific threshold below which ammonia concentrations are provably benign; and that flaws in the site's water quality monitoring preclude any valid determination whether the current landfill design suffices to prevent adverse environmental impacts, whether from ammonia or from other pollutants.

Although the preceding description presents only a simplified version of the testimony on these topics as prefiled for litigation, it illustrates that the parties' factual assertions in the text of the Joint Proposal--some of which incorporate by reference the prefiled testimony--are consistent with findings the Board could reasonably have reached had the testimony been fully litigated. In the Joint Proposal, parties initially adverse to one another on the issues described above have been able to concur that the combination of the modified liner system, a two ppm ammonia limit, and an agreed upon monitoring regime provide an effective and economically feasible solution to their disagreements over the applicant's original proposal.

The Joint Proposal also shows that the parties have reached a consensus solution not merely in the interests of litigation avoidance for its own sake, but with due regard for the substantive merits of the case. The substantive considerations include, most notably, AES's acknowledgement that this case ought to yield results that will remain satisfactory over the site's estimated 20 years' worth of disposal capacity; and the erstwhile opponents' acknowledgement that a deviation from the dual liner requirement imposed on other New York facilities is justified by the structural advantages of the Modified Liner Design, the distinctive characteristics of the

Somerset Station's waste stream and physical environment, and the extensive proposed water quality monitoring procedures.

Portions of DEC staff's prefiled testimony alleged that, in the aftermath of the 1999 MOU, DPS staff or the PSC had reached decisions on Certificate compliance issues inconsistent with advice from DEC experts. Nevertheless, at the July 11, 2006 hearing, the Joint Proposal's sponsors expressed confidence that adoption of its terms would cause no analogous conflicts in the future. Moreover, in response to our questions whether the Joint Proposal's juxtaposition of diverse standards on similar subject matter would produce an unduly complex definition of DEC's and DPS's respective roles in overseeing the various SWDAs,[47] DEC staff and AES emphatically opposed any attempt at a simplifying reformulation on the ground that it would be unnecessary and might disturb the balance of interests said to have been struck in the draft as filed.[48] Among other things, DEC staff said the Joint Proposal's inclusion of extensive details about water quality monitoring would tend to avert miscommunication between DEC and DPS staffs.[49] In view of these considerations, we recommend adoption of the proposed terms[50] as an adequate means of ensuring that DEC and DPS effectively monitor the SWDAs' compliance with applicable requirements.

In conclusion, for the reasons stated, adoption of the Joint Proposal's terms would permit an affirmative answer not

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[47] See text accompanying notes 31-34, above.

[48] Tr. 364-369.

[49] DPS staff did not intervene in the proceeding before us. In the DIM (note 21, above), DPS staff moved for leave to intervene, but withdrew its motion after determining that the parties' proposed resolution of that case would sufficiently protect DPS staff's interests in the matter. Letter dated July 10, 2006 from Steven R. Blow, Esq. to Examiner McClymonds.

[50] Here and generally, except as otherwise noted, our recommendation that the Board adopt terms stated in the Joint Proposal should be understood to include a recommendation that the Board adopt all corresponding proposed findings and ordering clauses (Certificate conditions) accompanying the Joint Proposal as Appendices B and C.

only to the Board's Question (3) (above) as to whether the plant can be operated consistently with the public health, but also to the Board's question

> 4. Whether the proposed amendment is in the public interest, given environmental impact and cost considerations.[51]

C. Nature of Environmental Impact (§146(2)(b))

The review of environmental impacts required by §146(2)(b) closely corresponds to the Board's question:

> 1. What is the nature of the probable environmental impact of the proposed change (including any predictable adverse effect on water quality).[52]

In addition to the water quality issue highlighted in the Board's Question (1), the testimony in support of the parties' litigating positions identified matters relevant to other §146(2)(b) criteria. Specifically, there was conflicting testimony on whether the waters potentially affected by leachate, if any, from the disposal site would include resources that support fish and wildlife populations and recreational uses. And, as noted previously, a basic issue pervading the testimony was whether the applicant can manage the plant's wastes in an environmentally acceptable manner while also operating the SCR system to the full extent consistent with other environmental objectives, namely protection of air and water quality.

The hearing record fulfills the Board's directive in Question (1) that we examine the probable environmental impact of AES's original proposal, with particular attention to water quality impacts. The record also provides sufficient evidence on which to evaluate the parties' subsequent Joint Proposal, in

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[51] Hearing Order, p. 9. In making this recommendation, we have, of course, reframed the Board's question by assuming that it refers to the parties' jointly proposed amendments (rather than the applicant's original proposal).

[52] Id.

terms of Question (1); and in terms of the more expansive list of possible impacts, insofar as relevant, in §146(2)(b).

D. Minimization of Environmental Impact (§146(2)(c))

The assessment of "minimum environmental impact" pursuant to PSL §146(2)(c) is reflected in the Board's question:

> 2. Whether such change [resulting from a proposed certificate amendment] represents the minimum adverse environmental impact, considering the state of available technology, the nature and economics of the reasonable solid waste disposal alternatives, and other pertinent considerations (such as the effect on the operation of the SCR system of DEC's acid deposition reduction regulations, which became effective on August 17, 2004).[53]

The statutory "minimum impact" test under §146(2)(c)(i), and the Board's Question (2), require a review of the same types of impact already noted in connection with §146(2)(a) and (e) and the Board's Questions (3) and (4) derived from those subdivisions. Thus, §146(2)(c)(i) requires that we consider environmental impacts on specified state interests which include, in relevant part, fish and wildlife. In addition, §146(2)(c)(ii) requires a determination whether the facility "is compatible with public health and safety," an issue reflected in the Board's Question (3) above. And §146(2)(c)(iii) imposes a water quality criterion which involves, for purposes of this case, the same factual issues as those implicated in the water quality component of the Board's Question (1).

Besides those criteria, however, the additional question introduced by the "minimization" test in §146(2)(c) and Question (2) is whether AES's proposal--or, now, the parties' supervening Joint Proposal--is the most economically reasonable method available for mitigating environmental impacts.

We conclude that adoption of the Joint Proposal's terms would satisfy that test. As we have described, litigation on the

[53] Id.

basis of the prefiled testimony might have supported a finding that the CCBs are sufficiently innocuous or inert, and the single liner systems in place at SWDA I and II are sufficiently effective, that the latter remain appropriate for future phases of SWDA II; or, on the other hand, that a different liner design is needed prospectively at SWDA II, given the nature of the CCBs and the single-liner system.

The record shows that the parties extensively considered evidence on various alternatives, including hydrogeologic analyses and engineering, operating, and water quality monitoring reports. It was such investigation that led to their agreement that the technical specifications in the Joint Proposal meet the demonstration requirements of 6 NYCRR 360-2.14(a) so that the Board may grant a variance from the strict requirements of Part 360.

The proposed Modified Liner Design would consist, in part, of a single liner constructed by overlaying a 60 mil, high density polyethylene geomembrane upon a 12 inch, low permeability soil barrier. We recommend that the Board accept, as well founded in the record, the parties' concurrence that the Modified Liner Design in SWDA II would constitute a reasonable compromise between an extension of the single liner system currently used in Phases A and B of SWDA II, and a multiple liner design with double liners and double leachate collection systems. Both those solutions were the subject of the prefiled testimony, in which all parties considered and rejected one or the other for reasons explained in the testimony. The Modified Liner Design overcomes both DEC staff's and the Town's objections to a single composite liner system, and AES's objections to a double liner system.

The Modified Liner Design also is more economical than either of those alternatives because (a) it substitutes the 12 inch, low permeability soil base in lieu of the 24 inches underlying the existing single liner design and (b) it omits one of the dual liners and dual leachate removal systems included in the double liner design. Moreover, in terms of technological effectiveness, we recommend that the Board accept the parties'

view that the Modified Liner Design represents a reasonable compromise between the single and double composite liner systems in the sense that those two approaches constitute the minimum standard for disposal of industrial waste and municipal solid waste, respectively, under 6 NYCRR Part 360.[54]

Coupled with the Joint Proposal's terms regarding the two ppm maximum ammonia content, and its provisions for a water quality monitoring regime more extensive and more thoroughly specified than in the 1999 amended Certificate,[55] the parties concur that adoption of their proposals would satisfy the demonstration required under 6 NYCRR 360-2.14(a) to justify a variance from the design requirements otherwise applicable under

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[54] One of the proposed findings is that the Modified Liner Design would "provide a greater level of environmental protection." Joint Proposal, App. B, ¶13. In response to questioning at the July 11, 2006 hearing, DEC staff said the finding is intended to mean the Modified Liner Design would provide greater protection than the amendment for SWDA II initially sought by AES in its September 2004 petition. AES disagreed, asserting that the intended finding is a comparison between the Modified Liner Design and the SWDA I design. Tr. 379-383. We recommend that the Board adopt the proposed finding subject to the latter understanding. That interpretation would not exceed the scope of either party's professed agreement; moreover, it is not readily apparent that a design could be more protective than SWDA I without also being more protective than AES's September 2004 proposal.

[55] In the proposed Certificate conditions, portions of the Environmental Monitoring Plan (namely, ¶15(b), (k), and (o)) recite that the monitoring facilities and practices would comply with 6 NYCRR 360-2.11 or subsections thereof. In response to the Examiners' questions at the July 11, 2006 hearing, the parties acknowledged that the applicable §360-2.11 provisions would be those in effect at the time of implementation, and not necessarily at the time the Joint Proposal was executed. Tr. 370-371. We recommend that the Board, in adopting the proposed terms, modify them to reflect that understanding.

Part 360.[56] We recommend that the Board accept this conclusion, because it is supported by DEC staff's analysis and by portions of the prefiled testimony concerning the system subsequently adopted in the Joint Proposal as the Modified Liner Design. In reaching our recommendation, we give substantial weight to the fact that DEC staff, whose interpretations of DEC regulations deserve special deference, has stipulated that the proposed design satisfies 6 NYCRR 360-2.14(a), as discussed in section III.E.2. of this Recommended Decision ("Compliance with 6 NYCRR 360-2.14(a)," below).

In summary, the record compiled over the course of the proceeding has thoroughly addressed the economics and efficacy of the most realistic alternative solutions. The record establishes that the Joint Proposal's provisions would be a reasonably cost-effective means of minimizing environmental impacts, and a review of the Joint Proposal by reference to 6 NYCRR 360-2.14(a) confirms that conclusion.

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[56] Section 360-2.14(a)(1) authorizes a single liner design for an industrial waste monofill facility such as the Somerset Station, provided however that:

> . . . a demonstration must be made as to the proposed liner's ability to adequately prevent a negative impact on groundwater and must address the following factors: the volume and physical and chemical composition of the leachate that will be generated at the disposal facility; the climatological conditions in the vicinity of the proposed site; and the hydrogeologic characteristics of the proposed site. The demonstration must include an assessment of leachate quality and quantity, anticipated liner system leakage to the subsurface and related contaminant transport to the closest environmental monitoring point. The demonstration should focus on developing an accurate profile of leachate quality and production rates sufficient to be used in evaluating its fate and transport from the point of release to the first point of environmental monitoring in order to determine whether leachate constituents can be expected to exceed the State's groundwater quality standards. It must be demonstrated that the industrial wastes' chemical characterization be accurately defined and that there are no reasons to anticipate significant changes in the concentrations of compounds that could increase the wastes' pollution potential in the future. The demonstration must include chemical compatibility test data run on the proposed liner and/or leachate collection and removal system materials with representative waste leachate, using an appropriate permeameter test to determine potential changes in the permeability of the proposed liner. The demonstration must include an estimate of the volumetric release of leachate from the proposed liner design based on analytical approaches supported by empirical data and/or be verified from other existing operational facilities of similar design. A dilution calculation must then be modelled to evaluate the impacts of the characterized leachate on groundwater quality based upon the calculated liner system's leakage rate.

E. Compliance with Applicable Law and Regulation (§146(2)(d))

1. Identifying the "Applicable Law"

Under §146(2)(d), the Board is obligated to determine whether the proposed amendment would enable the facility to operate in compliance with applicable State law and regulation.[57] Consequently the Board must determine, as the threshold issue, which State law and regulation applies to a certificate amendment proceeding. To address this question, the parties urge that we recommend adoption of specific provisions of the Joint Proposal which state: "While SWDAs I, II and III are subject to the Certificate, as amended, SWDA II satisfies the demonstration criteria in 6 NYCRR []360-2.14(a)."[58] The section of the Joint Proposal concerning the nature and economics of reasonable alternatives, further provides:

> The Signatory Parties agree that, while SWDAs I, II and III are subject to the Certificate, as amended, the Modified Liner Design meets the demonstration criteria in 6 NYCRR []360-2.14(a), considering the reduced pollution potential of the waste, the protectiveness of the Modified Liner Design relative to the waste, the significantly increased costs associated with a double composite liner, and the other factors in 6 NYCRR []360-2.14(a).[59]

The parties also suggest similar language for the findings and ordering clauses (Certificate conditions) proposed to be adopted by the Board.[60] For the following reasons, we conclude that the Board should adopt these provisions with modifications.

At the July 11, 2006 hearing on the Joint Proposal, we sought clarification of the meaning and purpose behind the above provisions. In particular, we inquired concerning the conditional phrase, "while SWDAs I, II and III are subject to the

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[57] Section 146(2)(d) also requires that local law govern the facility unless preempted by the Board. The applicability of local law was not an issue in the proceeding before us.

[58] Joint Proposal, ¶II.C.

[59] Id., ¶IV.C.

[60] Id., App. B, ¶B (proposed findings); App. C, ¶4 (proposed ordering clauses/Certificate conditions).

Certificate, as amended." During an extensive discussion, the parties explained that the conditional language reflected their disagreement as to which State laws and regulations govern this proceeding. AES took the position, as it has throughout the proceeding, that the prior 1978 Certificate and the 1999 Amendment Order are the State law that applies in this proceeding. DEC staff, on the other hand, took the position that the current provisions of 6 NYCRR Part 360, including the variance provisions of 6 NYCRR 360-2.14, apply to determine whether the proposed modifications to SWDA II are approvable by the Board.

Although the parties are unable to agree which State law the Board should apply pursuant to §146(2)(d) when reviewing AES's Certificate amendment application, the parties nevertheless agreed that the proposed modifications to SWDA II satisfy the demonstration criteria under 6 NYCRR 360-2.14 for a variance from the stringent requirements of Part 360, including the requirement of a double composite liner system. Accordingly, the parties urge us to recommend that the Board find the variance standards contained in 6 NYCRR 360-2.14 to have been met, while leaving undecided whether §360-2.14 specifically, or Part 360 in general, are the applicable State law and regulation in this proceeding. During the hearing, the parties agreed that the proposed findings and proposed Certificate conditions should therefore be modified to provide, "Assuming, without deciding, that 6 NYCRR Part 360 applies in this certificate amendment proceeding, SWDA II satisfies the demonstration criteria in 6 NYCRR 360-2.14(a)."[61]

We recommend that the Board reject the parties' proposal to leave open the threshold question of the governing State statutory and regulatory law. First, we conclude that pursuant to PSL §146(2)(d), current State environmental statutes and regulations clearly apply to certificate amendment proceedings. Under PSL Article VIII, the Board is vested with the sole authority to issue certificates authorizing the

[61] Tr. 417.

construction and operation of major steam electric generating facilities, the applications for which were filed on or before December 31, 1978, and assure such facilities' compliance with State environmental, health and safety laws.[62] The substantive requirements of State environmental law and regulations are enforced through Article VIII, and State law environmental permits for Article VIII facilities are granted under Article VIII through the certificate.[63]

Thus, the Board is, in essence, the permitting authority for Article VIII facilities. Nevertheless, the Board is not the agency authorized to adopt environmental rules and regulations applicable to Article VIII facilities. As the Board noted in its 1978 order granting the original Certificate for AES's facility, the Legislature conferred that power upon DEC.[64] Moreover, although the Board has the authority, after making certain findings, to waive any local ordinance, law, or resolution, or any local regulation issued thereunder, it is not similarly authorized to waive applicable State law or regulations.[65]

Accordingly, when the Board granted the original 1978 Certificate to NYSEG, it expressly applied to the facility's landfill design and operation the then-existing Part 360 regulations governing solid waste facilities, including the Part 360 standards governing the grant of variances thereunder,

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[62] PSL §§141(1), 149-a(1).

[63] Case 98-F-2005, supra, Amendment Order, p. 9.

[64] Case 80002, supra, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued December 29, 1978), p. 37.

[65] The transcript related to this issue requires two corrections to reflect accurately what was stated during the July 11, 2006 hearing. At Tr. 331:16, "not" should be deleted. At Tr. 331:18, "in this state" should be changed to "under Article VIII."

adopted by DEC pursuant to ECL article 27.[66] It is significant that the Board expressly applied the then-existing variance provisions of former Part 360 to allow variances from the strict provisions of Part 360, given that the Board otherwise lacked the authority to waive applicable State environmental, health and safety statutes and regulations.

PSL §141(1) further provides that a facility granted a certificate by the Board "shall not be built, maintained or operated except in conformity with such certificate and any terms, limitations or conditions contained therein, provided that nothing herein shall exempt such facility from compliance with state law and regulations thereunder subsequently adopted or with municipal laws and regulations thereunder not inconsistent with the provisions of such certificate" (emphasis added). The statutory provision expressly applying State law and regulations adopted subsequent to the issuance of a certificate by the Board, when read in conjunction with the statutory provision requiring the Board to make a finding of consistency with State law and regulation before issuing an amended certificate, evinces the Legislature's clear direction that current State law and regulation be applied to certificate amendment proceedings.[67] And again, with respect to State environmental regulations, the regulations to be applied by the Board are those adopted by DEC pursuant to its legislatively delegated rule making authority.

Review of the Board's decisions in the proceedings concerning AES's facility confirms that the Board itself has long

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[66] See Case 80002, supra, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued December 29, 1978), p. 37 (applying the 6 NYCRR former 360.1[e] standard employed by DEC staff in reviewing variance requests); id., pp. 49-51 (same). See also Case 80002, Recommended Decision (issued May 11, 1978), pp. 214-226.

[67] Indeed, to conclude otherwise would render the above quoted provision of PSC §141(1) a nullity. If current State law and regulation were not applicable in a certificate amendment proceeding, no mechanism would exist for bringing a previously issued certificate and the facility authorized thereby into compliance with subsequently adopted State law or regulation. The Legislature could not have intended this anomalous result.

held this understanding of the statute. The 402 Discharge Permit issued by the Board with the facility's original 1978 Certificate expressly provides that after notice and opportunity for a hearing, the permit may be modified, suspended or revoked based upon a change in any requirement or criteria applicable to any discharge, including changes in the water quality criteria, effluent limitations, or other requirements of State law.[68] Thus, the Board expressly indicated its understanding that current State statutes and regulations could supply the basis for, and would apply to, certificate modifications.

Similarly, when the Board amended the facility's Certificate in 1999, it expressly applied current State environmental law and regulation to the proposed modifications to the facility. Specifically, the Board applied the then-current version of Part 360, without variances granted thereunder, to SWDA III, which was to be the location for disposal of wastes from the proposed SCR system. As noted by the PSC, the Board also granted all variances necessary as of 1999 to continue the provisions of the Certificate with respect to SWDAs I and II.[69]

Significantly, the Board in its 1999 Amendment Order expressly addressed the situation currently before us. After imposing the stringent requirements of Part 360 without variance on the design and operation of SWDA III, the Board stated:

> Further, if AES in the future seeks to modify the design or use of SWDA 3, or to expand the landfilling of ammoniated waste beyond the existing boundaries of SWDA 3, the modifications will be effectuated in compliance with whatever applicable regulations are then in effect [emphasis added].[70]

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[68] 402 Discharge Permit, ¶III.B.3., Case 80002, supra, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued December 29, 1978), App. C.

[69] See Case 98-F-2005, supra, Order Denying Rehearing (issued September 2, 2004), p. 11 (PSC order concluding that the 1999 Amendment Order granted all variances from Part 360 necessary as of 1999 to continue provisions of Certificate with respect to SWDAs I and II).

[70] Case 98-F-2005, supra, Amendment Order, p. 17. See also MOU, second (of two) ¶3.

Thus, the Board has expressly determined not only that current State environmental regulations apply to certificate amendment proceedings in general, but that the current version of Part 360 applies in this proceeding seeking an amendment to the Certificate to allow landfilling of waste from the SCR system beyond the boundaries of SDWA III, that is, in SDWA II.

As noted, AES throughout this proceeding has taken the position that CCBs produced during operation of the SCR system are not "ammoniated" within the meaning of the 1999 amended Certificate and MOU if their ammonia concentration is two ppm or less. Thus, AES presumably would argue that because its CCB waste is not "ammoniated," under its definition, its proposal to place the CCB waste in SDWA II is not a proposal to "expand the landfilling of ammoniated waste beyond the existing boundaries of SWDA III" within the meaning of the 1999 Amendment Order. However, as the PSC has pointed out, the 1999 Amendment Order "is silent on the minimum standards that must be met to demonstrate that the [CCB] sludge is not ammoniated."[71] The 1999 Amendment Order, and the MOU upon which it is based, are unambiguous in requiring that CCB waste from the SCR system be landfilled in SWDA III.[72] Thus, AES's proposal to landfill that waste in SDWA II must be evaluated in compliance with Part 360 as it currently exists, as directed by the Board in the Amendment Order.

At the hearing, AES relied upon the PSC's Order Denying Rehearing in Case 98-F-2005[73] for the proposition that the prior certificates relevant to the facility, and not the current version of Part 360, are the "State law" to be applied in this certificate amendment proceeding.[74] In essence, AES argues that the PSC's order holds that the 1978 Certificate as amended

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[71] Case 98-F-2005, supra, Order Accepting Compliance Filing in Part (issued April 28, 2004), p. 8.

[72] Id.

[73] Case 98-F-2005, supra, Order Denying Rehearing (issued September 2, 2004).

[74] Tr. 307-08.

governs the terms of its own amendment. AES reads the PSC's order out of context, however. The PSC's order on rehearing, as well as the underlying order on which DEC had sought rehearing, were issued in the context of a compliance filing proceeding before the PSC. In such a proceeding, the issues are limited to whether the certificate holder's filings demonstrate compliance with the requirements for construction and operation established in a then existing certificate. In such a context, the certificates themselves establish the standards for determining such compliance.

The proceeding before us, however, is not a compliance proceeding before the PSC. Rather, it is a certificate amendment proceeding before the Siting Board. Thus, the holdings of the PSC concerning the governing standards, instruments, and analysis in a compliance proceeding are inapposite. Indeed, the PSC expressly recognized that the issues presented in Article VIII compliance proceedings were limited to those related to compliance, and that it lacked the ability in such proceedings to modify the terms, conditions and variances from Part 360 provided for in a Siting Board's order.[75]

Even assuming for sake of argument that AES is correct that the question remains open which State law applies in certificate amendment proceedings, before we could avoid deciding which law applies, we would have to conclude that all laws that arguably apply have been satisfied.[76] Thus, in this context, we would have to be able to conclude that AES's proposed modifications to SWDA II meet the requirements of both Part 360 and the Certificate/Amendment Order. While we can conclude that the requirements of Part 360 can be met through the application of the variance standards of 6 NYCRR 360-2.14 (as will be

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[75] Case 98-F-2005, supra, Order Denying Rehearing (issued September 2, 2004), pp. 12-14.

[76] Case 00-F-2057, Besicorp-Empire Dev. Co., LLC, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued September 24, 2004), p. 28.

discussed further below), we cannot conclude that compliance with the Certificate and the Amendment Order has been demonstrated.

First, AES has not identified, and review of the Certificate and Amendment Order does not reveal, standards against which AES's certificate amendment proposal is to be evaluated. Second, AES's proposal to landfill CCB waste from the SCR system in SWDA II with the Modified Liner Design does not comport with the 1999 Amendment Order's requirements. As noted above, the Amendment Order requires that the CCBs from the SCR system be deposited in a landfill constructed in compliance with Part 360 without variance. Nothing in the Certificate or Amendment Order allows the CCBs to be disposed of in a landfill with the proposed Modified Liner Design. Thus, to the extent AES contends the Certificate and Amendment Order is the governing State law in this proceeding, AES has failed to carry its burden of establishing that its proposed Certificate amendment complies with such State law. Accordingly, we are unable to avoid the question concerning which State law and regulation applies in this case.

In sum, we conclude that the Board must reject the parties' invitation to expressly leave open the threshold question concerning which State law and regulation governs this certificate amendment proceeding. To do so despite clear statutory direction and decisional precedent to the contrary would needlessly inject uncertainty into an area of otherwise settled law. Such uncertainty might have repercussions contrary to the public interest not only for facilities sited under either version of Article VIII, but also for facilities sited under PSL Article X, whose relevant statutory provisions are substantially similar.[77] Moreover, because AES has failed to explain how its proposed modifications would satisfy any relevant standards imposed under the 1999 amended Certificate and Amendment Order, assuming such standards can be identified, it cannot be concluded

[77] PSL §162(1); PSL §168(1), (2)(d).

that all arguably applicable State laws and regulations have been satisfied.

Accordingly, we recommend that the Board apply Part 360, including the variance standards established in 6 NYCRR 360-2.14, to determine pursuant to PSL §146(2)(d) whether AES's proposed modification complies with applicable State laws and regulations. To preclude any doubt that Part 360 is applicable here or in analogous circumstances in other proceedings, we further recommend that the Board expressly adopt the reasoning set forth above; and that the Board adopt the proposed terms, findings, and Certificate conditions only after disavowing (and, in the Certificate conditions, deleting) the phrase "While SWDAs I, II and III are subject to the Certificate," in each instance where the parties have used that formulation,[78] thus:

> ~~While SWDAs I, II and III are subject to the Certificate, as amended,~~ SWDA II satisfies the demonstration criteria in 6 NYCRR 360-2.14(a).

2. Compliance with 6 NYCRR 360-2.14

Having concluded that Part 360 applies, including the variance standards established therein, we conclude that, based upon the record, AES's proposed modifications meet the standards for granting a variance from the stringent requirements of Part 360. Section 360-1.7(c) provides the general variance provisions of Part 360. Pursuant to that section, a variance may be granted from one or more specific provisions of the Part based upon a demonstration (1) that compliance with a specified provision would, on the basis of conditions unique to an applicant's particular situation, impose an unreasonable economic, technological or safety burden on the applicant or the public, and (2) 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

[78] Joint Proposal, ¶II.C.; ¶IV.C.; App. B, ¶10; and App. C, ¶4.

expected from application of Part 360.[79] In granting any variance pursuant to the section, specific conditions necessary to assure that the subject activity will have no significant adverse impact on the public health, safety or welfare, the environment or natural resources may be imposed.[80]

Subpart 360-2, with certain exceptions, establishes the specific regulatory requirements for the siting, design, construction, operation, closure and post-closure activities of all new and existing landfills.[81] Section 360-2.14 provides the variance standards applicable to industrial and commercial waste monofills, which are landfills or landfill cells into which only one type of waste, as recognized by the DEC, is placed.[82] Section 360-2.14(a) provides that monofills used solely for the disposal of solid waste resulting from industrial or commercial operations are subject to all the requirements of Part 360 relevant to landfills, "unless the applicant demonstrates that specific landfill requirements in this Subpart are not necessary for the solid waste to be disposed of at the subject facility."[83] Variances from the strict requirements of Part 360 are granted on a case-specific basis, and additional or less stringent requirements may be imposed on industrial monofills "based upon the pollution potential of the waste."[84] Pollution potential is based upon the volume and physical, chemical, and biological properties of the solid waste and its variability.[85]

If, as here, an alternative liner system is proposed for an industrial waste monofill, "a demonstration must be made as to the proposed liner's ability to adequately prevent a

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[79] 6 NYCRR 360-1.7(c)(2)(ii), (iii).

[80] Id. §360-1.7(c)(3).

[81] Id. §360-2.1.

[82] Id. §360-1.2(b)(104).

[83] Id. §360-2.14(a).

[84] Id.

[85] Id.

negative impact on groundwater."[86] Section 360-2.14(a)(1) further details the specific factors that must be demonstrated before a variance from the Part 360 liner requirements may be granted. Based upon the documents submitted in support of the technical evaluation for the Modified Liner Design agreed to by the parties, together with DEC staff's stipulation that the demonstration required under §360-2.14(a) has been made, we conclude that the Siting Board may grant the variances from the stringent requirements of Part 360 required to approve the Modified Liner Design for SWDA II. Accordingly, we recommend that the Board make the finding, based upon the hearing record, that AES's proposal to dispose of stabilized CCBs containing concentrations of two ppm ammonia or less in SDWA II constructed with the Modified Liner Design agreed to by the parties will comply with applicable State laws and regulations.

F. Public Interest Criterion (§146(2)(f) and (g))

The "public interest" requirement of §146(2)(f) and (g), particularly the juxtaposition of public interest versus environmental impacts and costs in §146(2)(g), is mirrored in the Board's Question (4) whether (as discussed more fully in section III.B. of this Recommended Decision, "Need Vis-à-Vis Environmental and Economic Costs," above) adoption of the parties' proposals "is in the public interest, given environmental impact and cost considerations."[87]

Given the relatively narrow range of issues presented in the proceeding before us as compared with a full certification proceeding under PSL Article VIII, we find no significant difference between the analysis appropriate for answering Question (4) by reference to subdivisions (a) and (e), or for answering it by reference to subdivisions (f) and (g). As with subdivisions (a) and (e), the primary effect of subdivisions (f) and (g) for purposes of this proceeding is to require a

[86] Id.

[87] Hearing Order, p. 9.

determination whether there are feasible measures for environmental protection that would enable the generating plant to operate in a manner consistent with the public interest. For reasons already noted in our discussion of subdivisions (a) and (e), adoption of the parties' proposals would justify a finding that the resulting operations will satisfy not only those statutory criteria but also the criteria in subdivisions (f) and (g). Moreover, as in the case of subdivisions (a) and (b), a review of the record pursuant to subdivisions (f) and (g) justifies an affirmative answer to the Board's Question (4) regarding the public interest.

IV. SUMMARY AND CONCLUSIONS

For the reasons stated above, we conclude that the record as a whole, including the prefiled testimony and exhibits, the hearing record, and the matters recited in the Joint Proposal, fully addresses the questions posed by the Siting Board in its January 7, 2005 order initiating these hearings. We therefore find no need for additional evidentiary hearings at this time.

We recommend that the Board adopt the Joint Proposal's "Proposed Findings" and "Proposed Ordering Clauses/Certificate Conditions" with the modifications and clarifications identified above, because such action would resolve the contested issues in this proceeding consistently with the evidence and with the relevant provisions of PSL §146(2).

December 12, 2006
RAE/JTM:yrs

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