

AUDIT REPORT

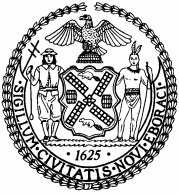


CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
BUREAU OF FINANCIAL AUDIT
WILLIAM C. THOMPSON, JR., COMPTROLLER

Audit Report on Department of Parks and Recreation Oversight of Capital Improvements by Ferry Point Partners, LLC

FR06-137A

October 25, 2007



THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
1 CENTRE STREET
NEW YORK, N.Y. 10007-2341

WILLIAM C. THOMPSON, JR.
COMPTROLLER

To the Citizens of the City of New York

Ladies and Gentlemen:

In accordance with the responsibilities of the Comptroller contained in Chapter 5, § 93, of the New York City Charter, my office has audited the Department of Parks and Recreation's oversight of capital improvements by Ferry Point Partners, LLC.

Under the terms of a May 31, 2000 license agreement with the Department, Ferry Point Partners, LLC was granted a concession that required it to develop, operate, and manage the Ferry Point Golf Course in the Bronx. We audit programs such as this to ensure that City agencies are providing the necessary oversight to ensure that private entities conducting business on City property comply with the terms of their agreements.

The results of our audit, which are presented in this report, have been discussed with officials of the Department of Parks and Recreation, and their comments have been considered in preparing this report. Their complete written responses are attached to this report.

I trust that this report contains information that is of interest to you. If you have any questions concerning this report, please e-mail my audit bureau at audit@Comptroller.nyc.gov or telephone my office at 212-669-3747.

Very truly yours,

A handwritten signature in cursive script that reads "William C. Thompson, Jr.".

William C. Thompson, Jr.

WCT/fh

Report: FR06-137A
Filed: October 25, 2007

Table of Contents

AUDIT REPORT IN BRIEF	1
Audit Findings and Conclusions	1
Audit Recommendations	2
INTRODUCTION	3
Background	3
Objectives	4
Scope and Methodology	4
Discussion of Audit Results	5
FINDINGS AND RECOMMENDATIONS	7
Concessionaire Overpaid \$5.98 Million	7
Overpayments for Remediating Hazardous Material	7
Improper Reimbursements for Required Capital Improvement Work	9
Recommendations	10
\$3.02 Million in Forgone Fees	11
Liquidated Damages Not Assessed	13
Recommendations	13
Lack of Effective Project Management System	14
No Written Work Scope and Cost Estimates	14
Recommendations	15
Lack of Written Procedures for Reviewing Documentation	16
Recommendations	17
More Than \$10 Million in Forgone Earnings	18
Recommendations	19
Conclusion	20
APPENDIX	
Additional Auditor Comments to Address Department's Written Response	
ADDENDUM	
Department Response	

*The City of New York
Office of the Comptroller
Bureau of Financial Audit*

**Audit Report on Department of Parks and Recreation
Oversight of Capital Improvements by
Ferry Point Partners, LLC**

FR06-137A

AUDIT REPORT IN BRIEF

We performed an audit of the Department of Parks and Recreation's (Department) oversight of capital improvements by Ferry Point Partners, LLC. Under the terms of a May 31, 2000 license agreement with the Department, Ferry Point Partners LLC (i.e., the concessionaire) was granted a concession that required it to develop, operate, and manage the Ferry Point Golf Course in the Bronx. The agreement required the concessionaire to complete, by January 1, 2003, at least \$22,470,000 in capital improvements and pay the City the greater of a \$1.25 million annual fee or a percentage of gross receipts.

The concessionaire commenced capital improvement work in August 2000 by importing fill material to shape and contour the premises, formerly the site of a New York City municipal landfill. After excessive levels of methane gas—a hazardous substance—were detected in 1999, the concessionaire undertook its remediation. The City's Franchise and Concession Review Committee authorized the Department to expend up to a total of \$8.60 million for the remediation. As of September 2006, the Department had reimbursed the concessionaire \$7.24 million. In addition, the Department modified the original agreement's ending date from January 1, 2003, to April 15, 2004.

In November 2006, while this audit was in progress, the Department informed the Comptroller's Office that it was preparing to terminate its license agreement with the concessionaire. The Department did not provide an explanation for its decision.

Audit Findings and Conclusions

The Department has not effectively monitored remediation costs submitted by the concessionaire to determine whether they were substantiated, reasonable, and necessary, and did not determine whether scheduled capital improvement work was being performed in accordance with the license agreement and modification. As a result, the City overpaid the concessionaire almost \$6 million and lost more than \$3 million in revenue from forgone license fees. Moreover,

the Department permitted the concessionaire's contractor to collect fees that could have been remitted to the City, thereby defraying the cost of the remediation.

Furthermore, the Department did not have written procedures to ensure the adequacy of documentation submitted to substantiate the reasonableness of costs and to approve the work as required remediation. In that regard, the Department did not prepare written descriptions of specific remediation items required and estimates of their associated costs. These would have aided the Department in determining whether the work items paid for by the Department were part of the required remediation and whether the costs were reasonable.

Audit Recommendations

This report makes a total of 11 recommendations. The major recommendations are as follows:

The Department should:

- Review all concessionaire invoices to identify which specific work items are included in the \$7.24 million reimbursements. For those items for which the concessionaire is not entitled to reimbursement, the Department should revoke the improperly granted reimbursements and recoup the excess payments.
- Ensure that City funding is used solely for the purposes for which it has been authorized.
- Track the progress of capital improvements against start and completion dates prescribed in the agreement.
- Assess the concessionaire all appropriate liquidated damages.
- Prepare a written scope of work and an itemized breakdown of costs for all required activities.
- Prepare and adhere to written policies and procedures that govern the review of invoices, canceled checks, and other related documentation.
- Prohibit concessionaires that have concession agreements with the City from collecting and retaining any type of fees before the commencement of concession operations.

INTRODUCTION

Background

The Department of Parks and Recreation (Department) oversees various City concessions for ice rinks, marinas, golf courses, restaurants, and other facilities. Under the terms of a May 31, 2000 license agreement with the Department, Ferry Point Partners LLC (i.e., the concessionaire) was granted a concession that required it to develop, operate, and manage the Ferry Point Golf Course in the Bronx. The agreement required the concessionaire to complete, by January 1, 2003, at least \$22,470,000 in capital improvements consisting of a golf course, driving range, restaurant, and related facilities. According to the agreement, the concessionaire was required to pay the City the greater of a \$1.25 million annual fee or a percentage of gross receipts.

Until its closure in the 1960s, the Ferry Point concession property was the site of a New York City municipal landfill. After the landfill ceased operating, it was closed and capped in accordance with the then-existing environmental regulations. According to the license agreement, “If it is discovered that the Licensed Premises are contaminated with substances or materials defined as hazardous under the current federal, New York State or City laws (“**Hazardous Substances**”) in amounts requiring remediation or removal” the City would be responsible for undertaking the remediation work. Alternatively, the concessionaire was permitted to either terminate the agreement or remediate the hazardous material itself and recoup the cost for doing so as a credit against future lease payments.

The concessionaire commenced capital improvement work in August 2000 by importing fill material to shape and contour the premises. After excessive levels of methane gas—a hazardous substance—were detected in 1999, the concessionaire elected to do the remediation work. The Department subsequently amended the original agreement on March 18, 2002 by stipulating that the concessionaire would be reimbursed directly for remediating any hazardous materials rather than by recouping the cost of reimbursement as a credit. The City’s Franchise and Concession Review Committee—which is responsible for reviewing and approving the selection of franchise agreements in accordance with §363 of the New York City Charter—authorized the Department to expend up to \$6.9 million for the remediation. On July 12, 2006, the Franchise and Concession Review Committee authorized the Department to reimburse the concessionaire an additional \$1.7 million for remediation work. As of September 2006, the Department had reimbursed the concessionaire \$7.24 million. In addition, the Department modified the original agreement’s ending date from January 1, 2003, to April 15, 2004. According to the Department, the reasons for the time extension were “unforeseeable circumstances and protracted delays caused by requirements of government agencies.”

The importation of fill material was carried out under the terms of a July 2000 6 NYCRR Part 360-1.9(b) Solid Waste Management permit from the New York State Department of Environmental Conservation (DEC). Subsequent to the original permit, DEC granted additional permits to the concessionaire on October 18, 2002, and November 18, 2005, for importing more fill material to shape and contour the concession premises.

In November 2006, while this audit was in progress, the Department informed the Comptroller's Office that it was preparing to terminate its license agreement with the concessionaire. The Department did not provide an explanation for its decision.

Objectives

The objectives of the audit were to determine whether the Department has effectively monitored Ferry Point Partners, LLC to ensure that remediation costs were substantiated, reasonable, and necessary, in accordance with provisions of the license agreement and amendment; and to determine whether scheduled capital improvement work was being performed in accordance with the license agreement and modification.

Scope and Methodology

The scope of this audit covered the period from September 1999 to September 2006.

To understand the Department's internal controls for administering the program, we obtained and reviewed the license agreement and other pertinent documentation. We interviewed officials from the Department's revenue division, capital projects division, and engineering-audit office about departmental internal controls and conducted a walkthrough of the methods by which invoices were approved and payments were processed. We documented our understanding of these controls in written descriptions.

To determine whether the Department has effectively monitored Ferry Point Partners, LLC to ensure that remediation costs are substantiated, reasonable, and necessary, we reviewed all of the invoices, totaling \$17,715,045, submitted by the concessionaire from April 1998 to June 2006 that the Department paid in 12 payment requisitions for a total amount of \$7,242,753.63.¹

In addition, we interviewed the concessionaire's contractor, Westway Industries Inc./Laws Construction Corp. (Laws Construction), which was responsible for undertaking the capital improvement work, and we obtained financial records to ascertain the cost of work performed and revenue received. We reviewed the contract dated August 4, 2000, between the concessionaire and Laws Construction. We also reviewed documentation obtained from the concessionaire to substantiate the invoices submitted to the Department for reimbursement for remediation work. Finally, we reviewed various Department records, including status reports, design documents, and other related documentation, to evaluate the Department's efforts in monitoring the concessionaire.

We contacted and met with the New York State Department of Environmental Conservation—the agency that approved the permits under which the concessionaire imported fill material to the premises—to understand the process of obtaining the permits and the requirements pertaining to landfill remediation.

¹Payment of the 12th requisition occurred in September 2006 and included invoices through June 2006.

As a result of our initial observations, we decided to independently prepare our own estimates of the costs associated with the methane remediation. Our audit engineers performed calculations and used “as-built” drawings obtained from Laws Construction and a construction industry standard (“R.S. Means Building Construction Cost Data”) as the basis for preparing estimates for methane venting system costs. We then prepared written analyses of our findings.

To determine whether scheduled capital improvement work was being performed in accordance with the license agreement and modification, we visited Ferry Point Park on August 22, 2006, to observe existing conditions and ascertain the status of completed work. We also reviewed engineering and environmental inspection reports, and other file documentation submitted by the concessionaire, and prepared our own independent work schedules and estimates of projected completion dates.

Independence Disclosure

The Franchise Concession and Review Committee was established pursuant to §373 of the New York City Charter. One of the Charter-mandated members is the Comptroller. The Comptroller’s representative to the Franchise Concession and Review Committee was not involved in writing or reviewing this report.

This audit was conducted in accordance with Generally Accepted Government Auditing Standards (GAGAS) and included tests of the records and other auditing procedures considered necessary. This audit was performed in accordance with the audit responsibilities of the City Comptroller as set forth in Chapter 5, § 93, of the New York City Charter.

Discussion of Audit Results

The matters covered in this report were discussed with Department officials during and at the conclusion of this audit. A preliminary draft report was sent to Department officials and discussed at an exit conference on June 26, 2007. On July 26, 2007, we submitted a draft report to Department officials with a request for comments. We received a written response from the Department on August 9, 2007.

In its response, the Department stated that it

“firmly disagrees with most of the findings and recommendations in the Audit. Indeed, the Audit reflects numerous errors in both fact and law and a fundamental misunderstanding of a highly complex project and its associated regulatory permitting process. Moreover, the City believes that the Audit takes an unduly narrow view of the License Agreements between the City and Ferry Point Partners, LLC (‘FPP’) dated May 31, 2000, as amended (‘the License’). In addition, the Audit ignores many of the environmental complexities involved in attempting to construct a golf course on the site of a former municipal landfill in Ferry Point Park and criticizes Parks [the Department] for taking the most environmentally sound and cost-effective approach in its efforts to create a golf course at this site.”

The Department agreed with four and disagreed with two of our 11 recommendations. The Department maintains that it has already implemented four recommendations and will consider implementing one recommendation.

The Department's specific comments and our rebuttals are contained in the relevant sections of this report and in the Appendix. However, the nature of the Department's response calls for the following general comments.

The Department's response attempted to obfuscate the serious issues raised in the report by speculating that the auditors do not understand the regulations, technical requirements, and other aspects associated with the Department's oversight of capital improvements and remediation work by Ferry Point Partners, LLC. Clearly, the Department has failed to understand the salient conclusion of this audit report—that the Department has not properly overseen and managed the administration of the Ferry Point concession. We recognize that administering a concession for constructing a golf course over a former municipal landfill is complex, but doing so without adhering to adequate procedures is unacceptable for the management of any government program. It is especially unacceptable as far as Ferry Point Park is concerned, since required capital improvements are far from complete and the operation of the concession is more than three years behind schedule, costing the City more than \$3 million in lost revenue from forgone concession fees.

During the course of this audit, the Department informed our Office that it was terminating the license agreement with the concessionaire. The Department did not provide us with an explanation as to why it did so. But the fact remains that six years after signing a license agreement the City has overpaid the concessionaire almost \$6 million for the remediation work, while the golf course is only partially complete, and construction of the other facilities has not even started.

The most puzzling aspect of the Department's response is its defense of the concessionaire's inability to proceed with the work because of New York State Department of Environmental Conservation (DEC) "delays." If the delays were, in fact, attributable to circumstances beyond the concessionaire's control, such as the inability to obtain permits, it would be reasonable to expect that the Department would support the concessionaire in its attempts to complete the project. However, the Department chose to terminate the license agreement rather than grant any further time extensions to the concessionaire.

The full text of the Department's response is included as an addendum to this report.

FINDINGS AND RECOMMENDATIONS

The Department has not effectively monitored remediation costs submitted by the concessionaire to determine whether they were substantiated, reasonable, and necessary, and did not determine whether scheduled capital improvement work was being performed in accordance with the license agreement and modification. As a result, the City overpaid the concessionaire almost \$6 million and lost more than \$3 million in revenue from forgone license fees. Moreover, the Department permitted the concessionaire's contractor to collect fees that could have been remitted to the City, thereby defraying the cost of the remediation.

Furthermore, the Department did not have written procedures to ensure the adequacy of documentation submitted to substantiate the reasonableness of costs and to approve the work as required remediation. In that regard, the Department did not prepare written descriptions of specific remediation items required and estimates of their associated costs. These would have aided the Department in determining whether the work items paid for by the Department were part of the required remediation and whether the costs were reasonable.

These matters are discussed in greater detail in the following sections.

Concessionaire Overpaid \$5.98 Million

From June 2002 to September 2006, the Department reimbursed the concessionaire \$7,242,754 for work performed at the concession premises. However, our estimate indicated that the Department should have reimbursed the concessionaire only \$1,264,338. Consequently, the Department overpaid the concessionaire \$5,978,416. We prepared our own estimate because the Department was unable to document the specific items of work—including the methane remediation work—for which it reimbursed the concessionaire, and could not reconcile the payments with the invoices submitted by the concessionaire.

Overpayments for Remediating Hazardous Material

We calculated the cost of remediating hazardous material to be \$1.26 million—in contrast to the \$7.24 million that was actually reimbursed. (See Table I on page 8.) Section 3.4(a) of the license agreement required remediation of the premises if it was “contaminated with substances or materials defined as hazardous under the current federal, New York State or City laws (“**Hazardous Substances**”) in *amounts requiring remediation or removal* under applicable law.” (Emphasis in italics added.) Given this stipulation, New York State Department of Environmental Conservation (DEC) officials advised us on September 6, 2006, that the only hazardous substance in significant amounts that required remediation was methane gas. Accordingly, the Department's March 18, 2002 license agreement amendment #2 acknowledged that remediation was limited to the removal of methane gas.² Moreover, the December 2001

²Amendment #2 permitted the concessionaire to directly recoup the cost for remediation from the City, rather than recoup the cost as a credit against future license fees.

Franchise and Concession Review Committee Resolution granting approval for remediation funding states that it “hereby approves the reimbursement to Licensee for costs for the removal or remediation of Hazardous Substances . . . *specifically for the containment of methane gas levels* in and around Ferry Point Park.” (Emphasis added.) It should be noted that the Resolution was adopted based on testimony by Department officials.

Table 1
Comptroller’s Estimate of Methane
Gas Remediation Costs

Activity	Cost Estimate
Construction	\$553,718
Design	\$33,223
Independent Monitoring	\$190,400
Maintenance	\$486,997

Total \$1,264,338

The vendors that submitted bid proposals for the concession were advised by the Department in its May 28, 1997 Request for Proposals that the concession premises had been used as a municipal landfill. Prior use of the premises as a waste landfill, however, did not necessarily mean that the premises were inherently hazardous and would need to be remediated. According to DEC officials, on December 11, 2006, the premises would be considered suitable for recreational use after the placement of a cover layer meeting certain New York State Department of Health specifications.³ Furthermore, our review of the concessionaire’s contract with Laws Construction showed that the municipal waste underlying the landfill was not deemed hazardous. Thus, §12.5 of the contract states “waste which is regulated although it does not constitute a Hazardous Substance (‘Regulated Waste’) is located throughout the Site.” These facts indicate that the only required remediation of hazardous substances that has already been carried out by the concessionaire was for methane venting and monitoring.

DEC officials informed us on October 23, 2006, that the activities connected with remediating methane gas “were construction and maintenance of the gas venting trench, the gas monitoring wells, the off-site gas monitoring points, and the piezometers” (i.e., an instrument for measuring groundwater level). The Department could not tell us how much of the \$7.24 million reimbursement was actually for remediating hazardous methane gas. Furthermore, based on our review of the concessionaire’s invoices and payments made by the Department, we were unable to determine which work items were approved and reimbursed by the Department. At the exit conference, Department officials informed us that the direct costs (excluding design) to remediate methane gas totaled \$2.3 million, for which an associated list of supporting concessionaire invoices was provided. Our review of the invoice descriptions, however, indicated work items that were not directly related to methane remediation but were included in the \$2.3 million estimate. For example, invoice no. 0069241 to Langan Engineering was to “survey, evaluate retaining wall foundations.” In another example, invoice no. 083381 to TRC Engineering was for “redesign of golf course and driving range.”

³ This cover layer will eventually need to be placed when the golf course is completely contoured.

Our independent cost estimate calculated that the cost of this remediation (inclusive of constructing a landfill gas venting trench, installing monitoring wells, performing maintenance, engineering design, and a required monitoring program) should have been \$1.26 million. However, our review of invoices submitted by the concessionaire found that the Department reimbursed the concessionaire for work other than that required to remediate or remove methane gas.

Improper Reimbursements for Required Capital Improvement Work

The Department used a significant amount of the funding that was specifically earmarked for remediation to reimburse the concessionaire for work other than remediating hazardous material. Our review indicates that \$3.58 million of the \$5.98 million of improper reimbursements were for work items associated with the concessionaire's obligation to carry out the required capital improvements.

License agreement §9.1 requires the concessionaire to "complete or cause to be completed Capital Improvements . . . with a value of at least \$22,470,000. Such value shall take into account all costs associated with the Capital Improvements including all hard-costs and soft-costs." According to the agreement, the capital improvements include "without limitation the renovation of the Licensed Premises to accommodate a golf course, golf driving range center and related facilities, a pro shop and snack bar, a restaurant and a banquet facility." However, despite its obligation to carry out this work, the Department reimbursed the concessionaire for certain costs that were necessitated by the method that was selected to build the golf course.⁴ These costs were for engineering services to prepare and obtain permits for importing the fill material required to shape the golf course and for environmental inspectors to monitor the material's quantity and quality. Based on invoices submitted by the concessionaire to the Department, we calculate the cost of this work to be approximately \$3.58 million.

Furthermore, based on descriptions of the reviewed invoices, it appears that the remaining \$2.40 million of the \$5.98 million of improper reimbursements were for environmental review costs required under the license agreement as capital improvements, consultant fees to design the concession facilities required under the agreement, various legal costs (including an attorney to serve as counsel for a lawsuit), and engineering and additional monitoring costs incurred as a result of the concessionaire's decision to make design changes. In addition, some of the \$2.40 million might have consisted of excessive payments for remediating the methane gas. Based on our review of documentation and interviews with DEC officials, we conclude that these activities do not constitute applicable, reasonable expenses for the remediation of methane gas and were not expenses appropriate for reimbursement.

⁴ If the premises had not been the site of a municipal landfill, the concessionaire could have shaped the desired golf course contours by "cutting and filling" existing on-site material. Given that the premises were, in fact, the site of a landfill, the concessionaire chose to shape the desired contours by importing material to place over the existing landfill.

Recommendations

The Department should:

1. Review all concessionaire invoices to identify which specific work items are included in the \$7.24 million reimbursements. In addition, the Department should reconcile the payments with the invoices. For those items for which the concessionaire is not entitled to reimbursement, the Department should revoke the improperly granted reimbursements and recoup the excess payments.

Department Response: “The Audit acknowledges that Parks has rejected over \$10 million in reimbursements requests from FPP. This magnitude of this fact demonstrates the depth of Parks’ prudence and the strict analysis Parks followed in its review of reimbursement requests and determinations as to what items should be paid. Parks did reconcile payments to invoices. The Audit staff was given canceled checks and detailed invoices for all payments made. Parks reviewed each invoice and all checks were logged into spreadsheets organized by both payment and vendor. See materials presented to Audit staff at the Exit Conference, attached as Exhibit B. Based upon Parks’ own careful review and consultation with the Law Department, we concluded that the items referenced above were not, in fact, improper reimbursements.”

Auditor Comment: Rather than acknowledging its rejection of “over \$10 million in reimbursements requests from FPP,” the audit actually stated that the Department overpaid the concessionaire approximately \$6 million. We reviewed invoices totaling \$17.71 million, of which \$8.17 million were either duplicates or resubmitted invoices. The Department paid the concessionaire \$7.24 million, even though our analysis indicated it should have paid only \$1.26 million.

Also, we found no evidence that the Department “reviewed each invoice.” In fact, as stated in this audit report, only seven percent of the invoices submitted by the concessionaire contained evidence to indicate that Department officials had actually reviewed the invoices to verify that the work was performed and was for remediation. But even in these few cases, evidence that reviews had taken place was minimal. Invoices did not appear to have been reviewed consistently with uniform notations and lacked approval by the reviewer. In none of the cases was there any evidence to indicate that the invoices and payment certifications were reviewed and approved by a supervisor. In addition, we noted that certain files lacked critical information, such as time sheets and labor rates, which is required to determine whether the work was actually performed and whether the cost of the work was reasonable.

We note that the Department’s written evidence (Exhibit B) about reconciling payments to invoices and logging all checks into spreadsheets was not available in file documentation during the course of the audit. This evidence was submitted to us only after our fieldwork was completed and after the exit conference, which was held on June 26, 2007. In fact, during an audit meeting on December 21, 2006, to review the Department’s process of reconciling payments, a Department official was not able to

reconcile a randomly chosen payment with the supporting invoices or cancelled checks submitted by the concessionaire, nor could the official reconcile the invoice total with the check total. We were further informed that the cancelled checks were not matched to the invoices; rather, amounts on invoices and cancelled checks were compared and the lesser amount approved for payment. Clearly, these deficiencies demonstrate that the Department lacked a prudent system for reviewing and reconciling invoices and payments during the course of its oversight of this concession.

2. Ensure that City funding is used solely for the purposes for which it has been authorized.

Department Response: “The City agrees, and affirms that its reimbursements reflect a correct understanding of the proper purposes of the City funding. Parks reviewed all invoices and canceled checks and based decisions on site inspections and the DEC permit conditions. For example, the scope of work listed in Langan Engineering invoice no. 0069241 cited in the Audit includes ‘settlement monitoring of test fills and settlement plates.’ The monitoring is a condition of the DEC Part 360 permit. One of the primary reasons for tracking settlement is to help monitor methane gas migration due to the placement of fill on the property. This is clearly a direct cost associated with methane gas remediation that was missed by the Audit staff and perhaps evidence that they lacked a sufficient understanding of the details and complexities of the environmental work.”

Auditor Comment: According to the DEC permit, settlement monitoring is required “to ensure successful construction and completion of the proposed end use project”—not to help monitor methane gas migration as the Department contends. The Department further neglected to mention that Langan invoice no. 0069241 included work to “survey, evaluate retaining wall foundations”—work that is unrelated to methane gas remediation. Further, while the Department questioned our understanding of the environmental work, the Department did not offer any evidence to contradict our detailed estimate of methane remediation costs in Table 1, which incidentally included more than \$190,000 for other required monitoring costs.

\$3.02 Million in Forgone Fees

The concessionaire has not completed the required capital improvements by the concession commencement date stated in the license agreement. As a result, the City has had to forgo \$3,020,833 in license fees through September 30, 2006.⁵ (See Table II on page 12.) Further, the public has been deprived of the use of a concession facility and “world class public recreational urban park” as proposed by the concessionaire.

⁵Based on the minimum fee guaranteed by §6.1 of the license agreement.

Table II
Forgone Fees through September 30, 2006

Year	Fee
Year 1 (April 2004 through April 2005)	\$1,250,000
Year 2 (April 2005 through April 2006)	1,250,000
5 months of Year 3 (April 2006 through September 2006)	520,833
Total \$3,020,833	

The agreement's Schedule 4 lists 14 distinct capital improvements that must be completed by the concessionaire by the concession's commencement date. The Department extended the concession's original January 1, 2003 commencement date to April 15, 2004, in a written modification dated December 31, 2002. Our independent analysis showed that April 2004 was a reasonable date by which the concessionaire could have completed all the capital improvements. However, as of September 2006, the only improvement underway was grading of the 18-hole golf course. Based on our observations, discussions with the concessionaire, and our review of reports prepared by the environmental inspector, only 60 percent of the fill for shaping the golf course was imported and contoured at that time. Given this rate of progress, and notwithstanding the Department's November 2006 decision to terminate the concessionaire's agreement, we estimate that all 14 improvements for the concession would not have been completed until September 2011. Consequently, if the concession were not to be completed until 2011, the City would forgo fees totaling \$9,712,500. (See Table III below.)

Table III
Forgone Fees through Projected Completion in 2011

Year	Fee
Year 1 (April 2004 through April 2005)	\$1,250,000
Year 2 (April 2005 through April 2006)	1,250,000
Year 3 (April 2006 through April 2007)	1,250,000
Year 4 (April 2007 through April 2008)	1,350,000
Year 5 (April 2008 through April 2009)	1,350,000
Year 6 (April 2009 through April 2010)	1,350,000
Year 7 (April 2010 through April 2011)	1,350,000
5 months of Year 8 (April 2011 through September 2011)	562,500
Total \$9,712,500	

We attribute a portion of the delays to the concessionaire's decision to revise the design of the golf course and failure to obtain required permits on a timely basis. In addition, the Department did not ensure that the concessionaire was making adequate progress by adhering to a construction schedule, particularly after the concessionaire failed to complete work by the Department's extended deadline. In fact, the Department was unable to provide us with any work schedules, and did not track the progress of work against start and completion dates and significant milestones.

Liquidated Damages Not Assessed

The Department has not assessed more than \$6 million in liquidated damages due as a result of the concessionaire's failure to complete capital improvements. License agreement §9.6 states that "in the event the Licensee fails to finally complete a particular improvement by the date specified for final completion . . . Licensee may be required to pay the City liquidated damages of \$500 per day." Nevertheless, the Department has not assessed liquidated damages as allowed for when particular capital improvements were not completed on time. We calculated that the amount of liquidated damages that could be assessed as of September 2006 is \$6,286,000. (See Table IV below.) Given that the Department is now undertaking proceedings to terminate the license agreement, liquidated damages should be assessed as part of any such agreement.

Table IV
Schedule of Liquidated Damages

Time Period	No. of Calendar Days	Liquidated Damages Per Day	Capital Improvements	Total
April 16, 2004 to September 30, 2006	898	\$500	14	\$6,286,000

Recommendations

The Department should:

3. Track the progress of capital improvements against start and completion dates prescribed in the agreement.

Department Response: "Parks has carefully tracked the progress of the capital work on this project and will continue to maintain detailed records, as specified above."

Auditor Comment: The fact that the project was to be completed by April 2004 but would not be complete until September 2011 belies the Department's contention that it carefully tracked the progress of the project's capital work.

4. Assess the concessionaire all appropriate liquidated damages.

Department Response: "We disagree with this conclusion and decline to follow this recommendation."

"The exercise of the License's liquidated damage clause is not a mandatory action; the clause merely allows the City to assess such damages if the Licensee did not complete capital improvements on time, absent a suitable reason . . . the force majeure provision in Section 9.4 of the License strongly suggests that the City would not have had a good faith basis to impose such liquidated damages."

Auditor Comment: We contend that the concessionaire failed to meet its obligations under the license agreement, thereby resulting in forgone revenue to the City. Accordingly, the Department should assess liquidated damages to protect the City's interest, or document the reasons such damages should not be assessed.

Lack of Effective Project Management System

Many of the problems described above were precipitated by the Department's lack of an adequate project management system to ensure that: the license agreement contained all necessary items, and that remediation work and capital improvements were completed in accordance with the license agreement. An effective management system to oversee the concession project from inception to final completion should have included:

- Preparing a written scope of work that describes required remediation activities;
- Developing an itemized breakdown of costs for remediation activities;
- Written procedures for ensuring adequate review of invoices, canceled checks, and other related documentation; and
- Employing a full-time project manager to oversee project work;

However, interviews with Department staff and a review of records indicates that the Department did not take any of these steps to ensure that the license agreement contained all necessary items, and that remediation work and capital improvements were completed in accordance with the agreement. As a result, in our opinion, the City paid for work other than that required to remediate or remove hazardous materials; and required capital improvements were not completed.

No Written Work Scope and Cost Estimates

The Department did not include as part of amendment #2 of its license agreement: written descriptions of the specific remediation work items required, unit prices of their associated costs, and estimated quantities and total costs. As a result, the Department overpaid the concessionaire for required remediation work, and paid the concessionaire for work that was not part of the required remediation. Moreover, work was not completed in a timely manner.

Detailed scopes of work and cost estimates that describe required activities, material quantities, and unit prices are important to carrying out work successfully, on time, and within budget, and to limiting the possibility of a vendor's submitting future monetary claims against the City. However, the license agreement and file documentation we reviewed lacked any work scopes and estimates prepared by the Department that could have been used to assess whether the remediation work was being carried out effectively and in a timely manner.

Department officials contended that they consulted with the City's Law Department to develop guidelines for defining the scope of the remediation work, and that those guidelines were included in the license agreement. However, the guidelines in the agreement (§3.4a) do not define the scope of remediation work and simply declare that remediation must occur if the concession premises are found to be "contaminated with substances or materials defined as hazardous under the current federal, New York State or City laws ("**Hazardous Substances**") in amounts requiring remediation or removal under applicable law."

Recommendations

The Department should:

5. Prepare a written scope of work that describes required activities.

Department Response: "This proposal was addressed during the project, given the specificity of the license and careful procedures followed by Parks and the Law Department described above. Parks will prepare written scopes of work, as feasible and appropriate, going forward."

Auditor Comment: As discussed in the audit, the Department did not prepare a written scope of work for the required activities at the concession site. However, we acknowledge that the Department will prepare written scopes of work "going forward."

6. Develop an itemized breakdown of costs for required activities.

Department Response: "We have already done so. See materials provided to Comptroller's staff at the Exit Conference, attached as Exhibit B. Additionally, Parks submitted detailed estimates prepared by its staff outlining total project cost and an itemized list for hazardous material remediation. See attached Exhibit D.

"In a similar vein, the Audit concludes that the 'Department lacked any written policies [sic] and procedures governing the review and approval of documentation for remediation expenditures.' The Audit then determines that payment requisitions were reviewed without any identifiable rationale. That is incorrect. Because of the legal and environmental complexities involved, Parks staff routinely reviewed all reimbursement issues with both Parks counsel and the Law Department. Parks provided the audit staff with extensive documentation of this process, including copies of e-mails, memoranda and reports and communications between Parks staff, supervisors and legal advisors."

Auditor Comment: We disagree with the Department's contention that it developed an itemized breakdown of costs for required activities. The Department's Exhibit B is simply a list of individual invoices submitted by the concessionaire for payment and is not an itemized cost breakdown consisting of unit prices and estimated quantities as required by the Franchise and Concession Review Committee's Resolution of December 2001. Exhibit D was prepared by the Department on August 28, 2006, more than six

years after improvement work commenced and only three months before the Department announced it was terminating the license agreement with the concessionaire.

Further, the payment amounts listed in Exhibit B are not consistent with, and cannot be compared to the item costs in Exhibit D. For example, Exhibit B contains a payment category labeled “Methane Hard Cost/Testing/Monitoring” totaling \$2,331,731. Exhibit D, however, lacks a corresponding cost category against which payment amounts can be reviewed. Thus, our review of Exhibit D indicated a cost item labeled “Gas vent trench” totaling \$985,000, which could be a “methane hard cost.” However, there are no corresponding categories in Exhibit D for testing and monitoring.

During the course of the audit, we consistently asked the Department to provide evidence to show that it had written policies and procedures governing the review of invoices for remediation expenditures. Notwithstanding the Department’s claim that it provided us with “extensive” documentation, we obtained only a single e-mail transmitted in 2002, five e-mails transmitted in 2003, and seven e-mails transmitted in 2005 among Departmental staff, supervisors and legal advisors. Moreover, we were not provided with any other evidence of review such as memoranda, reports, and communications. Accordingly, the minimal amount of documentation provided does not demonstrate that the Department had a systematic approach to reviewing and approving remediation expenditures.

Lack of Written Procedures for Reviewing Documentation

The Franchise and Concession Review Committee’s December 2001 Resolution requires the concessionaire to submit full documentation of remediation expenditures and the Department to determine that the costs are fair and reasonable and are exclusively for the removal or remediation of hazardous substances. However, the Department lacked any written policies and procedures governing the review and approval of documentation for remediation expenditures. Although the Department received copies of invoices and canceled checks from the concessionaire, our review of file documentation indicated that the Department had an inadequate process for reviewing the documentation submitted so as to substantiate the reasonableness of costs and to legitimate the work as required remediation.

Only 55 (7%) of the total 807 invoices comprising the 12 payment requisitions contained evidence to indicate that Department officials had actually reviewed the invoices to verify that the work was performed and was for remediation. In these cases, evidence that reviews had taken place was minimal. Invoices did not appear to have been reviewed consistently with uniform notations and lacked approval by the reviewer. In none (100%) of the cases was there any evidence to indicate that the invoices and payment certifications were reviewed and approved by a supervisor. In addition, we noted that certain files lacked critical information, such as time sheets and labor rates, that is required to determine whether the work was actually performed and whether the cost of the work was reasonable. Moreover, the Department could not track payments, nor could it reconcile specific invoices with payments made. As a result of the inadequate review, the total amount paid by the Department for three vendors exceeded the amounts of their supporting invoices by \$127,044. (After the exit conference, the Department

provided us with the supporting invoices. We note that none of the invoices—except those supporting \$12,600 in payments—had been provided to us during the course of our audit review.)⁶

Department officials told us that their decision to consider an invoice reimbursable for remediation work was based on their review of individual invoices. However, the basis upon which the Department reviewed the invoices is unknown since written descriptions were lacking that would have served as documented standards for deeming an invoice reimbursable. Furthermore, our review of information obtained from the concessionaire indicated that it also lacked certain required documentation to support the submitted invoices. Therefore, we cannot ascertain the authenticity of the costs submitted by the concessionaire for work performed.

We attribute these problems in the review of documentation to the lack of a full-time project manager to oversee the work. Although the Department authorized more than \$7 million in reimbursements to the concessionaire, the Department employs a single revenue architect—whose responsibilities also include oversight of capital improvements at 50 other concessions—to monitor payments to the concessionaire.

In addition, it should be noted that the funding for the remediation was obtained from the City’s capital budget. Comptroller’s Directive #7 (“Audit of Payment Vouchers Issued under Contracts for Construction, Equipment, and Related Consultant Services”) provides specific guidelines for the audit of payment vouchers by City agency engineering-audit officers. However, although the Department has a full time staff of engineering-audit officers, they did not audit reimbursements to the concessionaire. Department engineering-audit officers told us on October 30, 2006, that they did not audit reimbursements because they were not able to assess whether the work was actually done. Further, the Department’s capital project division of architects and engineers did not oversee any of the work carried out by the concessionaire.

Recommendations

The Department should:

7. Prepare and adhere to written policies and procedures that govern the review of invoices, canceled checks, and other related documentation. In this regard, invoices related to construction and consultant services should be audited by the Department’s engineering-audit officers.

Department Response: “Parks will enhance its process and will prepare written procedures, as feasible and appropriate, going forward. Parks will also ensure that, as and when appropriate, Engineering Audit is involved in the review of concession projects.”

8. Ensure that all supporting documentation is submitted with invoices.

⁶Invoices for \$12,600 in expenses incurred by Impulse Environmental were included in documentation for Laws Construction.

Department Response: “Parks did, in fact, require and receive such documentation. Specifically, the Audit finds that, ‘the total amount paid by the Department for three vendors exceeded their supporting invoices by \$127,044.’ This is incorrect. The supporting invoices provided to the Audit staff for these three vendors *exceeded* the total amount paid by Parks by \$91,831.76. In addition, the Audit staff was provided with copies for 100 percent of the invoices for the three vendors in question and a spreadsheet reconciling all payments to invoices. See materials attached as Exhibit E. While the Audit includes an admission that the Audit staff initially missed \$12,600 in invoices, it fails to correct the mistake that accounts for the additional \$187,620.57 in overlooked invoices. There is no \$127,044 shortfall.”

Auditor Comment: As noted in the audit, supporting invoices were not in file documentation during the course of our audit work and were provided to us only after the exit conference. Furthermore, \$12,600 in invoices to Impulse Environmental were not included in the documentation for that particular vendor. The invoices were actually submitted under documentation for Laws Construction, thereby demonstrating the necessity for clearly identifying required work items and matching them with specific vendor invoices.

9. Employ a full-time project manager to oversee major concession work.

Department Response: “Parks takes its responsibility for oversight of major capital work connected to concessions very seriously and already has several full-time concession project managers, as well as an architect, who is solely assigned to oversee capital work performed in connection with Parks’ concessions.”

Auditor Comment: We welcome the Department’s acknowledgement of its responsibility for overseeing major capital work. We should note, however, that during the audit we were informed that a project manager assisting the Department’s architect was mainly responsible for clerical tasks. Therefore, the Department should ensure that it employs trained project managers who can properly oversee capital work in connection with concession projects.

More Than \$10 Million in Forgone Earnings

Our analysis indicated that the remediation work could have been undertaken without expending City funds while attaining for the City net revenue of approximately \$10.29 million.

The Department allowed the concessionaire to reach an agreement with its contractor (i.e., Laws Construction) in which the contractor would be paid to import and shape the fill required to construct the golf course by retaining “tipping” fees paid by waste haulers seeking to dispose of construction and demolition debris from other sites. As previously discussed, the concessionaire was required to undertake this work as part of constructing the golf course, which is one of the 14 capital improvements included under the license agreement’s \$22.47 million minimum required expenditure.

According to Laws Construction, the tipping fees collected totaled \$15.13 million. The decision to accept tipping fees required that the concessionaire and the Department obtain a Part 360 solid waste management permit from DEC. To prepare the permit application, engineers and attorneys were employed. In addition, the permit necessitated the employment of full-time environmental inspectors to monitor the quantity and quality of the imported fill. These expenses would not have been necessary had the concessionaire chosen not to obtain a Part 360 permit. In fact, our analysis indicated that the work could have been carried out without collecting tipping fees and without seeking a Part 360 permit.

However, our independent analysis indicated that if the Department had collected the \$15.13 million in tipping fees while the concessionaire was still carrying out the work under the provisions of the Part 360 permit, the City could have defrayed the estimated \$1.26 million cost for remediating the methane gas. In this case, it would also have been reasonable for the City to reimburse the concessionaire for the costs of obtaining the permit and retaining the environmental inspectors. Based on reviewed documentation, it appears that the City paid \$3.58 million for these costs. Therefore, this arrangement could have yielded the City earnings totaling \$10.29 million.

An additional consequence of the Department's decision to allow Laws Construction to retain the tipping fees was that public oversight and accountability were forfeited. Department officials were unable to provide us with any information about the amount of tipping fees that were collected by Laws Construction. Notwithstanding the missed opportunity to collect these fees, the Department is now making arrangements to terminate the concessionaire's license agreement. According to the agreement, the concessionaire may be entitled to collect a monetary settlement from the City. That being the case, while our own review did not find evidence that the concessionaire received any share of the tipping fees, the City in future should establish safeguards to prohibit concessionaires or contractors from collecting and retaining any type of fees before concession operations commence.

Recommendations

The Department should:

10. Prohibit concessionaires that have concession agreements with the City from collecting and retaining any type of fees before the commencement of concession operations.

Department Response: "Parks will take this recommendation under advisement should any similar projects arise."

11. Use the information provided in this audit about excess fees in conducting termination proceedings with the concessionaire

Department Response: "Parks will use the information provided in the audit in connection with the termination of this License. However, there is little persuasive evidence of any improper payments or fees. The City shares the Comptroller's interest in

ensuring that all concessions provide the City with the most favorable terms possible, and will continue to work with the Comptroller to achieve that goal in future projects.”

Auditor Comment: The audit clearly stated that we found no evidence that the concessionaire received any share of the tipping fees. Nevertheless, had the City collected the tipping fees, it could have defrayed the cost of remediating the methane gas. Therefore, the Department should consider this information when conducting termination proceedings.

Conclusion

The Department’s 1997 Request for Proposals stated that “Ferry Point Park represents one of the largest pieces of undeveloped parkland in New York City, and one of the greatest opportunities for augmenting the City’s recreational resources.” Accordingly, the concessionaire’s proposal was based on constructing an 18-hole golf course, driving range, teaching and catering facilities, clubhouse, waterfront community park, and a renovated community playground. However, six years after signing a license agreement, the golf course is only partially complete, and construction of the other facilities has not even started. Thus, the opportunity for the public to benefit from a project that was meant to augment the City’s recreational resources has been waylaid, the concessionaire has been overpaid almost \$6 million, and the City has lost more than \$3 million in license fees.

**Additional Auditor Comments to Address
Department's Written Response**

Department Response: “The Audit contends that Parks overpaid FPP by reimbursing costs that were not directly related to the remediation or removal of methane gas on the site. In addition, the Audit states that Parks did not properly document the specific items of work that it approved for reimbursement.

“Section 3.4 (a) of the License reads in pertinent part:

If it is discovered that the Licensed Premises are contaminated with substances or materials defined as hazardous under the current federal, New York State or City laws (‘Hazardous Substances’) (emphasis in the original) in amounts requiring remediation or removal under applicable law and such contamination resulted from events occurring prior to the date of this License Agreement, it shall be the responsibility of the City, as owner of the Licensed Premises, to promptly undertake and diligently complete the removal of all such Hazardous Substances and the remediation of the Licensed Premises to the extent required by all relevant federal, State and City agencies. The City and Parks hereby agree to indemnify, defend and hold harmless Licensee, its principals and affiliates, and their respective officers, directors, partners, lenders, agents, employees, successors and assigns (‘**Indemnities**’) (emphasis in the original) from and against all losses, damage, costs, expenses or liabilities (including attorneys’ fees) that Licensee or any of such Indemnitees may sustain as a result of the presence of any Hazardous Substances (other than Hazardous Substances deposited by Licensee) at or affecting the Licensed Premises either before, during or after the Term of the License Agreement, except as otherwise provided in Section 3.4 (c) (emphasis in the original) (the ‘**Environmental Indemnification**’) (emphasis in the original).

“The Audit incorrectly interprets the License to limit the City’s obligation to remove or remediate only methane gas.³”

Department’s Footnote 3: “Contrary to the Audit’s claims of improper reimbursement, the importation of fill to the site (and expenses related to such fill) is logically and directly related to addressing the Hazardous Substance methane. The importation of fill was necessary in order to build the golf course, otherwise the more expensive method of removing all or a substantial portion of the waste at the site would have been required by the State Department of Environmental Conservation (‘DEC’). To address the presence of methane, FPP could have removed all the waste at the site, thereby removing the methane and then subsequently sought reimbursement for its costs. On the other hand, FPP could vent and monitor the methane, while bringing clean fill to the site to construct the golf course and the golf course’s necessary infrastructure. The actions that FPP and Parks took were both economical and environmentally sound and, more importantly, appropriate in the face of the Hazardous Substances at the site.”

“The License, however, is clear that the City must indemnify FPP for all expenses related to the presence of ‘any Hazardous Substances’ at the site. The Audit’s contention that FPP received inappropriate reimbursements is thus seriously flawed, as it was the City’s obligation to

indemnify FPP for the challenged costs. The expenses that Parks approved for reimbursement to FPP all fell within the City's obligations under the License."

Auditor Comment: The Department erroneously concludes that the audit interpreted the license agreement to limit the City's obligation to remove or remediate only methane gas. In fact, agreement §3.4 required remediation of the premises if it was "contaminated with substances or materials defined as hazardous under the current federal, New York State or City laws ('Hazardous Substances') in amounts requiring remediation or removal under applicable law." As stated in the audit, New York State Department of Environmental Conservation (DEC) officials advised that the only hazardous substance in amounts requiring remediation was methane gas.

Notwithstanding this determination, the Department argues that agreement §3.4 further obliges the City to indemnify the concessionaire for all costs sustained "if it is discovered that the Licensed Premises are contaminated" with any existing hazardous substances. The Department has interpreted this provision in a sweeping manner to relieve the concessionaire of its obligation to "complete or cause to be completed Capital Improvements . . . with a value of at least \$22,470,000" as required by agreement §9.1. The audit showed that prior to the agreement's award, the concessionaire was aware that the concession property was the site of a municipal sanitary landfill. Therefore, given that the special conditions pertaining to the concession property were foreseeable before the agreement was awarded, the costs associated with undertaking the capital improvements constituted necessary construction work and should not have been paid by the City under the guise of unforeseen remediation work.

The discovery of methane gas at the concession premises and its subsequent remediation by constructing a venting trench was a distinct and separate activity from importing fill to shape and contour the golf course. Accordingly, the business decision by the concessionaire to import fill to shape and contour the golf course and its associated costs were necessitated by the concessionaire's responsibility to complete the required capital improvements—not to remediate methane gas. Thus, DEC considered fill importation an activity associated with building the golf course, not with remediating the site. DEC's "Permit Application Detail," which provides information about the application for a second permit, states that importing fill was necessary "to achieve design grades that have been revised since the issuance of the original permit." According to DEC's "Permit Application Detail" pertaining to the third permit application, "The proposed modification supports a change in design from a traditional tree lined course to that of a 'links' type golf course." Further, according to a February 23, 2004 entry in the Department's "Ferry Point Golf Course Report Summaries," the "Jack Nicklaus design has recommended that additional fill be brought to the site so that he may better sculpt the course to get the most desirable design."

Department Response: "The Audit further relies on a portion of the text of the December 2001 Franchise and Concession Review Committee Resolution granting approval for certain reimbursements to FPP for the removal and remediation of Hazardous Substances to suggest that

such remediation was intended only to address the presence of methane. In fact, the text of the Resolution explicitly states that Parks may approve reimbursements to FFP if the costs are for the removal or remediation of ‘methane gas or *other Hazardous Substances.*’ (Emphasis added). Similarly, the July 2006 Franchise and Concession Review Committee Resolution approving an additional \$1.7 million to reimbursements for the removal or remediation of Hazardous Substances was also not limited to methane.”

Auditor Comment: The December 2001 Franchise and Concession Review Committee Resolution coincided with the completion of the venting system for remediating methane gas. Accordingly, the Resolution stated that the “Licensee has submitted a preliminary estimate and request for reimbursement of expenditures for the removal or remediation of hazardous substances due to the discovery of methane gas, a Hazardous Substance, on the concession site.”

Department Response: “The Audit draws an inappropriate conclusion from discussions with DEC officials that occurred on December 11, 2006, arguing that very little remediation was needed to prepare the site for recreation use. Likewise, much is made of a section of the contract between FFP and one of its contractors, Laws Construction, regarding the waste on the landfill site, all in an effort to argue that there are no Hazardous Substances required to be remediated other than methane. This position disregards the point that there were, in fact, other defined Hazardous Substances present in the waste layer at the site, and that DEC prohibited disturbance of this matter unless stringent and vastly more expensive procedures were followed. These included a prohibition on using any portion of the waste layer at the site for golf course shaping purposes and a requirement that any such material be removed if it was uncovered.⁴”

Department’s Footnote 4: “DEC also made clear throughout the permit negotiations that it considered mass-excavation of the waste material beneath the site constitute ‘landfill operations’ and that it would have required the City to close the landfill in accordance with current regulations governing landfill operations set forth in Title 6 of the New York State Codes, Rules and Regulations, Part 360.”

Auditor Comment: The Department’s response attempts to obscure the distinction between the costs to remediate methane gas and the costs related to building the golf course by importing fill. As previously stated, our conclusions on this point were based on a number of factors. Therefore, we contend that the costs associated with importing fill to carry out the required capital improvements should not have been paid by the City.

The Department has also mischaracterized the audit findings with respect to the methods chosen by the concessionaire to build on or to remediate the concession property. As stated previously, the audit sought to determine whether the Department effectively monitored the concessionaire’s activities. Given this objective, the audit did not express an opinion about the concessionaire’s methods or procedures. Accordingly, the Department’s statements about alternative procedures such as mass excavation of the waste material are irrelevant insofar as this audit is concerned.

Department Response: “It is incorrect to suggest that recreational use at the site would only have required a cover layer of clean fill. Most recreational uses, if properly built, require subsurface

work that would necessitate penetrating the waste layer at a site like Ferry Point. Moreover, it is clear that the site contained Hazardous Substances other than methane. This is evident from even a cursory review of the environmental assessment of the project, which was prepared in 1999. *See also* Stephen Kass letter to William Thompson, Jr., dated July 5, 2007 (“Kass Letter”), attached as Exhibit A. In sum, given the DEC permit conditions and the nature of the material present on the site, we believe that costs associated with the fill operation as a result of the DEC permitting process were properly paid for by the City under the License.”

Auditor Comment: The Department bolsters its view that other hazardous substances in the existing waste layer warranted remediation by stating in Exhibit A that “The U.S. Environmental Protection Agency (‘EPA’) defines ‘household hazardous waste’ as ‘leftover household products that contain corrosive, toxic, ignitable, or reactive ingredients,’ such as bleach and other household cleaning products, pesticides, motor oil, antifreeze, batteries, mercury thermometers and fluorescent light bulbs.” However, it is clear that household waste is *not* defined as hazardous under current federal, New York State or City laws. DEC Rules, 6 NYCRR, §371.1, “Identification and Listing of Hazardous Waste,” and federal environmental rule 40 CFR §261.4(b)(1), also titled “Identification and Listing of Hazardous Waste,” contain exclusions for household waste. Moreover, the DEC Web site explains in its “Inactive Hazardous Waste Disposal Site Program FAQ” that “Most municipal landfills are not formally listed as hazardous waste sites because the definition of hazardous waste contained in New York State law excludes household hazardous waste.”

Accordingly, the concession property was not a hazardous waste site based on the standards cited above. The concession property would be suitable for recreational use by installing a 2-foot cover layer meeting certain chemical composition requirements. We note that the cover layer (specified by the New York State Department of Health) must be placed on all golf course surfaces irrespective of the thickness of any shaping layer material that was imported by the concessionaire to achieve its desired design contours. The cost to place the cover layer would be a legitimate remediation cost should it actually be installed.

Material that is disturbed by required subsurface work that penetrates the existing waste layer must, according to DEC, be removed and disposed of properly. However, such material must be disposed of as solid waste—not as hazardous waste, which has more stringent disposal requirements. In any event, the Department has conjectured a hypothetical scenario about possible future costs for subsurface work that was not a work activity that occurred during the course of this audit.

Department Response: “Finally, even if the Audit were correct that cost related to methane remediation and removal was the only proper item for reimbursement, the Comptroller’s estimates for methane-related work are inaccurate and exclude many items attributable to this category. In sharp contrast to the numbers calculated by the Audit, over \$3 million of remediation expenses were directly related to methane gas remediation. These expenses included hard costs related to the construction of a 1.5-mile long methane gas-vending trench,

the installation of methane gas monitoring wells, methane vent trench maintenance and the installation of methane gas venting pipes. Soft costs included bi-weekly monitoring well inspections, data analysis, specialized design and bi-weekly tracking and reporting on methane gas levels and methane gas migration in and around Ferry Point Park.⁵”

Department’s Footnote 5: “The remaining remediation payments were primarily for costs associated with maintaining compliance with the DEC permit and to minimize breaching the municipal waste layer at the site. These reimbursements included the costs for the independent monitor, laboratory testing and engineering design.”

Auditor Comment: It was not until the exit conference held on June 26, 2007—six years after the methane venting system was installed—that the Department was able to provide us with information about the cost to remediate methane gas. This is not surprising given the deficiencies noted in the audit about the lack of written work scopes and cost estimates, and the lack of written procedures for reviewing invoices, cancelled checks, and other relevant documentation. These deficiencies are further exemplified by the fact that the information provided at the exit conference was flawed because it included other-than-methane remediation work in submitted invoices.

Nevertheless, the Department contends that our independent estimate for methane-related work is inaccurate and excluded many required items. However, the Department did not provide any evidence to challenge the accuracy of our estimate of the cost for methane-related work shown in Table 1 of this report. Moreover, a review of our estimate clearly indicates the inclusion of the required costs to remediate methane gas including constructing a landfill gas venting trench, installing monitoring wells, performing maintenance, engineering design, and a required monitoring program.

Department Response: “The Audit contends that the allegedly unnecessary reimbursements were part of FPP’s required capital improvement obligations under the License. We disagree; as explained above, this work was directly related to environmental conditions that needed to be addressed in order to complete the project. Furthermore, in a footnote, the Audit suggests that FPP ‘chose’ to accomplish its shaping work by bringing in fill to the site, rather than using on-site materials and disturbing the waste layer. This point suggests that FPP would have had a choice to use on-site materials, which is incorrect. DEC specifically forbade the use of on-site materials.

The Audit speculates that the City lost \$3,020,833 in license fees because FPP did not complete its capital work by April 2004, criticizes FPP for not obtaining necessary permits on a timely basis and criticizes Parks for not tracking the progress of FPP’s work. Each of these findings is without merit. Throughout the course of this concession, the significant delays that have affected the project were attributable to the very substantial environmental problems⁶ encountered at the site and the resulting difficulty in obtaining permits from DEC. See timeline provided to the Audit staff at the Exit Conference, attached as Exhibit C and Kass Letter.”

Department's Footnote 6: "Indeed, shortly after the License was executed, the City faced two lawsuits regarding the project. The City ultimately prevailed in both of the cases."

Auditor Comment: A careful analysis of Exhibit C casts doubt on the Department's account of project delays. Specifically, Exhibit C indicates a five month "Delay due to DEC permit issuance in late August 2000 . . ." Contrary to the Department's contention, the fact is that the concessionaire submitted an application to DEC for a Part 360 permit on April 11, 2000, and a permit was issued by DEC on July 17, 2000. This is a span of just 97 days, which is less than the six-to-twelve month time period that DEC considers reasonable for attaining such permits.

In addition, Exhibit C indicates delays due to "inability to secure fill material until December 2001 construction season," and "Delay due to secure fill contracts after DEC issues permit." However, the concessionaire's inability to secure sufficient fill material is curious since the New York City Department of Design and Construction reported in May 2003 that "each day NYC produces about 19,500 tons of 'fill material,'" which is more than 14 times the average fill quantity of 1,354 tons (equivalent to 1,354 cubic yards) that the concessionaire actually imported daily. Additionally, Exhibit C attributes delays due to ". . . importing additional 500,000 CY of material," and ". . . the garbage settlement and additional fill requirement." According to DEC, the need to import additional fill was to achieve design elevations and to correct the concessionaire's error in originally underestimating the actual amount of fill required.

Department Response: "It is important to note that the License, in Section 9.4, clearly contemplated situations where FPP would not be responsible for delays in completing capital work if:

[S]uch work cannot be completed due to circumstances beyond the control of Licensee including acts of God (including weather), war, enemies or hostile government actions, revolutions, insurrection, riots, civil commotion, strikes, fire or other casualty, unreasonable delays by any governmental agency, the City, Parks or Commissioner in review of plans, specifications and drawings submitted by Licensee in accordance with this License Agreement, **or the inability through no fault of Licensee to obtain either a certificate of Occupancy, or permits, licenses, or certificates required by any agency having jurisdiction thereof, or other similar circumstances which the Commissioner has determined to be beyond the control of Licensee.** (Emphasis added).

"We were aware of the delays in the project and, in light of the DEC permitting process, deemed those to be valid reasons for FPP's inability to proceed. Because of the importance to the City of compliance with all required environmental remediation measures, the City chose to work closely with DEC to reach agreement on a proper course of action. The delays necessitated by the ongoing discussions with DEC essentially stopped the project for over a year. In particular, when DEC shifted its position (during the most recent permit modification process), to a significantly more costly standard for the fill, the project schedule was again interrupted.

“DEC’s requirements resulted in lengthy delays even when the fill operations were not shut down because the importation of fill had to be slowed each time that the permit limits were approached, until they could be revised. The reality was that no long term schedule could be fully reliable in this setting, given the complexity of the DEC regulations and the uncertainty of the permit process.”

Auditor Comment: The Department attributes project delays to the DEC while relieving the concessionaire of any responsibility in this regard. In particular, the Department refers to the *force majeure* provisions of license agreement §9.4, which absolves the concessionaire from responsibility in completing the work due to circumstances beyond its control, such as the inability to obtain permits. The Department’s statements that problems in obtaining permits were “valid reasons for FPP’s inability to proceed,” and its declaration that “the delays necessitated by the ongoing discussions with DEC essentially stopped the project for over a year,” are disingenuous. The Department had alleviated these concerns on December 21, 2002, when it extended the concessionaire’s scheduled completion date from January 1, 2003, to April 15, 2004, after the two permits were already issued (one on July 17, 2000, and another on October 18, 2002). Yet, as reported in the audit, as of September 2006, only a portion of one of the 14 required capital improvements to the concession property was underway. But, despite the inability of the concessionaire to complete the required improvements by the revised date, the Department did not deem any further extensions of the completion date as warranted.

Moreover, the Department’s attempt to shift responsibility for project delays to DEC is flawed for the following reasons. First, DEC’s involvement in the project was not necessitated by the license agreement, but was triggered solely by the business decision of the concessionaire to collect tipping fees. Had the concessionaire chosen not to collect these fees and had undertaken the project using alternative regulatory means such as a Part 360-1.15 Beneficial Use Determination, DEC permits would not have been required. Second, after the Department and the concessionaire decided to seek a Part 360 permit, they woefully underestimated the normal time process (six months to a year) that was required to obtain such a permit, and neglected to solicit a modified or new permit application prior to attaining existing permit limits. Moreover, according to DEC, the necessity for obtaining the second of three permits was to correct the error made by the concessionaire in underestimating the actual amount of fill required in the initial permit application.

However, the most puzzling aspect of the Department’s defense of the concessionaire’s inability to proceed with the project because of DEC “delays” is the lack of any detailed explanation of the Department’s decision to terminate the concessionaire’s license agreement. If, as the Department contends, the delays were in fact attributable to *force majeure* provisions or to DEC—rather than to the concessionaire—it would be reasonable to expect that the Department would support the concessionaire in its attempts to complete the project. However, the Department chose to terminate the license agreement rather than grant any further time extensions to the concessionaire.

Department Response: “The Audit connects a finding that FPP should be made to pay more than \$6 million in liquidated damages to its erroneous conclusion that the capital work was improperly delayed. The Audit suggests that Parks should seek such liquidated damages as part of its termination of the License. However, the exercise of the License’s liquidated damage clause is not a mandatory action; the clause merely allows the City to assess such damages if the Licensee did not complete capital improvements on time, absent a suitable reason. As noted above, the force majeure provision in Section 9.4 of the License strongly suggests that the City would not have had a good faith basis to impose such liquidated damages.”

Auditor Comment: We agree that the Department is not required to assess liquidated damages. However, when the concessionaire fails to meet its obligations under the license agreement and the City has forgone expected revenue, it is incumbent upon the Department either to assess liquidated damages to protect the City’s interest or to document the reasons such damages should not be assessed.

Department Response: “The Audit concludes that a primary cause of the problems found by the Audit is the ‘lack of an adequate project management system . . .’ Specifically, the Audit makes an unsupported pronouncement that Parks failed to take the necessary steps to ‘ensure that: the license agreement contained all necessary items, and that remediation work and capital improvements were completed in accordance with the license agreement.’ However, quite to the contrary, Parks did develop a system to review carefully the items requested for remediation and rejected over \$10 million in such claims. The architect from the Parks Revenue Division worked closely with Parks’ counsel and attorneys from the Law Department to review all the items submitted for reimbursement. Numerous meetings were held with FPP and their attorneys regarding remediation costs and their treatment under the License. Numerous other meetings were also held with DEC to negotiate appropriate permit conditions that were both cost-effective and protective of public health. This was a dynamic situation that depended in large measure upon the field conditions that became evident over time.

“The Audit also criticizes Parks for not developing a written scope of work or cost estimates. But Parks frequently reviewed proposed costs and types of allowable remediation with FPP and its lawyers, as well as with the attorneys from the Law Department, who are charged with advising Parks as to its legal rights.”

Auditor Comment: As previously noted, we asked the Department to provide evidence to show that it had written policies and procedures for the review of invoices for remediation expenditures. Despite our requests, we did not receive any memoranda, reports, or communications between Department staff and supervisors and the Law Department that provided evidence of such policies and procedures. We did, however, obtain a single e-mail transmitted in 2002, five e-mails transmitted in 2003, and seven e-mails transmitted in 2005 between Departmental staff, supervisors and legal advisors. Given that the Department approved

reimbursements totaling more than \$7 million over six years, it would have been reasonable to expect a more comprehensive written record to clarify Department approvals of those reimbursements. For a complex endeavor such as Ferry Point, comprehensive written records, work scopes, and cost estimates are particularly important in providing transparency to the process by which City funds were authorized and expended.

Department Response: “The Audit suggests that the City should have arranged to receive the tipping fees itself, although there was no contractual requirement for the City to do so. Moreover, the Audit suggests that the auditors ‘own analysis,’ revealed that the project could have been carried out without tipping fees and without seeking a Park 360 Permit. As both Parks and the Law Department explained at the Exit Conference, tipping fees significantly reduced costs for the project, over the alternative of mass excavation of the waste beneath the site. Parks and the Law Department also noted that both the tipping fee arrangement and the alternative of mass excavation would have required a Park 360 permit, and/or compliance with other landfill regulations. It should be noted that even as the Audit suggests a scenario without tipping fees or a DEC permit, it completely fails to project the costs of such a scenario or explain how it would be preferable from a public health or regulatory perspective.

“The Audit claims that the decision to allow Laws Construction to retain the tipping fees somehow forfeited public accountability. As noted above, there was no reason for the City to retain the tipping fees. Accountability was provided through the audit provision of the License.”

Auditor Comment: The audit stated that the Department allowed the concessionaire’s contractor to collect more than \$15 million in tipping fees to carry out required capital improvement work. Although there was no contractual requirement that permitted the City to collect these fees, the Department should have modified the license agreement in order to do so, thereby serving the City’s interests more effectively.

Our discussions with DEC officials indicated that the concession could have been constructed under a less expensive method for importing fill material known as a Part 360-1.15 Beneficial Use Determination. Under this approach, a permit for importing construction and demolition debris would not have been required because the concessionaire’s contractor would have accepted the fill without collecting tipping fees. Additionally, an environmental monitor would not have been required. The technical requirements governing the quality of the construction and acceptable debris would have been similar to those under the permit method. Our analysis indicates that the cost to obtain a Beneficial Use Determination would have been less than \$700,000.