STATE OF NEW YORK
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
ALBANY, NEW YORK 12233-1017

MARC S. GERSTMAN
DEPUTY COMMISSIONER AND GENERAL COUNSEL

May 27, 1994

Mr. Andrew S. Lynn
Acting Deputy Commissioner for Legal Affairs
City of New York Department of Sanitation
125 Worth Street, Suite 710
New York, NY 10013

RE: Declaratory Ruling 19-08: Applicability of 6 NYCRR Part 203

Dear Mr. Lynn:

In a February 10, 1994, letter to me your agency requested our guidance as to whether a 6 NYCRR Part 203 permit is required in connection with the City's proposed relocation of Department of Sanitation ("DOS") activities from its District Garage Manhattan 6 ("Manhattan 6") at an existing site under the Williamsburg Bridge to three essentially contiguous parcels of land on 29th and 30th Streets between Eleventh and Twelfth Avenues. Based on your predecessor's oral concurrence I am treating the February 10, 1994, letter as a request for a declaratory ruling pursuant to 6 NYCRR Part 619, and this letter constitutes a responsive declaratory ruling.

For the purposes of this declaratory ruling the following facts, provided by your letter, are assumed:

The present location of Manhattan 6 is under the Williamsburg Bridge and it must be removed to enable a major bridge rehabilitation project to get under way consistent with a federal funding deadline of May 1994. Accordingly, the City intends to relocate Manhattan 6 temporarily to three parcels located on West 29th and 30th Streets between Eleventh and Twelfth Avenues (the "Site") in Manhattan. The first parcel is located at 606 West 30th Street, is currently leased by DOS from a private landlord and is used as a garage to house the Manhattan Borough repair shop. The second parcel, a parking lot, is located at 635 West 29th Street and is also currently leased by DOS from a private landlord for parking in connection with the Manhattan Borough repair shop. The third parcel, a vacant lot with a railroad trestle which occupies the north block of 30th Street between Eleventh and Twelfth Avenues, will be leased by the City from the Metropolitan Transportation Authority ("MTA").

Under the plan, beginning in May 1994, the Manhattan 6 fleet would be relocated to the Site. The fleet consists of 65 vehicles and includes 11 different types of vehicles. The north block of 30th Street will be used to park all of the vehicles except for the salt spreaders. There will be parking spaces for 60 heavy-duty size vehicles although some of these spaces will be used to park lighter-duty vehicles. No space will be provided for employees to park personal vehicles. A temporary truck-wash structure and outdoor-fueling depot will be installed on this portion of the Site. In addition, the garage located at 606 West 30th Street will be used for vehicle repair and maintenance and to store the fleet's salt spreaders. Trailers will be parked on the lot at 635 West 29th Street and will be used to support the activities of personnel assigned to Manhattan 6.

The examination of this question centers on whether the relocated facilities constitute an indirect source under Part 203.

Under 6 NYCRR §203.2(a), as amended, the term "indirect source of air contamination or indirect source" is defined as:

> a facility, structure or installation the construction or operation of which results or may result directly or indirectly in associated vehicular movements which contribute to ambient concentrations of any air contaminant for which there is an ambient air quality standard, including:
>
> (1) highways and roads on which the predicted annual average of daily traffic volume within 10 years of completion of construction may exceed 20,000 vehicles, or where the modification of any existing section of road or highway which may increase the annual average of daily traffic volume within 10 years of completion of modification by more than 10,000 vehicles; and
>
> (2) parking areas.

The proper scope of the above definition must be ascertained through an application of the rules of statutory construction. As a general rule of statutory construction, words of ordinary import are to be construed according to their ordinary and popular significance. See Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Bd., 51 N.Y. 2d 506, 434 N.Y.S. 2d 961, 415 N.E. 2d 950 (1980). Thus, on its face, the definition of indirect source would appear ordinarily to encompass facilities, structures and installations of which highways, roads and parking areas are illustrative examples.

However, the seemingly plain meaning of a word is not necessarily controlling; instead terms must be construed in the

context of the entire regulatory intention, pursuant to the rules of construction. See McKinney's Statutes §234. The principal aim of construction is to ascertain the intent of the drafter, and the import of the specific provisions must be considered in the context of the expressed intent, as discerned in the entire regulation. The language should be construed so as to effectuate that intent. See McKinney's Statutes §94.

Regulatory intent is best derived by reference to the rulemaking documents and administrative history underlying the regulation in question. The definition of "indirect source" was amended in 1979, and again in 1981 and 1983. Each of these amendments narrowed the universe of structures that were subject to the requirement to obtain a Part 203 permit. Prior to the 1979 amendments, Part 203 was applicable statewide to highways and roads, parking facilities, shopping centers, recreational centers, office facilities, hotels and motels, theaters and hospitals.

The Notice of Agency Action, published in the State Register, describes the subject of the 1979 agency action as follows:

> Amends applicability of [Part 203] such that it will apply only to certain proposed parking facilities in New York County and major roads, highways and airports proposed throughout New York State.

The 1981 amendments reduced the statewide applicability of Part 203 to facilities located in New York County south of 60th Street. The Summary of Proposed Revisions prepared by the Department as part of the 1981 rulemaking states the following purpose for the amendments:

> The Department proposes to amend existing Part 203 such that its provisions will only apply to roads, highways and parking areas in New York County (Manhattan) south of 60th Street. In addition, a number of other changes are proposed which are intended ... to delete unnecessary portions of the rule.
>
> To delete the applicability of Part 203 to all indirect sources except roads, highways and parking areas in lower Manhattan.

Emphasis added. In setting forth its justification for the proposed revisions, the Department stated:

> Part 203 requires that an application be submitted and a permit to construct be issued by the Department before certain indirect sources of air contamination may be constructed. This requirement is dependent on

the satisfaction of three prerequisites relative to the type of source, size of source and location of a source. Currently, Part 203 requirements apply to roads, highways and airports of a specific size everywhere in New York State and to all parking areas in Manhattan south of 60th Street.

The revisions to the rule would exempt all indirect sources from the permit requirements of Part 203 except roads, highways and parking areas in New York County south of 60th Street.

Emphasis added.

In 1983 the definition of "indirect source" was again amended to further limit the applicability of Part 203 by removing all parking areas, other than those owned by the State or federal government, from its purview. As part of that rulemaking process and to further clarify the intent to limit the applicability of Part 203 to only highways, roads and specified parking areas, the amendments deleted the phrase "but not limited to" which followed the word "including."

These rulemaking documents clearly indicate that the intended result of the cumulative rulemaking efforts was to limit Department review only to those categories of indirect sources which are contained in existing §203.2(a).

Reference to other provisions of Part 203 also suggests that the regulatory intent was to provide a definition under which indirect source review would be limited to the enumerated categories. Most notably, this intent is reflected in former 6 NYCRR §203.16 (amended in 1983 and renumbered to be 203.10), wherein the drafters provided for the treatment of applications pending before the Department on the effective date of the amended Part 203. Paragraph (a) of such section declares that applications which were incomplete on the effective date of amended Part 203 and are "for projects other than highways, roads, or parking lots and garages located in the City of New York south of 60th Street" will be considered null and void. The plain language of 6 NYCRR §203.10(a) reflects an intent to exclude from consideration those applications pending for projects which, due to the limiting amendments, would no longer fall within the scope of Part 203. If jurisdiction over the specified projects were intended to be continued, then the applications currently on file would most easily have been continued in effect. This was obviously not the objective of the amendment.

Based upon the language of the regulation and the underlying regulatory intent set forth in rulemaking documents, the Department interprets Part 203 as being applicable only to

indirect sources situated in New York County south of 60th Street which are roads, highways, or parking areas as those terms are defined in Part 203. The Department's implementation of the provisions of Part 203 has been consistent with the foregoing and is in accordance with the State Implementation Plan for carbon monoxide submitted to the U.S. Environmental Protection Agency by the State of New York on May 16, 1979, pursuant to the Clean Air Act.

Since the proposed relocation of Manhattan 6 clearly falls within the geographic limitation of the regulation, the applicability of section 203.2(a) turns upon a determination of whether the facility is a road, highway, or parking area as those terms are defined. The relevant definition in this instance lies in section 203.2(b) wherein "parking area" is defined as "a State or Federally owned parking facility, including a lot or garage, which is located in New York County, south of 60th Street." Because the Site is owned by the City of New York Department of Sanitation and not by a state or federal entity, Part 203 is facially inapplicable to the relocation of Manhattan 6 to the Site. Accordingly, an indirect source permit is not required for the actions described in the February 10, 1994 letter.

We note that in Silver et al. v. Dinkins et al. (Supreme Court, New York County, Index No. 103245/93, Crane, J., April 27, 1993), the court held that a Part 203 permit was required for a different NYC proposal to relocate the District Garage. The Department was not a party to that proceeding. Thus, the court had no opportunity in that case to consider formally the official agency interpretation of Part 203 given by the Department as the administrative agency charged with administering Environmental Conservation Law ("ECL") Article 19 and the regulations promulgated thereunder.

Sincerely,

Marc S. Gerstman
Deputy Commissioner
and General Counsel