

In the Matter of the Application for a Permit to Construct and Operate a Transfer Station for Regulated Medical Waste and Exempt Hazardous Waste pursuant to Article 27 of the Environmental Conservation Law and Parts 360 and 370 of Title 6 of the New York Compilation of Codes, Rules and Regulations by

**ALJ RULINGS ON
ISSUES, PARTY
STATUS and
ENVIRONMENTAL
SIGNIFICANCE and
ORDER OF
DISPOSITION**

CMW INDUSTRIES, LLC

DEC Project No.
2-6104-01410/00001-0

Introduction

These proceedings concern the application of CMW Industries, LLC (CMW) to construct and operate a 15 ton per day (330 tons per month) regulated medical waste (RMW) transfer station. The applicant proposes to also accept 350 gallons per day of conditionally exempt hazardous waste. The proposed facility will transfer the waste between vehicles and it will be sent by long haul transport to permitted treatment and destruction facilities. The location of the proposed project is in the Brooklyn neighborhood of Canarsie - 100-02 Farragut Road, bounded by Farragut Road and East 100th Street (Kings County).

The on-site storage of hazardous waste is limited to less than ten days pursuant to § 364-1(c)(12) of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR), an activity not subject to permitting by DEC. CMW proposes to accept waste from conditionally exempt, small quantity and large quantity generators such as dentists, radiological facilities, laboratories, hospitals, and research laboratories. The waste that would be accepted would include fixer and developer water formalin, formaldehyde, and formaldehyde solutions, xylene, alcohol, mercury, and waste mercury. The applicant proposes to collect and store the regulated medical waste and conditionally exempt hazardous waste for removal by a licensed hazardous waste transporter. The number of truck trips to and from the facility are estimated at 17 per day. The proposed operating hours are Monday through Friday, 7 a.m. to 9 p.m.

The proposed location for this facility is zoned commercial (C8-1) and neighbors both residential (R-4) and manufacturing (M1-1) zones. Currently, FMA Farragut Road, LLC owns the 6,000 square foot building and associated property at this location. Apple Home Care operates a transportation service for the handicapped and mentally disabled from this location. CMW proposes to use a portion of the existing building to operate the transfer station by constructing a dedicated, segregated area consisting of 1,500 square feet of the existing garage space.

In its application, CMW explains that it will utilize cargo vans and/or small box trucks to collect RMW and exempt hazardous waste material from doctors' offices, small veterinary and medical clinics, dental practices, nursing homes, etc. within the local area. These wastes will be transferred to the Farragut Road facility where the waste will be removed from the vans/trucks and placed directly into a tractor trailer. When the container is filled, CMW states that it will be taken to a registered disposal facility. Citiwaste, LLC, a business associated with the Farragut Road site, is a licensed RMW transporter. Citiwaste has one cargo van permitted for RMW transportation and it is already engaged in the pickup of RMW that it takes to a transfer station, Health Care Waste Services, in the Bronx. Its Part 364 permit (Permit No. 2A-538) was issued on May 19, 2005 by the New York State Department of Environmental Conservation (DEC or Department).

The Department staff's draft permit (special condition no. 27) provides that RMW will be stored at the facility for a maximum of 72 hours at ambient temperatures and up to a maximum of 7 days in a refrigerated trailer at less than or equal to 45-degrees Fahrenheit.¹ CMW states in its application that exempt hazardous waste will be limited to a maximum storage time of ten days pursuant to 6 NYCRR § 373-1.1(d).

To construct and operate the facility, CMW requires a solid waste management facility permit, pursuant to Environmental Conservation Law (ECL), Article 27 and Parts 360 and 370 of 6 NYCRR. Staff issued a notice of complete application on August 11, 2008 and based upon the substantial interest in the proposal evinced by public comment, a notice of public hearing and issues conference was published in the December 8, 2008 *Environmental Notice Bulletin* and the December 11, 2008 *Canarsie Courier*.

Pursuant to the State Environmental Quality Review Act (SEQRA, ECL Article 8), on August 11, 2008, the Department staff determined that the proposed project is an unlisted action (as defined in 6 NYCRR § 617.2[ak]) that will not have a significant effect on the environment and thus, did not require the preparation of an environmental impact statement (EIS).

Based upon the Department staff's identification of the area surrounding the proposed project as a minority community, DEC staff applied CP-29 (Commissioner Policy on Environmental Justice and Permitting) as part of its assessment of the environmental significance of the proposal. This policy requires that the Department, once it has determined that a project is proposed for a minority or low-income community, require a public participation plan as well as completion of a full environmental assessment form (EAF). Both of these were prepared. CP-29 provides that once the Department staff determines that a project assessed under this policy will not have significant negative environmental effects, no further environmental justice review is required.

¹ The application materials provided for storage in a freezer when the materials were stored up to 30 days; however, the condition in the draft permit would control if the permit is issued. See, draft permit, special condition no. 17.

Legislative Hearing

At 7:00 p.m. on January 13, 2009, a legislative hearing commenced before Administrative Law Judge (ALJ) Helene G. Goldberger at the Remsen Heights Jewish Center located at 8700 Avenue K, Brooklyn, New York. Approximately 300 people attended this very animated legislative session and 38 individuals spoke at the hearing, including elected representatives and spokespersons of local community organizations. Apart from the applicant and one employee of CMW, all commenters spoke against and/or in criticism of the proposed project. In addition to the oral comments, the ALJ received 35 written comments, all in opposition to the project.² The concerns identified by members of the Canarsie community are: the addition of truck traffic in a heavily trafficked community and the impacts of this traffic on health - particularly with respect to air pollution and resulting respiratory diseases such as asthma; the decision by DEC staff that no EIS was necessary; the potential for the release of toxins into the community; the change in community character that this project would create; likelihood for noise, odors and vectors; and negative economic effects due to perceptions associated with these kinds of facilities. Below is a summary of some of the comments presented at the hearing.

Tim Wolf, of Malcolm Pirnie - the engineering consultant to the applicant - presented a description of the proposal accompanied by a powerpoint display. Mr. Wolf described the applicant as a local company that will use small box trucks to pick up waste in sealed containers that will not be opened at the facility. He stated that these containers will be consolidated into larger boxes in a tractor trailer type truck and that all of this activity will take place within a closed building behind a fence. The large trucks will take the waste to Baltimore, North Carolina, and New Jersey for disposal. He stressed that there would be no disposal at the facility. Mr. Wolf showed pictures of the site before Mr. Klein, the principle of CMW, purchased the property. These showed a neglected lot with trash and graffiti. He stressed that Mr. Klein cleaned up the lot, provided for security, a new building, and fencing. He emphasized that the project would not create emissions, odors, or noise and that all wastes will arrive and leave in sealed containers. He explained that the facility had a contingency plan to address public/worker safety in case of an emergency or accident. Mr. Wolf mentioned that the applicant already has a Part 364 permit that allows it to transport hospital waste. He concluded his presentation by stating that the facility currently employs 40 people and will add 5 individuals as a result of this project and that the creation of this business will contribute to the tax base of the community.

Lou Oliva, the Regional Attorney for the Region 2 office of the Department, stated DEC's appreciation for the opportunity to hear the comments of the public. He explained that the Department staff had determined that the permit may be issued and that a draft permit was available for review.

² This does not include the hundreds of letters in opposition to the project received by the Department after the notice of complete application was published.

Collette Clark explained that when she was without employment, insurance and her daughter was ill, she got care for her at the Flatlands Medical Center - a facility of Mr. Klein's. She expressed her appreciation for his assistance and her belief that he was a good employer who has done a lot.

Mercedes Narcisse, a neighborhood nurse involved in many community organizations, next spoke in opposition to the transfer station. Ms. Narcisse stressed that asthma, caused by major pollution, was a major concern. She mentioned a study by New York University that identified a relationship between the high incidence of asthma and the existence of transfer stations. She spoke in support of an "idle-free New York." Ms. Narcisse also emphasized the proximity of schools and public transportation to the project and the high amount of traffic in the area. She concluded that the proposed transfer station would increase the pollution in the community.

Melba Brown explained that she came to the community appreciating its beauty and dedicated herself to improving the neighborhood. She worked to stop white flight and was happy to see areas cleaned up but felt the siting of a medical waste facility would compromise these positive efforts. She questioned why the applicant had the opportunity to present its environmental engineer, but the community did not.³ Ms. Brown expressed concern over the facility's training of employees, recordkeeping, adherence to OSHA requirements, and noise. She inquired as to who would be responsible for monitoring the facility's compliance with environmental and safety requirements. She concluded by stating that the community was committed to doing whatever it had to do to ensure that the proposal did not come to fruition.

Next, Assemblyman Nick Perry of the 58th Assembly District provided his unequivocal opposition to the facility. Assemblyman Perry explained that the project would alter the character of the community and increase traffic substantially. He also stated that it would increase health risks and that the application should be denied as "out of line" with SEQRA. He stated that DEC had an obligation to perform a full environmental review and that every "conceivable" impact must be examined. The Assemblyman noted that the area was zoned C8-1 to allow for commercial use but that this facility would be located within 400 feet of homes and therefore was not in keeping with present land uses. He further explained that the C8-1 district was comprised typically of businesses such as automotive sales and service - not for medical waste facilities. He stated that the lot was close to the subway station and if there was an accident at the facility many individuals would be exposed to chemicals that would be stored there.

³ To clarify, all individuals who requested an opportunity to speak at this forum were permitted to do so and to my knowledge, other than Mr. Wolf, retained by the applicant, no professional had been offered by any individual or community organization to speak on its behalf.

Assemblyman Perry stated that the decision seemed on track for approval and therefore it was necessary to provide substance in opposition to the proposal. He argued that the amount of hospital waste that was proposed to be received each month was great and the amount of exempt hazardous waste was undefined. He maintained that the existence of a medical waste transfer station in the South Bronx was related to poor health of the neighboring residents. He explained that the transport of mercury was dangerous due to the potential for release causing potentially catastrophic results. Assemblyman Perry stated that the business that currently exists at the site combined with the new facility will result in a traffic level that was not acceptable particularly in light of proximity to a high traffic area. He stated that there was a study that found that wheezing related to asthma increased on days of medical waste transfer.

Assemblyman Perry argued that there was environmental racism in this matter - the intentional siting of a detrimental facility within a poor, minority community. He stated that 93% of landfills and waste facilities were sited in poor African American communities. He criticized the Department staff for issuing a negative declaration on this proposal and stated that a full review was required. The Assemblyman maintained that the if New York City Department of Buildings had jurisdiction over this facility there would be a higher standard applied to the review of the proposal.

New York City Council member Charles Barron commended the speakers for the research they did in their criticisms of the project. He stated that the hearings were an exercise in futility but that no matter what DEC decided this project would not go forward in his neighborhood. The Councilman expressed his concern that there were already bus depots, transfer stations, and other noxious land uses in the community and that this proposal was “racism in rawest sense.” He suggested that the waste be taken somewhere else where there are no residents, no schools, no daycare centers. He stated that it was necessary to organize against this proposal.

Joy Simmons of Councilman Barron’s office spoke about how initially there was not going to be a hearing and that through a coalition of organizations uniting and 1000 letters sent demanding the permit be denied, the hearing was achieved. She urged constituents to contact the Councilman’s office.

State Senator John Sampson stated that this facility wouldn’t happen in wealthier communities. He questioned as to why the facility couldn’t be used for a youth center, school or senior center. Senator Sampson stated that it would be necessary to continue to organize and fight the project and to let the Governor know of the opposition so that the facility doesn’t happen.

Barbara Dominique described a legislative proposal to ban medical waste facilities within 1 mile of any residence. These bills were subsequently revised in the Legislature to require insurance [this is already a requirement under ECL § 27-1513(5)] and certification with respect to zoning compliance. See, S2581 and A4341B annexed to this ruling.

Sylvia Jones described how she was offended by the proposal. She is 76 years old and the project would be a stone's throw from her home and a school.

Ducame Sageese stated that he is the father of 3 children with one son suffering from asthma. He explained that a lot of people have second jobs and couldn't make the hearing. He asked that the permit be denied on behalf of these people and asked why Mr. Klein didn't put it in his backyard.

Steven Kaye - a self-described lifetime resident of Canarsie - said that his home was not a hazardous waste dump. He compared the proposal to Plum Island research station and depicted the high security measures used there that he claimed were ultimately futile in keeping infectious agents sequestered. He asked whether there would be spread of pathogens in the community and if an accident occurred, who would protect the residents.

Reverend Peter Allen said that the closest group to the site were the members of the E. 98th Street Block Association and that some of the members live in close proximity to the proposed facility. He said that communities would be at high risk for disease by pathogens and bacteria. He raised concerns about the spread of tuberculosis and said that an accident is something not planned for - there could be no guarantees. He is worried about all the schools, nursing homes, daycare centers and other similar facilities whose occupants could be affected by a disease outbreak.

Menachem Lipkind described himself as an engineer who performs cleanups at hazardous waste sites. He raised concerns about the building being composed of tin and right on the sidewalk. He expressed questions about the lack of a loading dock in the building and the possibility of a truck out of control that would not be stopped by such a structure. Mr. Lipkind worries that if a fire occurred, a toxic cloud could result. He acknowledged that this location was in a commercial zone but stressed that it was also right across the street from a residential area.

Cyril Parris, a retired DEC environmental conservation officer, spoke about the medical waste violations at hospitals that he observed while performing his duties.

Emily James is a real estate broker on Avenue L and is selling "a better quality of life." She is looking for benches, lights, flowers and not garbage. She said that this project would put her out of business.

Issues Conference

The issues conference was held on January 27, 2009 at the Department's Region 2 Annex in Long Island City. The applicant was represented by Jeffrey E. Baker, Esq. of Young, Sommer LLC. The Department staff was represented by Regional Attorney Lou Oliva. The office of Assemblyman Nick Perry was represented by his Chief of Staff and Counsel Barbara Pierre-Louis (Dominique), Esq. The office of New York City Council Member Charles

Barron was represented by Chief of Staff Joy Simmons. South Canarsie Civic Association (SCCA) was represented by Ms. Maryann Sallustro and Ms. Melba Brown.

The notice of public hearing and issues conference provided that petitions for party status were due in the Office of Hearings and Mediation Services by January 8, 2009. SCCA filed its petition for *amicus* status on January 7, 2009, Council Member Barron filed his petition for full party status on January 8, 2009, and Assemblyman Perry filed his petition for full party status on January 15, 2009.

Assemblyman Perry submitted an affirmation in support of his petition to file late stating that he was not notified of the public hearing until December 22, 2008 despite the fact that he had submitted comments previously against the project and therefore was a person of interest who should have received earlier notice. I heard argument from the participants regarding the late filed petition and conclude that there was no prejudice to the applicant or Department in accepting the Assemblyman's petition as there was no delay in proceeding with the issues conference caused by the late filing. Therefore, I am considering the Assemblyman's petition in this ruling. *See, Matter of Application of Keyspan Energy*, Part 624 Issues Ruling (April 18, 2001).

Because the applicant stated its concurrence with the draft permit conditions proposed by the Department staff, the only potential issues for adjudication are those proposed by the intervenors. 6 NYCRR § 624.4(c)(1)(iii).

After we concluded the issues conference on January 27, 2009, we convened at the facility location. We walked around the immediate area of the facility on Farragut Road and alongside the applicant's structure from where the neighboring food distributors, Jetro (across the street on Farragut Road) and Kemach (on E. 100th Street - on dead end lane) can be seen as well as the adjacent subway station and NYC Transit train yard. East 100th Street does not go through here - the facility is on a dead end street that ends on the north side of Farragut Road across from the site. As one walks from the sidewalk on Farragut Road south through the dead end lane on the west side of the building, this lane ends at a fence that separates the subway tracks and train yard from the businesses that exist at this location. *See*, pp. 10-11 of CMW powerpoint presentation that Mr. Wolf presented at legislative hearing, attached hereto.⁴ Mr. Klein opened up the doors to the facility so that we could see the interior of the building that is proposed to be converted for application's purposes. After we concluded the walk and view of the building's interior, Mr. Klein drove Mr. Urda, Ms. Sallustro, Mr. Baker, Ms. Simmons, Ms. Pierre-Louis, and me on a tour of the vicinity. We traveled on Foster Avenue where we viewed several large commercial facilities such as United Parcel Service (UPS) and an electrical supply distributor; on Avenue D towards Linden Boulevard; and on Rockaway Parkway, a very busy road that goes through an active commercial area with shops and restaurants. A portion of this tour was

⁴ I added these page numbers to the presentation that was e-mailed to me by Mr. Baker at my request.

devoted to going through the residential neighborhoods that lie to the south of the train yard that is directly south of the proposed facility. We passed several schools and other community institutions such as the police and fire departments.

Attached to this ruling is a copy of the issues conference exhibit list. The transcript of the issues conference was received in the OHMS on February 17, 2009. On February 20, 2009, Assemblyman Perry's office faxed a letter to my office requesting an additional nine days (until March 6, 2009) to file its post-issues conference filing due to difficulties in obtaining the transcript. This request was opposed by Mr. Baker. Because the transcript was received by my office approximately one week later than originally projected and Ms. Pierre-Louis had difficulties in obtaining a copy of the transcript, I decided to grant the short extension. On March 6, 2009, by overnight mail, I received a letter dated February 27, 2009 from Ms. Sallustro on behalf of SCCA. On that same date, I received by electronic mail, filings by Department staff; the applicant; and a combined filing by the three intervenors - Assemblyman Perry, Council member Barron, and SCCA. On March 9, 2009, Mr. Baker requested permission to file a brief reply to the intervenors to address primarily their offer of witnesses in their post-issues conference filing. I granted the request and upon receipt of this letter, the issues conference record closed.

SCCA's Petition for *Amicus* Status

SCCA's petition requested *amicus* status in a letter submitted by Mary Anne Sallustro, President of SCCA. However, it did not contain any information in support of that request as required by 6 NYCRR § 624.5(b). SCCA failed to identify the group's environmental interest; identify any interest relating to statutes administered by the department relevant to the project; or identify the precise grounds for opposition. 6 NYCRR §§ 624.5(b)(1)(ii), (iii), (v). Moreover, the petition failed to set forth "the nature of the legal or policy issue(s) to be briefed which meets the criteria of section 624.4(c) of this Part; and provide a statement explaining why the proposed party is in a special position with respect to that issue." 6 NYCRR §§ 624.5(c)(i), (ii).

Mr. Baker, on behalf of the applicant, objected to SCCA's participation on these grounds. TR 29-30. While noting deficiencies, Mr. Oliva, on behalf of staff, stated staff did not object to SCCA's participation as an *amicus*. Issues Conference Transcript (TR) 30-31.

At the issues conference, Ms. Sallustro provided a list of items that she stated SCCA was concerned with such as: cumulative effects; a Uniform Land Use Review Procedure (ULURP) hearing regarding 1145 Rockaway Avenue and Avenue D; the Canarsie terminal market; narcotics unit south; the building of a mall on Avenue D and Foster Avenue; trucks traveling residential blocks; actions to minimize noise on quiet tree-lined streets; illegal parking; air monitoring plan; food plants; leakage emitted from trucks; dangerous truck maneuvers; historic character of Canarsie; and re-zoning. TR 24-29.

The separate hand-written letters and attachments that Ms. Sallustro sent to me after the issues conference echo Ms. Sallustro's statements and other submissions - they are comprised of a list of concerns related to the community such as zoning, traffic, and certain procedural matters related to this process.

Ms. Simmons supported SCCA's application. TR 31. Ms. Pierre-Louis stated that SCCA had a grasp of community life and would be in a good position to explain how it would be affected by this facility. TR 31-32.

Pursuant to § 624.5(d)(2), *amicus* status will be granted where the petitioner has filed an acceptable petition, has identified a legal or policy issue which needs to be resolved by the hearing, and has demonstrated sufficient interest in the resolution of such issue and through expertise, special knowledge or unique perspective may contribute materially to the record.

There is no question that SCCA has an interest in this application and no one contested the environmental interest of this intervenor or any other. Moreover, it is apparent that Ms. Sallustro and Ms. Brown have an extensive knowledge of their community and its characteristics. However, SCCA's petition failed to meet any of the other standards contained in Part 624 - the identification of a legal or policy issue requiring resolution and an acceptable petition. As Mr. Baker noted, some leeway should be given when petitioners are represented *pro se*. But SCCA's petition did not satisfy the regulatory requirements. And, Ms. Sallustro's oral presentation and other submissions are only a list of concerns about various developments in the community without any indication how SCCA could provide information to support a nexus between these concerns and the proposal or to demonstrate that the application was faulty in addressing any of them. While SCCA also joined in the collective post-issues conference memorandum submitted with Assemblyman Perry and Council member Barron, there is no specific identification of SCCA's role within this submission. Given the dearth of any articulated issue put forward by SCCA, I am compelled to deny SCCA's application.

Petitions of City Council member Barron and Assemblyman Nick Perry

I will begin with the issues raised by Councilman Barron and to the extent that there is overlap with Assemblyman Perry's petition, I will address them simultaneously, followed by the matters raised exclusively in the Assemblyman's petition.

Community overburdened with noxious land uses

The Councilman states that this area is already overburdened with environmentally hazardous and undesirable facilities that threaten the well being of the community. Ms. Simmons introduced the Councilman's office as representing the 42nd Council District comprised of East New York, Brownsville, East Flatbush, Canarsie, and Spring Creek. TR 41. The specific offensive land uses that she identified were the compost waste site (Spring Creek), the landfill

near Starrett City (closed), and the bus depots that are scattered throughout East New York - specifically in the Fountain Avenue area. TR 41-42.

Ms. Simmons characterized the community that immediately surrounds the facility as primarily residential. TR 42.

In response, Mr. Baker described these complaints as ones relating to SEQRA. He said that pursuant to 6 NYCRR § 624.4(c)(6)(i)(a), once the staff has issued a negative declaration, the review by the administrative law judge (ALJ) is constrained with respect to SEQRA concerns. He explained that pursuant to this regulation, only if the ALJ finds the staff's negative declaration irrational or otherwise affected by an error of law can it be remanded to staff for a reappraisal of the determination of significance. Mr. Baker argued that the record of this case does not lend itself to a finding that the negative declaration was irrational or violated any procedure nor was there any error of law on the part of the staff's review. He maintained that there was a variety of land uses in the Councilman's district. He explained that the scale of this proposal was in keeping with the neighborhood as the activities would all be maintained inside the building and that smaller vehicles would be bringing the materials to be contained in a larger truck inside. Mr. Baker emphasized that on two sides of the facility there were already activities that employed trucks and that the railyard separates the facility from the rest of the community. TR 42-44.

Mr. Oliva agreed with Mr. Baker's comments that this matter was not an adjudicable issue pursuant to 6 NYCRR § 624.4(c) and that there was no basis to reject the staff's negative declaration. TR 45.

Ms. Sallustro provided another list of concerns, facilities, and institutions in the surrounding area such as the New York City Department of Environmental Protection (DEP) storage facility on Avenue D and Remsen Avenue; a combined sewer overflow plant at Ralph Avenue and Flatlands Avenue; asphalt and salt storage; bus depot on Flatlands and Pennsylvania Avenue; cell towers at the Brooklyn terminal market; Office of Mental Retardation and Developmental Disabilities (OMRDD) group homes; homeless shelters; senior centers; nursing homes; and the expansion of a shopping mall. Ms. Sallustro also emphasized that there is a large amount of truck traffic already in the vicinity of the project. TR 45-47.

Without any specific citations, Ms. Pierre-Louis pointed to the precedent of DEC decisions that had determined that the staff's SEQRA review was irrational requiring a second look. She argued that it would be irrational to site this facility less than 1/4 mile from residential areas.

Ruling

Section 624.4(c)(1) of 6 NYCRR sets forth the standards for an adjudicable issue: (i) it relates to a dispute between the Department staff and the applicant concerning a substantial term

or condition of the proposed permit; (ii) it relates to a matter cited by the staff as a basis to deny the permit; or (iii) is raised by an intervenor and is both substantive and significant. Section 624.4(c)(2) defines substantive as “. . . sufficient doubt about the applicant’s ability to meet statutory or regulatory criteria applicable to the project . . .” Section 624.4(c)(3) defines significant as having “. . . the potential to result in the denial of a permit, a major modification to the . . . project or the imposition of significant permit conditions. . . .”

As Mr. Baker explained in his statement of position regarding the SEQRA matters, § 624.4(6)(i)(a) provides:

As part of the issues ruling, the ALJ may review a determination by staff to not require the preparation of an environmental impact statement. Where the ALJ finds that the determination was irrational or otherwise affected by an error of law, the determination must be remanded to staff with instructions for a redetermination. In all other cases, the ALJ will not disturb the staff’s determination.

Councilman Barron’s petition regarding this proposed issue does not meet the requirements set forth in Part 624. My understanding of this proposed issue is that the Councilman finds that the cumulative effect of the proposed facility in combination with the facilities identified will have a significant negative impact on the community. While the entities identified by Ms. Simmons at the issues conference exist in the district overseen by the Councilman, they are not in the vicinity of the proposed project. The facilities that Ms. Simmons mentioned, the closed landfill on Fountain Avenue and the Spring Creek compost facility are approximately 2 miles from the facility. There is also the Pennsylvania Avenue Landfill - also closed, as well as the 26th Ward sewage treatment facility and 26th Ward combined sewage overflow facility mentioned by other participants - these are also about 2 miles from the facility. The bus depots are apparently located in East New York - a different neighborhood. Moreover, the facilities that were listed - presumably because the Councilman believes that the CMW facility would have a negative impact on them - such as the high school, the senior citizen center, and the food market, are not proximate to the site.

In addition, even assuming that these described noxious activities or presumably sensitive institutions or residences were in closer proximity, the petition fails to identify specifically what impacts would result or what proof will be offered at a hearing to support a conclusion that the cumulative impact of the proposal combined with these existing activities would produce a significant negative environmental impact.

In *Matter of American Marine Rail, LLC*, ALJ Issues Ruling, (August 25, 2000), community groups raised similar claims with respect to a proposed marine/rail solid waste

transfer station proposed for the Hunt's Point section of the South Bronx. In that issues ruling, I concluded that the intervenors were correct in their arguments that the Department staff had erroneously determined that an EIS was not required. However, in that case, in addition to the scale and nature of the facility being completely different from the matter before us, the petitioners were able to identify the potential impacts that existing facilities - other transfer stations - that were in close proximity to the proposed site would have in combination with the proposed project. For example, the Bronx Borough President's office provided information showing that 21 other waste transfer facilities were near the proposed project. In addition, a tour of the vicinity shortly confirmed the clustering of the facilities in the area as well as the blatant permit violations (on-street queuing, idling, discharge of garbage on the streets, open doors, etc.) that could be readily seen. Based upon these offers as well as other issues with respect to the staff's environmental review, I made a determination that an EIS was required.^{5, 6}

Based upon the above discussion and the record before me, I conclude that there is no basis to find an adjudicable issue with respect to the alleged existence of noxious and sensitive land uses proximate to the proposed facility that will result in environmentally significant cumulative impacts or would be affected by significant negative impacts from the project, respectively. Nor do I find that the staff's negative declaration is erroneous or irrational.

Zoning

Both Councilman Barron and Assemblyman Perry raised the matter of zoning with respect to this application. They contend that although the property is within the C8-1 zone, this is meant for commercial activities such as car dealerships and not medical waste transfer stations. Both representatives describe the area as primarily residential and say that the siting of this facility will alter the character of the community in a negative fashion.

Pursuant to 6 NYCRR §§ 617.7(c)(1)(iv) and (v), "the creation of a material conflict with a community's current plans or goals as officially approved or adopted;" or "the impairment of the character of quality . . . of existing community or neighborhood character;" are criteria that if found should result in a finding of significant adverse environmental impact and the requirement of an EIS. The information provided during these proceedings do not indicate a conflict with the

⁵ Due to the applicant's decision not to move forward with this project, no EIS was completed.

⁶ Several commenters at the legislative hearing cited to a New York University study that supposedly targeted a hospital waste transfer station as the cause of a high incidence of asthma in the South Bronx community. Although no participant in this process has provided me with a copy of this study, my research on the Internet reveals that a 2006 joint study by the Wagner Graduate School of Public Service and the Institute for Civil Infrastructure Systems found high asthma rates in South Bronx communities that neighbored major highways and a concentration of industrial facilities including waste transfer stations.

official plan for this area because at this time the area is zoned commercial. While the petitioners advocated that various New York City officials such as NYC Buildings Borough Commissioner Derek Lee and Ellen Ryan of City Planning claimed that a hospital waste transfer station would not be permitted in such a zone, there was no support offered for that proposition during the issues conference.⁷ TR 55-56.

Under the City zoning requirements, Mr. Baker contended that a medical waste facility was specifically excluded from the solid waste operations that are to be sited only in M-1 areas. Mr. Baker argued that the residences that are in this zone are non-conforming uses and that the area was promoted by the City for commercial uses and thus, the activity proposed is in accordance with the zoning plan.

District leader Melba Brown and Ms. Mercedes Narcisse of SCCA contended that the facility was not in line with the community character and would have severe impacts on the existing residences. Mr. Baker responded that New York City had made the decision to zone the area C8-1 and that trucks already leave from this location and collect hospital waste and take it to existing transfer stations in the Bronx.

In response to questions from Ms. Simmons with respect to the purpose of the zoning queries in the environmental assessment form (EAF), Mr. Oliva explained that the Department staff does ask for information on zoning as part of an application process. However, only in cases where it is clear that a project would not conform with zoning would staff determine not to further process the application. TR 47-49.

Ms. Simmons offered Ms. Melba Brown, in her capacity as district leader of the community, as Councilman Barron's witness on this subject.

The post-issues conference memorandum submitted collectively by Assemblyman Perry, Council member Barron, and SCCA (hereinafter referred to as petitioners' brief [Pet. Br.]) reiterates the arguments made at the issues conference regarding this proposed issue. The memorandum argues that the proposed project would be a major change in use and that the facility is "surrounded" by 1 and 2 family residential homes in addition to the schools, day care center, churches and senior center. Pet. Br., p. 3.

Ruling

As explained in my memorandum of January 30, 2009, as set forth in the Commissioner's Interim Decision in *Matter of New York City Department of Sanitation (Spring Creek Yard Waste*

⁷ On March 18, 2009, Regional Attorney Louis Oliva e-mailed to me a letter from Mr. Lee to Assemblyman Perry dated March 4, 2009 that states that waste transfer stations of any type are not permitted in a C8-1 district. This letter was received after the close of the record in this matter.

Composting Facility) (June 14, 2006), the Department lacks the authority under the ECL to adjudicate legal issues concerning compliance with local government zoning, and any attempt to do so would be an arrogation of the Department's jurisdiction (*see Matter of Town of Poughkeepsie v. Flacke*, 84 AD2d 1, 5-6 [2d Dept 1981], *lv denied* 57 NY2d 602 [1982]; *see also Matter of Hingston v. New York State Dept. of Envtl. Conservation*, 202 AD2d 877, 878-879 [3d Dept], *lv denied* 84 NY2d 809 [1994]). Instead, issues concerning consistency with local zoning must be decided by the local agency with appropriate jurisdiction, subject to judicial review if necessary (*see Matter of 4-C's Develop. Corp.*, Interim Decision of the Commissioner, [May 1, 1996], at 3). Ms. Pierre-Louis also made statements at the issues conference concurring that “[t]he ALJ does not have jurisdiction to consider the zoning issue.” TR 48. An ALJ can consider zoning as part of a proposed issue with respect to community character but cannot adjudicate a zoning dispute. Therefore, apart from the lateness of the Borough Commissioner’s letter submitted by Community Board 18 to the regional staff and from the regional staff to me on March 18, 2009, Mr. Lee’s interpretation of the law is in contrast to that of staff and the applicant, it is not a matter which I can decide.

The on-line NYC Zoning Handbook describes C8-1 zoning uses as automotive and other heavy commercial services. “C8 districts form a bridge between commercial and manufacturing uses, and are appropriate for heavy uses which are land consuming but not labor intensive.” Housing is specifically prohibited in the C8 zone according to this source. http://www.tenant.net/Other_Laws/zoning/c8.html.

The package of materials that Ms. Sallustro sent to me with a cover memo dated February 14, 2009, contains a letter from Council member Tony Avella dated December 22, 2008 as well as several maps that indicate a current proposal to re-zone portions of Canarsie. It appears that the proposal, if enacted by the City, would alter the current zoning of the facility from C8-1 to R4-1. However, this proposal does not reflect the current status of the relevant zoning.

With respect to the community character, I found, based on our tour of the area, that the commercial use proposed by the applicant is not at variance with the uses that currently exist in this area. As Mr. Baker noted, the facility already has trucks that depart regularly to collect hospital waste. In addition, the immediate neighbors of the facility consist of two large food distribution facilities, a subway station, and a large train yard that separates the facility from the residential community that was identified by the intervenors as one of major concern. In addition, during the first part of our tour, we observed the large commercial facilities on Foster Avenue such as the UPS site. While there is no question that there are residences within a quarter mile of the facility, including apparently a home within 400 feet, no information provided leads me to find that the establishment of the applicant’s facility would qualitatively change the character of the community. Accordingly, I do not find this proposed issue to be a proper subject for adjudication nor do I find that the staff’s determination to issue a negative declaration was irrational or in error.

Property Values

In his petition, NYC Council member Charles Barron maintains that the establishment of this business will threaten property values. Ms. Simmons explained that the impact of the project on economic development could negatively impact both mental and physical well being of the populace. TR 61-62. She stated that the Council member planned to submit statistical evidence of how the surrounding environment will be affected and initially offered that the Councilman would be the offered expert on these issues. TR 62, 66. Shortly afterwards, Ms. Simmons retracted this expert offer but did not provide a replacement other than to indicate that one would be provided. TR 130-131.⁸

In response, Mr. Baker argued that the Councilman had failed to make an adequate offer of proof and that this process did not allow for “place card holders.” TR 62-63. He emphasized that the petition and issues conference were the places to step forward with offers. In addition, he explained that property values were not a relevant subject for this process and that the negative declaration was not irrational. TR 63.

Mr. Oliva concurred with Mr. Baker that property values was not an appropriate issue for adjudication and was not linked to any statutory or regulatory criteria. He said that even SEQRA does not examine property values. TR 63.

Ms. Sallustro stated her concerns regarding impacts to house sales, daycare centers, new homes, and residential quiet blocks. TR 63-64.

Ruling

As set forth in the Interim Decision in *Matter of William E. Dailey* (May 14, 1992), the purpose of review under SEQRA is to avoid or mitigate adverse environmental not economic impacts. Economic values are only considered when after an EIS is prepared, despite efforts to mitigate environmental harm, the lead agency determines that there will be adverse environmental impacts resulting from the project. At that point, a balancing must be performed between the social and economic values of the proposed project and the environmental effects to determine whether even with the negative environmental impacts, the public welfare is served by the project. In *Matter of Red Wing Properties, Inc.*, Interim Decision (January 20, 1989) Commissioner Jorling explained that these considerations are only scrutinized in the SEQRA process where adverse environmental impacts have not been completely mitigated or avoided. “In those cases, lead agencies are permitted to consider economic factors to determine whether anything less than complete mitigation or avoidance is justified. This is the essence of the balancing which is required by the findings provision of SEQRA (ECL § 8-0109[8]).” *Id.*

⁸ In the petitioners’ post-issues conference memorandum, there was no further offer of proof or identification of witnesses with respect to this specific issue.

In *Red Wing*, the Commissioner also emphasized that maintenance of property values is principally a local concern which is addressed, among other ways, through zoning requirements. And as discussed above, SEQRA does not change the basic jurisdiction among involved agencies and, accordingly, where potential property value changes are attributable to factors which cannot be addressed by established environmental mitigation techniques, any decision to further restrict the activity that may be the cause of such decline is a local one and should be exercised by the local jurisdiction rather than DEC. Citing the Court of Appeals decision in *Frew Run Gravel Products, Inc. v. Town of Carroll*, 71 NY2d 126 (1987), Commissioner Jorling made clear that any relief in these circumstances should be addressed by the local jurisdiction rather than by DEC through the SEQRA process.

Because the staff has found that this project will not have any significant negative environmental impacts and accordingly did not require an EIS, there is no balancing of socio-economic versus environmental effects required and property values, by themselves, are not an appropriate subject for this forum.

Finally, as required by 6 NYCRR § 624.5(b)(2)(ii), petitions for full party status must “present an offer of proof specifying the witness(es), the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect to that issue.” It is not sufficient to make conclusory arguments regarding a particular concern combined with an offer to identify an expert in the future. As I stated in my issues ruling in *Matter of AMR*, “. . . the time to set forth objections to the project and the technical support for these was in the petitions and at the issues conference.”

Based upon the foregoing, I do not find that property values is an adjudicable issue.

Truck Traffic

Council member Barron describes all the streets leading to the proposed facility as densely populated, narrow residential streets. He further states that the increased truck traffic from the CMW facility will bring an unacceptable level of pollution and congestion that will adversely affect air quality and health. Assemblyman Perry also states in his petition that the proposed site is already marred by high traffic and that the operation of 17 trucks to and from the site will substantially increase the traffic level. Ms. Pierre-Louis provided “[w]e have polled all the trucking industries from a mile of that area, and none of them have more than twelve trucks that travel to that area per day. You’re proposing to have 30 trucks which is a substantial increase which is about three times that.” TR 51. She concludes that the addition of this facility represents a substantial increase in the number of trucks. *Id.* In response to my question to clarify the numbers, Ms. Pierre-Louis reiterated that these facilities claim to have no more than 12 truck trips a day - total. *Id.* She also maintained that because there are residences, a fire station, and a police station near the facility, the heightened level of traffic would potentially add to the noise and accident levels. TR 53. She explained that New York City Department of Transportation (NYC DOT) was preparing a survey regarding truck traffic in the Rockaway

Parkway area so that the intervenors could determine the amount of “diesel fumes” that are generated and how they would increase with the addition of the proposed facility. TR 67. She suggested that the study would be completed in approximately a week from the issues conference.

Mr. Baker responded that traffic was a SEQRA issue and that the applicant had completed its analysis which was part of the permit application package. *See*, Appendices J (traffic analysis) and K (traffic routing maps). He emphasized that because the analysis revealed that the impact threshold would be below that established by the *City Environmental Quality Review (CEQR) Technical Manual* for further examination, there was no reason to address this matter in a hearing. TR 69. He explained that there would be a maximum of 17 truck loads per day.

Mr. Wolf, the applicant’s consultant, reiterated that the study the applicant performed was based upon 17 round trips - according to the amount of weight that each truck could hold. TR 69-70. He further explained that of these trucks, two would be semi-trailers and the remainder would be small cargo vans and box trucks. TR 70.

Mr. Oliva pointed to the information provided at p. 4-9 of the application materials as providing sufficient information on this subject. He stated that staff did not believe a permit condition limiting truck traffic was necessary. TR 73-74. In the staff’s post-issues conference filing, Mr. Oliva reiterates that the staff reviewed the engineering report of the applicant, pp. 4-9 - 4-10 and Appendices J, K, and N, and determined based upon a comparison with the thresholds in the *CEQR Technical Manual* that CMW’s project was below the impact levels demanding a more extensive evaluation.

While initially the applicant was amenable to a limit of 30 trucks per day, after a brief recess, Mr. Baker stated that his client was not prepared for an “arbitrary” permit condition and that the text of the permit application addressed 40 vehicle trips. TR 71-72. He maintained that the CEQR manual provided that up to 50 vehicle trips at a peak hour was below the triggering threshold for further review. He argued that since the project would largely be based on the use of small trucks and vans and that there was a complete absence of proof regarding any errors in the applicant’s traffic analysis, there was no reason to pursue this proposed issue further.

Ms. Pierre-Louis added that the traffic study was insufficient because it only considered the truck route and didn’t address the surrounding area. She stated that as an alternative there could be a limit set for the number of trucks to limit the environmental impact on the neighborhood. TR 74-75.

I inquired as to the number of employee vehicles and parking. The applicant responded that most of the employees use public transportation with some using their own cars. There is parking in the yard of the facility and also on the street. Currently the facility employs 2 or 3 individuals and will be adding 4 or 5 if the facility is permitted. TR 75-76.

Mr. Wolf stated that there would be designated parking for employees and trucks not in use. He explained that this parking is located in gated areas on the east and south sides of the facility. TR 76-77. Those areas will allow for employee parking as well as for trucks not in use. There would also be parking on the street and on the north and west sides of the facility. There would always be one tractor trailer in the facility that would back in via Farragut Road. Box trucks would queue, when necessary, on the dead end street to the west of the building and the facility would do its best to have trucks in the parking lot. TR 76-78. Mr. Baker noted that this part of the street is a dead end with only one other business on it. TR 78.

Mr. Baker reiterated CMW's viewpoint that traffic was not an issue - there was no identification of a regulatory standard that the applicant was not meeting and no offers of proof to support the claims of the intervenors. Moreover, he stated that there have been no complaints asserted by the specific nearby businesses. TR 82-83.

Ruling

Traffic is a potential impact that is routinely analyzed by lead agencies as part of their SEQRA review. Although, as noted by DEC Environmental Analyst Michelle Moore, the Department does not regulate traffic or have in-house expertise in this subject, when it serves as a lead agency it must determine whether traffic resulting from a given proposal will result in significant impacts. TR 90-91. *See, In the Matter of William E. Dailey*, Interim Decision (June 20, 1995). Reasonably, the Department staff opted to use New York City's *CEQR Technical Manual* as its guide in assessing the applicant's traffic analysis. TR 88; Staff Br., p. 2. *See also, CEQR Technical Manual* at pp. 3O-1-2 and the negative declaration, IC Ex. 2B.

The CEQR manual provides detailed traffic studies may not be necessary with respect to "low- or low- to moderate-density development in particular sections of the City." *CEQR Technical Manual*, 3O-1. This guidance contains development thresholds in order to set a point at which a detailed examination is required. The manual explains that densities that result in fewer than 50 peak hour vehicle trips are unlikely to produce significant impacts requiring further analysis. However, the same manual provides that in areas that are congested and for actions that generate a significant volume of truck traffic significant traffic impacts may be found for fewer than 50 peak hour trips. Thus, a light waste collection truck would be considered to be equivalent to 1.5 passenger cars and a heavy waste transfer trailer would be equivalent to 2.0 passenger cars. *Supra*, at p. 3O-2. However, based upon the trucking schedule table provided in Appendix J to the application package, at any one time the maximum number of trucks to arrive or depart from the facility is 2. Even using a multiplier of 2.0 for the large trucks, that still would only be 4 trucks during any period. Therefore, based upon these facts and the CEQR manual provisions, a further in depth traffic study would not be required because significant impacts would not result.

The intervenors described a traffic study being performed by NYC DOT and I welcomed the opportunity to review any information that would shed light on the proposed issues of

concern. However, no mention of this study was made in the post-issues conference filings by the intervenors and it was not produced for me.

In reviewing this permit application, the Department staff performs two important roles - that of ensuring compliance with the laws and regulations of which DEC has jurisdiction such as Article 27 of the ECL and Part 360 of 6 NYCRR and that of lead agency to perform a SEQRA review. With respect to the latter, as explained by Mr. Oliva in the staff post-issues conference filing, the Department uses its expertise and that of affiliated agencies to review the various aspects of any given proposal - noise, air quality, traffic, community character, visual impacts, etc. In the course of its review, it may go back and forth with the applicant many times to obtain more information and clarify details.

It is the burden of the applicant to provide the necessary technical information for DEC's staff to review. Once the Department determines that an application is complete - either after a DEIS is completed or after a negative declaration is issued, if the project is deemed major and there is significant public interest such as in this case, the public will have the opportunity to provide comment and possibly participate in a hearing. 6 NYCRR §§ 621.7, 621.8. If the DEC staff determines that the application may be approved, it will be up to the intervenors to produce information that will shift back to the applicant the burden of answering any identified failings of the application such as missing information or that which shows the project will not meet regulatory standards. See, <http://www.dec.ny.gov/permits/6230.html>; <http://www.dec.ny.gov/permits/6189.html>; 6 NYCRR § 624.4(c)(4); TR 90-91. As decided in the case cited by staff in its post-issues conference filing, *Matter of Citizens for Clean Air v. DEC*, 135 AD2d 256-260-261 (3d Dep't 1988), where the staff has concluded that an application is approvable, the burden of persuasion shifts to the petitioners to provide clear explanations for how it is lacking and how they will demonstrate those weaknesses in a hearing.

It is challenging for citizens to muster the resources needed to provide the technical and legal expertise that may be required to demonstrate weaknesses with a given application. Unlike proceedings before the Public Service Commission pursuant to the expired Article X of the Public Service Law, there are no funds that the Department can distribute to participants to use to support these efforts. However, that does not alter the requirements contained in 6 NYCRR §§ 624.4(c) and 624.5 with respect to the findings necessary for adjudicable issues. Conclusory concerns, no matter how heartfelt, are not tantamount to a showing of proof that indicates a project proposal does not meet regulatory standards or contains a glaring omission. Assertions made by potential parties cannot be conclusory or speculative "but must be supported by a sound factual and/or scientific foundation." *Matter of Bonded Concrete, Inc.*, Interim Decision of the Commissioner, (June 4, 1990), at 2.

I have heard comment in these proceedings that there has not been an "objective" review of CMW's application. TR 88. In the petitioners' post-issues conference memorandum, the statement is made that DEC staff stated at the issues conference that it made no independent review of the environmental impacts on the community. Pet. Br., pp. 10. Neither of these

statements are accurate. The Departments staff is a professional one that is made up of engineers, attorneys, planners, and scientists. Their applied expertise is the objective review that has been brought to bear in this matter. Their analysis and findings have been put forward in their negative declaration, the statements of counsel at the issues and conference, and in their post-issues conference filing. It appears that the intervenors misunderstood Mr. Oliva's statement at the issues conference in response to questions with respect to the review of the local area. TR 100. As Mr. Oliva explained, the essence of the SEQRA process is to look at the local impacts and that is what staff did.

The intervenors were free to come forward with their experts to dispute the findings of staff and the applicant's engineers but did not. The intervenors have produced the names of two individuals in their post-issues conference memorandum that they seek to offer as expert witnesses. These are Monona Rossol, a certified industrial hygienist, and Joel Kupferman, an environmental attorney. Mr. Baker objected to the late identification of these individuals in a letter dated March 9, 2009. I agree that this offering is improper at this stage. As stated by Commissioner Grannis in his November 17, 2008 decision in *Matter of Buffalo Crushed Stone, Inc.*, “. . . the issues conference is not the point where a potential party should be deciding what experts or qualified witnesses it will need to substantiate the allegations that it has made in its petition. The potential parties' offer of proof should be based upon the opinions of experts or other qualified witnesses already identified. [citations omitted].”

By identifying these individuals after the issues conference, the petitioners have denied the applicant and staff a full opportunity to address their credentials and the relevance of their proposed testimony. Potential parties must raise their issues and make their offers of proof in a timely fashion and in accordance with the requirements of 6 NYCRR Part 624 for such issues to be considered. *See, Matter of Sullivan County Division of Solid Waste*, Interim Decision, (March 28, 2008). More importantly, as noted by Mr. Baker, the intervenors have presented these individuals' names without any clear identification of what they would contribute to this process. They do not specify any issue that either of these individuals would address. Without any disrespect to the credentials of Ms. Rossol, I do not see how her expertise relates to this application. And while Mr. Kupferman's experience as an environmental attorney could aid in putting forward arguments, he is not identified as a professional with experience in the substantive areas of concern to the petitioners such as traffic, noise, or safe handling of RMW.

While I do not find traffic to be an issue requiring adjudication, I direct staff to include several permit conditions in the final permit to ensure that the traffic generated by this facility does not become a burden on the community. 6 NYCRR § 360-1.11(a). There should be a maximum number of 30-35 (round trip) truck trips per day permitted. While the applicant states that the volume of waste is what will determine the number of vehicles and that it is illogical to bring in partially loaded trucks, there are no guarantees that circumstances would not arise that would result in many more partially loaded vehicles. While I found that the facility is located in an area of distribution centers and where trucks are typically found, given the busy nature of the streets and the fact that there are some residences in the area, I do think it would be wise to limit

the volume of truck traffic. I also suggest that there be a condition absolutely prohibiting any truck idling. New York State law prohibits idling over 5 minutes and in New York City, idling is limited to three minutes. 6 NYCRR 217-3.2; NYC Administrative Code §§ 24-163. Finally, the draft permit would allow the facility to operate from 7:00 a.m. to 9:00 p.m. on weekdays. That is a long day and gets into the hours of the evening when people expect commercial activities to lessen. I direct that the hours be curtailed two hours and that the facility close at 7:00 p.m. nightly.

Food contamination

In his petition, Council member Barron stated that there are two food entities near the proposed site and the proximity of the project would be detrimental due to the possibility of food contamination. As noted above and also identified by Ms. Simmons, the two businesses are Jetro across Farragut Road from the CMW facility and Kemach which is on 100th Street to the west of CMW. TR 78-79, 82. See also, Exs. 10 and 11. To my knowledge, neither entity provided comments during the public comment period - either written or oral - regarding the proposed facility.⁹

Ruling

As explained by the applicant's representatives at the legislative hearing and issues conference and in the application, the materials coming to the facility will come pre-packaged and will be directly placed into a waiting tractor trailer. There will be no processing of these materials or re-packaging. In addition, all handling of the containers will take place in a closed facility. As noted by Mr. Baker, the Councilman did not identify any regulatory standard with which the applicant would not be complying. TR 82-83. Mr. Oliva concluded this discussion by stating that this would be considered an operational matter but did not rise to a level of substantive and significant because the application was compliant with the Part 360 regulations. TR 83.

Ms. Simmons did not identify any specific information to base these concerns upon nor did she put forward any expert that would be available to testify at a hearing and identify the potential for the alleged contamination.

⁹ On March 16, 2009, I received from Council member Charles Barron's office a faxed copy of a letter from Jetro Cash & Carry CEO Stanley Fleishman to Mr. Barron dated February 10, 2009 in which Mr. Fleishman states concerns regarding the "danger of medical infectious waste and radioactive waste escaping into the atmosphere and 'landing' on our food . . ." In response, Mr. Baker objected to the late submission of the letter in a letter e-mailed to me on March 18, 2009 and disputed its contentions.

With respect to the letter I received from Mr. Fleishman, as noted by Mr. Baker, it was sent well after the close of the issues conference record. Moreover, Mr. Fleishman does not provide any rationale for further environmental review or permit denial.

Accordingly, because this proposed matter is neither substantive nor significant, I do not find it appropriate for adjudication.

Unacceptable risk

Council member Barron maintains in his petition that there is reason to believe that the regulations will not be adhered to at this facility. At the issues conference, Ms. Simmons added that the “inconsistencies . . . within the application . . . and current advertising for medical waste being transferred . . . shows that they are not complying. As a matter of fact, they are doing something that is illegal and unethical.” TR 83.

Mr. Baker responded by stating that the facility is currently a licensed regulated Part 364 hauler of RMW and has been there for some time operating that business. He further stated that there was no evidence that they were not in compliance with the applicable regulations vis a vis that enterprise nor was there information to indicate there would not be continuing compliance. TR 85.

In response to Ms. Simmons’ questions regarding the exact nature of the current business, Mr. Klein, the president of CMW, responded that the facility operates two businesses. It operates a medical transportation company as well as a licensed RMW hauling business. He added that there is “office work” that is done inside the building such as billing and filekeeping. TR 86. He further described that with respect to the RMW business now being conducted, the trucks are dispatched in the morning and the RMW is picked up. Mr. Klein said that the trucks take the waste to Health Care Waste Services, a permitted facility in the Bronx, that then takes the RMW to its final destination in Baltimore, Maryland. Mr. Klein said that the billing is done from the CMW location. TR 85.

In response to Ms. Simmons’ question as to why the vehicles were located in Canarsie, Mr. Klein answered “that is where the business is located. There is a maintenance . . . shop as well in Canarsie.” TR 85.

Continuing with the Councilman’s argument that the facility’s misrepresentations about its business foretell that it will not be in compliance in the future, Ms. Simmons pointed to CMW’s responses in the EAF with respect to traffic generation and impacts on quantity or quality of open space and recreational opportunities. TR 86. She stated that the responses of the applicant were inaccurate because the applicant indicated that the project would not have a significant impact. *Id.* Moreover, Ms. Simmons pointed to the question in the EAF with respect to whether there would likely be controversy with respect to the project and the applicant had replied in the negative. TR 86-87. Furthermore, she noted the applicant’s responses in the

negative to questions regarding odors, noise, and vibration as not accurately reflecting the likely outcomes of the project. TR 87.

The post-issues conference filing of the petitioners reiterates the arguments made at the issues conference regarding the potential for disaster through release of toxins. Pet. Br., p. 4.

Ruling

While there can be no doubt that the intervenors disagree with the applicant's conclusions that its project will not significantly impact the levels of traffic, noise, and odors, that disagreement is an insufficient basis to find that CMW is not likely to comply with any permit that is issued to it by DEC relative to this project or the pertinent laws and regulations. The intervenors have not presented any information that would indicate that the project would result in unacceptable levels of noise, odors, or traffic.

The Department maintains a record of compliance policy known as DEE: Record of Compliance Enforcement Policy. <http://www.dec.ny.gov/regulations/25244.html>. This policy sets forth the standards under which the Department would determine to deny, suspend, or revoke a permit based upon the compliance history of an applicant or permittee with the Environmental Conservation Law. These standards include, *inter alia*, a demonstrated history of criminal or civil violations relevant to the permitted activity; conduct that violates an issued permit; and fraudulent activity. *Id*; see also, *Matter of Al Turi Landfill*, Commissioner's Decision (April 15, 1999). No participant in this process has put forward any evidence of a record of non-compliance by this applicant at this facility or elsewhere. Accordingly, I find that the proposed issue of unacceptable risk is not appropriate for adjudication. As I suggest, *infra*, at pp. 26, I recommend that the applicant set up an internal complaint hot-line for residents or designate an ombudsman for individual citizens to bring forward any concerns with respect to operations so that CMW can respond to them directly and promptly.

Environmental Racism

In Councilman Barron's petition he states that this application follows a pattern of placing hazardous facilities in neighborhoods inhabited by people of color. Regional Attorney Oliva provided that CMW was in compliance with the Department's environmental justice policy. TR 92. Mr. Oliva explained that this policy requires public notification and a public environmental justice meeting in which the applicant meets with the community and that CMW fulfilled these obligations. *Id*. He stated that there were no regulatory requirements with respect to environmental racism and that "[a]t best it can be considered a SEQR issue, but in the light of our SEQR review, we did not find any impact abnormal to this area." *Id*. Ms. Simmons inquired as to whether there were any details to explain the staff's conclusions in the negative declaration. TR 92-93. In its post-issues conference filing, the staff provides a summary of how it conducted its environmental review of the facility. Staff Br., p. 2.

Mr. Baker stated that the Department staff was not required to do a more in depth review because a negative declaration was issued and therefore, “the EJ analysis process stops.” TR 93. Mr. Baker argued that the nature of the project was benign; more so than any kind of auto repair shop or manufacturing facility. He also emphasized that the activity was heavily regulated and that the addition of a small number of trucks did not require a more detailed EJ analysis. Mr. Baker stressed that his client bought the property when it was an abandoned lot and turned it into the current business. He objected to any characterization of the application as racist and instead argued that CMW seeks to site the facility at this location because that is where it runs its operations. TR 94. He added that this facility “should not be equated with anything equivalent to placing an incinerator that has air emissions in a low income community.” *Id.*

Ms. Sallustro argued that there was illegal parking and that if there was more enforcement, the trucks would not be coming down these streets. TR 95-96.

Ms. Pierre-Louis stated that despite the description of the project as “small scale” by Mr. Baker, she maintained that it was not exempt from SEQRA, building or zoning requirements. TR 96. Ms. Simmons stated her agreement with this position and reiterated her argument that a “full blown analysis” was necessary.

Ruling

In recognition of the impacts of the placement of deleterious facilities in poor and minority communities, in 1999, the Commissioner of DEC announced the Department’s determination to establish a program to “ensure that local communities are given an opportunity to express their concerns and that those concerns are considered when making permitting decisions.” NYSDEC News, *DEC to Implement Environmental Justice Program* (October 4, 1999), www.dec.state.ny.us/website/press/presrel/99-146.html. As part of this effort, the New York State Environmental Justice Advisory Group was established; it includes representatives of community groups, environmental organizations, business, academia and government. This group issued a report in January 2002 that had a number of recommendations including the incorporation of environmental justice into the SEQRA process. See, www.dec.state.ny.us/website/ej/ejfinalreport.pdf. The report also called for more information to be distributed publicly when unlisted actions were slated to occur in EJ communities. In the event that the Department determines that a significant impact is likely to result from a project, staff considers if this would have a disproportionate impact on any minority or low-income community.

In March 2003, Commissioner Crotty issued Commissioner Policy - 29, *Environmental Justice and Permitting* (CP-29). The purpose of this policy is to “provide guidance for incorporating environmental justice concerns into the New York State Department of Environmental Conservation (DEC) environmental permit review process and the DEC application of the State Environmental Quality Review Act.” The policy amended the Department’s permit review by requiring the identification of environmental justice

communities; providing information on EJ to applicants with proposals for those areas; strengthening public participation requirements for proposed projects in such communities with potential for at least one significant adverse environmental impact; and providing mediation opportunities to allow communities and project proponents to resolve issues of concern.

According to CP-29, environmental justice “means the fair treatment and meaningful involvement of all people regardless of race, color, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including a racial, ethnic, or socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local and tribal programs and policies.”

Based upon the Department’s regional staff’s determination that the CMW proposal was in an EJ community, the staff directed CMW to prepare a public participation plan and final report. CMW prepared this plan and report which has been marked as IC Ex. 12 in these proceedings. The report provides that CMW identified the area within a 1/2 mile from the project site in the application, prepared a list of stakeholders, and mailed a fact sheet to each person on that list. CMW prepared other written materials and made information available to the public such as the draft public participation plan, stakeholders’ list, project fact sheet, proposed public meeting notice, environmental justice technical memorandum, proposed document repositories, and the final report. IC Ex. 12, pp. 2-3. This report identifies the two public libraries that were made document repositories and the two public meetings (the first one was not well attended) where information about the project was provided. *Id.*, pp. 3-4. The report describes the community concerns and responses to those provided by the applicant. *Id.*, pp. 4-5.

In addition to the public participation plan, the applicant was required to complete a full EAF. *See*, IC Ex. 3, pp. 3-1, *et seq.* CP-29 provides that if the Department, as lead agency, determines that there will be no significant adverse environmental impacts resulting from the project, then no further environmental justice analysis is required.

While it is clear that the intervenors do not find the work done to comply with CP-29 by the applicant and staff sufficient, they have not provided any information to demonstrate that there has been an inadequate review or that the community has been excluded from this process. Accordingly, I do not find the issue of environmental justice or racism as characterized by Council member Barron to be an appropriate one for adjudication.

An additional outcome of CP-29 is the establishment of environmental justice community impact grants. These grants can be used for a number of activities in the community including the assessment of traffic or truck idling, inventories of environmental harms, or identification of industrial, commercial processes that result in pollution in the community. <http://www.dec.ny.gov/public/41465.html>. I have heard in the course of the legislative hearing and issues conference and I have read in some of the comment letters that members of this

community identify a number of concerns such as traffic congestion and its health impacts. Perhaps an outgrowth of the organization that has taken place in opposing the CMW project could be an application for an impact grant that may aid in addressing or at least identifying the realities of these concerns.

In addition, while the staff clarified that an environmental monitor is not envisioned for this facility (TR 123), I recommend that the applicant establish a hot-line for the public to call to voice complaints related to the facility's operation and/or an ombudsman who would be designated to hear and address complaints. Either of these mechanisms would provide the community with a means to report concerns and for the facility to respond quickly to ensure that no activities from its operations cause even a minor nuisance.

Full Environmental Review

Assemblyman Perry stated in his petition that a full environmental review should have been conducted with respect to this permit application. Ms. Pierre-Louis confirmed that the intention of this statement was that a full EIS should have been required. TR 97. Mr. Baker responded stating that DEC took a "hard look" and identified the relevant concerns such as noise, traffic, and character of the area. *Id.* He described a year and a half of review by the Department staff that included repeated requests for information that the applicant satisfied. *Id.* He reiterated his argument that the intervenors were only raising generalized objections and concerns. *Id.* Mr. Baker argued that there was nothing presented in the application or the analysis by staff that was misleading or incorrect. *Id.* With respect to traffic, Mr. Baker noted that there are approximately 40,000 trucks that travel on Linden Boulevard currently. TR 98. He emphasized that CMW will only be adding - at most - two tractor trailers per day. *Id.* In CMW's post-issues conference filing, Mr. Baker reiterates the applicant's position that the "petitioners offered nothing more than generalized objections and failed to identify any errors in the application, EAF or Negative Declaration that would suggest that the Negative Declaration was irrational." App. Br., p. 2.

Mr. Oliva maintained that the DEC staff stood behind its negative declaration, the matters raised by the intervenors were general, and the staff's determination was not irrational or otherwise affected by an error of law. *Id.* In staff's post-issues conference memorandum, as discussed above, Mr. Oliva explained the staff's SEQRA review and maintained that the "hard look" was taken. Staff Br., p. 2.

Ms. Pierre-Louis responded that the Department's review was not focused on the specific neighborhood of concern. TR 98. With respect to noise, she argued that "[l]ooking at the general noise level requirements is not going to sufficiently determine the level of the noise of this area . . . to be burdened by because of the increased traffic." TR 99. She reiterated that despite the size of the proposed project, it would have a large environmental impact on the community. *Id.* And, she also stated that the DEC staff's review was not objective or independent because it was based on a review of the applicant's submission and she found the negative declaration irrational. TR 99-100.

Mr. Oliva explained that the very nature of the SEQRA review is to examine local impacts and that staff did look at the facility - where it is located - and the potential impact to that area. TR 100.

Ms. Pierre-Louis replied that her office was seeking a review by staff that would look at the roads in the entire area, the effect on the schools as well as the subway station; “[s]omething is missing, and I would like it to be redone.” TR 100.

In their closing memorandum, the petitioners criticize the Department staff’s review and continue in their position that the addition of traffic, the handling of RMW and conditionally exempt hazardous waste, and the potential for the facility to become a public nuisance mandates a full EIS be prepared. Pet. Br., pp. 10-12. Petitioners also argue that the failure to issue a positive declaration and require an EIS is itself an adjudicable issue.

Ruling

ECL § 8-0109(2) requires that agencies or applicants must prepare an EIS “on any action they propose or approve which may have a significant effect on the environment.” And as noted by the intervenors, the environment has been broadly defined to include not only traditional resources such as air and water but land use and community character as well. *See, H.O.M.E.S. v. NYS Urban Development Corp.*, 69 AD2d 222 (4th Dep’t 1979) (traffic, congestion, and noise); *Chinese Staff and Workers Ass’n v. City of New York*, 68 NY2d 359 (1986) (community character). Section 617.7 of 6 NYCRR provides more guidance for those making decisions as to whether or not an action is to be deemed significant for purposes of requiring an EIS. “To require an EIS . . . , the lead agency must determine that the action may include the potential for at least one significant environmental impact.” 6 NYCRR § 617.7(a)(1).

The negative declaration (IC Ex. 2B) provides the staff’s conclusions, based upon the information provided in the applicant’s submission (specifically the noise analysis, truck trip generation analysis, the engineering report, and the zoning information), as to why it determined that there was not the potential for significant environmental impacts. Furthermore, the staff explains in its post-issues conference memorandum how it went about this review. Staff Br., p. 2. While the intervenors have made repeated statements as to their desire for an EIS based on their belief that there will be much more traffic, much more noise, and other undesirable impacts, I have not received any specific factual information to support these conclusions.

The intervenors are correct that it would be improper for the lead agency to abdicate its responsibilities to ascertain a project’s impacts by solely relying upon the self-interested submissions of the applicant (*see, e.g., Pyramid Co. Of Watertown v. Planning Board of Town of Watertown*, 24 AD3d 1312 (4th Dep’t 2005), *lv to app granted*, 6 NY3d 711 (2006); *app dismissed*, 7 NY3d 803 (2006)). However, unlike the facts in *Pyramid* where it was shown to the court that the Town Planning Board had completely ignored serious potential impacts to a wetland that the applicant’s EIS failed to address, the intervenors have not brought forth any

specific information to indicate that the staff has overlooked any potentially negative effects. The case cited by the intervenors in support of their position, *Billerbeck v. Brady*, 224 AD2d 937, 938 (4th Dep't 1996), merely says that agencies must perform their environmental review early in the decision making process. But there is no evidence that the Department staff did not conduct its review early.

As discussed at the issues conference and set forth in the regulations, the determination of significance itself is not an adjudicable issue. 6 NYCRR § 624.4[b][6]. Rather, it is up to the ALJ to decide if the staff acted irrationally or contrary to law in rendering its determination of significance. If I were to conclude that this was the case, I could remand the application to staff for further review but it would not be an appropriate subject for adjudication. As I discuss on pp. 11-12 and 18-20, *supra*, I have no basis to determine that the staff acted irrationally or contrary to law in its determination of non-significance and therefore, I have determined not to remand this matter to staff or to find that there are any related adjudicable issues.

Noise and nuisance level

Assemblyman Perry also maintains in his petition that the facility will increase noise and nuisance level. In my request for elaboration of these conclusions, Ms. Pierre-Louis responded that Mr. Perry's office was having a traffic study done and that "somebody . . . would tell us how it will impact the noise level as well as just the general every day impact on the roads. TR 101. This is an area that is already plagued by extremely bad roadways, and we have had several complaints in our office alone about the way the roads were structured, the potholes in the area." *Id.* The petitioners have not produced any studies related to traffic or noise.

Mr. Baker answered by repeating the applicant's position that "nothing concrete has been offered to indicate that the SEQR determination was irrational . . ." He stressed that a noise study was done and that it showed that the operations would be below the threshold for concern outlined in the CEQR technical manual. *Id.* Mr. Baker argued that it was not sufficient to establish an issue for adjudication to forecast that a study may be produced in the future that may indicate something is lacking from the applicant's presentation. TR 101-102. He emphasized that his client is a small businessman who is entitled to have his permit application processed in a timely fashion. TR 102. With respect to Assemblyman Perry's concerns about the problems with the current community infrastructure, Mr. Baker suggested that these matters, while legitimate, should be addressed through other channels. TR 102.

Ruling

With respect to the proposed issue of noise, the intervenors have failed to provide any specific information that would provide a basis to conclude that the proposed project will violate any noise standards or create a nuisance in the community. While the applicant's submission contains only its conclusions with respect to the limitations of noise levels emitted by its operations (IC Ex. 3, p. 5-20) and not its complete analysis, there is nothing in this record that

would indicate that a full noise analysis is mandated. The Department's noise policy: *Assessing and Mitigating Noise Impacts* (<http://www.dec.ny.gov/permits/6224.html>) cites to 6 NYCRR § 360-1.14(p) for noise level limits with respect to operations at a solid waste facility. This regulation provides limits of 67 decibels (A) for operations between 7 a.m. - 10 p.m. and 57 decibels (A) for operations between 10 p.m. and 7 a.m. in an urban environment. In its submission, the applicant provides that the facility will not exceed these limits.

There has been no demonstration that there would be a significant increase in noise that would affect sensitive receptors proximate to the facility. CMW proposes to conduct all activities behind the closed doors of its facility and the draft permit provides in special conditions 16 and 26 that all operations will take place within the facility and that gates and doors must remain closed except when a vehicle is coming into or leaving the building. IC Ex. 2G. Last, given the limited number of trucks - 2 large and approximately 15 small cargo vans - the facility does not meet the threshold for a noise analysis with respect to traffic. *See also, supra*, p. 18.

I do not find this matter appropriate for adjudication. However, as I note above, I direct the staff to place a limit on truck trips per day as a condition to the permit and that the hours of operation be restricted to 7:00 a.m. to 7:00 p.m. Truck idling should be prohibited. In addition, if the suggestion to the applicant of establishment of a complaint hot-line and/or ombudsman is adopted, legitimate complaints should have speedy redress.

Training

Assemblyman Perry maintains in his petition that CMW is not properly trained to run this facility in accordance with Article 27 of the ECL. Ms. Pierre-Louis explained that Assemblyman Perry's office believes that this is "an operational issue and that 360-17 requires that they are sufficiently trained and they have a safety plan and that certain minimal requirements are met before they can operate this facility." TR 104. She offered Menachem Lipkind, an individual who spoke at the legislative hearing, as the Assemblyman's witness on this subject. TR 104-105. However, this individual was not referred to in the petitioners' post-issues conference filing. She further explained that Mr. Lipkind does not believe that the facility's space is properly equipped for this operation and poses a "safety hazard." TR 105.

I followed up Ms. Pierre-Louis's statements with my own question regarding who would be responsible for training at the facility. TR 105-106.

Mr. Baker clarified that the petition appeared to state that the applicant was not trained to run the facility while Ms. Pierre-Louis raised the question as to whether the building was properly constructed. As to the latter matter, Mr. Baker responded that the building is properly designed by Malcolm and Pirnie Engineers and the design has been reviewed by the Department staff. TR 106. As for Mr. Lipkind's expertise with respect to this matter, Mr. Baker argued that we had no curriculum vitae from him to indicate what his expertise is nor any offer of proof as to what his testimony would be. TR 106-107.

In answer to my question regarding training, Mr. Wolf pointed to the Part 360 application with respect to the section entitled “personnel training plan.” TR 107; IC Ex. 3, p. 7-1, *et seq.* It sets forth that the facility manager will be responsible for training that includes: waste handling procedures, emergency response equipment and procedures, communications systems, permit requirements, recordkeeping, waste and unauthorized waste handling procedures, surface and groundwater contamination incident response, and blood borne pathogen training. *Id.* Mr. Klein identified himself or the general manager Josh Knobloch as the personnel responsible for training. TR 108. Mr. Klein stated that he had fifteen years of experience in operating transportation companies as well as experience operating a medical clinic and therefore was very experienced with respect to the type of operations in question. *Id.* He added that in addition, the company gets OSHA training, has communications systems in place, and operates a full service garage with heavy lifts and has had “no incidents in the past fifteen years.”

In response to statements made by Mr. Lipkind at the legislative hearing, Mr. Klein stated that the building meets all city codes and was constructed 5 years ago. TR 125. Ms. Pierre-Louis contested this statement on the basis that it meets all requirements for automotive repairs and not for the proposed use because the area is not zoned for this use. *Id.* Mr. Klein responded that the building has been used for large vehicles for the entire five years without incident and that there were “dead men” installed in the building to prevent structural damage in case of an accident. *Id.* Mr. Oliva cited 6 NYCRR § 360-10.3(e)(1) which provides design requirements for storage and transfer facilities:

- (i) The unloading and loading areas must be adequate in size and design to facilitate efficient transfer of RMW to and from the collection vehicles and the unobstructed movement of vehicles.
- (ii) The unloading and loading area must be constructed of concrete or asphalt paving material, be equipped with adequate drainage structures, and be free of standing water.
- (iii) All processing, transfer, sorting and storage areas must be located within an enclosed building or fixed covered area.
- (iv) Provisions must be made for weighing all RMW transferred at the facility.
- (v) Radiation detection devices for radioactivity assessment must be installed in a location appropriate for the monitoring of all incoming waste.

Ruling

The section of regulations cited by Ms. Pierre-Louis, 6 NYCRR § 360-17, pertains to regulated medical waste treatment facilities except as specifically referenced in 6 NYCRR Subpart 360-10 which pertains to RMW storage, transfer and disposal. As explained repeatedly in these proceedings, CMW has not applied to treat medical waste at this facility. Rather, the applicant has applied to DEC for a permit to transfer RMW from small trucks and vans to a large semi-tractor trailer for shipment to a disposal facility. The regulations that govern the construction and operation of a facility to store and/or transfer RMW are contained in 6 NYCRR Subpart 360-10. With respect to personnel training, 6 NYCRR § 360-10.3(h) requires:

“[t]he personnel training plan must describe training that will be provided to all staff involved in the handling of RMW. Personnel training must include a thorough explanation of the operation plan, contingency plan, and the safe handling of RMW. Facility personnel must successfully complete the personnel training required in the personnel training plan within three months of the date of their employment. Prior to handling RMW, each employee must complete personnel safety training that includes the handling and management of RMW and worker protection.”

The regulations that address the design requirements for the facility are cited above.

The application addresses these issues, and other than general statements by the intervenors of their discomfort with the capacity of CMW to meet regulatory requirements, there has been no information provided that pinpoints a failing or omission of the applicant with respect to training or the facility structure. With respect to the offer of Mr. Lipkind as an expert witness, the petitioner did not provide any specific information as to his credentials or as to what he would testify to. I heard his statement at the legislative hearing but as noted by Mr. Baker, I have no information to indicate that he has any experience with respect to the type of facility at issue. The application, as well as Mr. Wolf’s explanations at the issues conference, describe the physical layout of the facility. The intervenors offered no reasons as to why this information was inadequate. Accordingly, I do not find training or facility layout to be appropriate issues for adjudication.

Refrigeration, Emergency Action Plan, Biohazards

These are three additional concerns that have been raised in the post-issues conference filing of the petitioners. With respect to refrigeration, the petitioners maintain that in the event of a black-out, CMW does not have sufficient “back-up and redundant power.” Pet. Br., p. 13. Mr. Klein had explained at the issues conference that lack of external generators was not a concern because the trucks could leave to transport the RMW to the disposal facility. TR 121. The

intervenors state that in a black-out traffic lights will be out of service and that travel at such a time would be hazardous enhancing the potential for an accident. Pet. Br., p. 13.

In his letter of March 9, 2009, Mr. Baker responded to this concern by stating that while traffic may be slowed during a black-out, it does not cease.

The petitioners argue that CMW's plan does not adequately address the potential for leakage and/or decontamination of a container that is inadequately cleaned at the disposal site. And, the petitioners raise dire predictions of catastrophe in the event of an accident. Pet. Br., pp. 13-15.

Ruling

While no emergency or contingency plan is a guarantee of safety, the applicant has submitted a plan that addresses contingencies in a manner that is in conformance with the applicable regulations. See, IC Ex. 3, pp. 6-1 - 6-7; 6 NYCRR §§ 360-10.3 (f), (g); 360-10.4. The operational requirements for the facility are spelled out in detail in the plan and include, *inter alia*, requirements for receipt of RMW and the transfer plan to minimize handling, radiation detection, identification and handling of unauthorized waste, segregation of unauthorized waste, confinement of all waste, recordkeeping, response to leaks, and decontamination for reusable RMW containers. IC Ex. 3. Here again, the petitioners have raised many concerns without identification of a specific substantial failing of the application. There appears to remain confusion as to the nature of the facility by the petitioners' citation to regulations that govern treatment facilities which this is not. Pet. Br., p. 4. On page 14 of their submission, the petitioners describe the facility as going out of state to pick up RMW to "store them in a warehouse . . ." The application sets forth that the facility will pick up RMW and a small volume of exempt hazardous waste from local facilities, transfer it to a tractor trailer within the facility, and ship it to an out of state disposal facility. IC Ex. 3, p. 2-1.

As confirmed by Department staff at the issues conference, the applicant does not require a permit to accept and transfer small quantities of exempt hazardous waste materials. TR 126-127. And, in fact, the Department does not track the transfer of these materials currently. *Id.* Thus, this facility will be under greater scrutiny than others that currently limit their activities to only the handling of exempt hazardous waste materials due to the permit requirement for transfer of RMW.

While I agree with petitioners that they need not prove their case at this stage (Pet. Br., pp. 5-6), it is not sufficient to throw out a myriad of general concerns without more to establish a case for adjudication. In addition, the petitioners did not specifically raise concerns about refrigeration or the emergency action plan in their petitions. While I have dealt with these matters on their merits, as stated in *Matter of Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3*, Interim Decision of the Assistant Commissioner, (August, 13, 2008), "it is essential to the administrative process that matters be raised in a timely fashion so that they

may be considered fully and in a manner that will not result in prejudice to the other parties. *See, e.g., Matter of Saratoga County Landfill*, Second Interim Decision of the Commissioner, (October 3, 1995), at 2; *Matter of the Town of Brookhaven*, Interim Decision of the Commissioner, (July 27, 1995), at 5."

Based upon the foregoing, I do not find that any of these matters are appropriate for adjudication.

Conclusion

Based on the above discussion and issues conference record, I find that the intervenors have not presented any substantive and significant issues for adjudication. As previously stated, *amicus* status is denied SCCA, and full party status is denied Assemblyman Perry and Council member Barron.

I have made several directives in this ruling with respect to permit conditions: a) limit on truck trips; b) prohibition on truck idling; and c) curtailment of operation hours to 7:00 a.m. to 7:00 p.m. In addition, I recommend to the applicant that it develop a public complaint hot-line and/or designate an ombudsman to provide an avenue for the community to address any perceived problems with operation. Of course, the public may always contact the Department or New York City if it observes violations of the permit, law or regulations.

I direct the staff to continue to process the permit in accordance with this ruling.

Appeals

A ruling of the DEC administrative law judge to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status may be appealed to the DEC Commissioner on an expedited basis and must be filed to the DEC Commissioner within five days of the disputed ruling. 6 NYCRR §§ 624.8(d)(2); 624.6(e)(1). As authorized by 6 NYCRR 624.6(g), I am allowing that any appeals must be in writing and must be received by the Assistant Commissioner for Hearings, Louis A. Alexander (Executive Office, N.Y.S. Department of Environmental Conservation, 625 Broadway, Albany, New York, 12233-1010) before 5 p.m. on April 20, 2009.¹⁰ All replies to appeals must be received before 5 p.m. on April 27, 2009.

The original of each appeal or reply and two copies of each must be filed with Assistant Commissioner Alexander. The Assistant Commissioner will provide the copies to the ALJ and Chief Administrative Law Judge James T. McClymonds. No faxes permitted but parties may file

¹⁰ By memorandum of March 12, 2009, Commissioner Grannis assigned this matter to Assistant Commissioner Alexander for any future decisions. A copy of that memorandum is annexed.

electronically via e-mail to "laalexan@gw.dec.state.ny.us" to be followed by three paper copies to the Assistant Commissioner by first class mail, all postmarked by the date(s) specified above. In addition, send one copy of any appeal or reply to the other issues conference participants.

The parties shall ensure that transmittal of all filings is made to the issues conference participants at the same time and in the same manner as transmittal is made to the Assistant Commissioner.

Appeals should address the ALJ's rulings directly, rather than merely restate the contentions.

Dated: March 24, 2009
Albany, New York

_____/s/_____
Helene G. Goldberger
Administrative Law Judge

TO: Service List

A4341B Perry -- Relates to permit application requirements for regulated medical waste treatment, storage or disposal facilities
Same as S 2581-A SAMPSON

02/03/09 referred to environmental conservation
02/13/09 amend (t) and recommit to environmental conservation
02/13/09 print number 4341a
03/03/09 reported referred to rules
03/04/09 reported
03/04/09 rules report cal.6
03/04/09 ordered to third reading rules cal.6
03/09/09 amended on third reading (t) 4341b
03/12/09 passed assembly
03/12/09 delivered to senate
03/12/09 REFERRED TO ENVIRONMENTAL CONSERVATION
03/16/09 SUBSTITUTED FOR S2581A
03/16/09 3RD READING CAL.68
03/19/2009 PASSED SENATE
03/19/2009 RETURNED TO ASSEMBLY

AN ACT to amend the environmental conservation law, in relation to permit application requirements for regulated medical waste treatment, storage or disposal facilities

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

- 1 Section 1. Subdivision 5 of section 27-1513 of the environmental
- 2 conservation law, as amended by chapter 180 of the laws of 1989, is
- 3 amended to read as follows:
- 4 5. As a condition of approval for such permit, any person who operates
- 5 a facility for the treatment, storage and disposal of regulated medical
- 6 waste shall provide:
- 7 (a) proof of liability insurance or other form of financial security
- 8 deemed sufficient by the commissioner to meet all responsibilities in
- 9 case of release of such waste causing damage; and
- 10 (b) certification that such activities conform with existing local
- 11 zoning laws or ordinances.
- 12 § 2. This act shall take effect immediately.

Issues Conference Exhibit List
CMW Industries, LLC

- 1a. Notice of Legislative Public Hearing and Issues Conference - 12/8/08
- 1b. *Environmental Notice Bulletin* Notice of Legislative Public Hearing and Issues Conference - 12/8/08
- 1c. *Canarsie Courier* Proof of Publication - 12/11/08
2. Hearings Request - 11/3/08
- 2a. Application for a Solid Waste Management Facility Permit - 9/12/08
- 2b. Negative Declaration - Notice of Determination of Non-Significance - 8/11/08
- 2c. NYSDEC Notice of Complete Application - 8/11/08
- 2d. Proof of Publication - *Daily News* - 8/21/08
- 2e. Letter dated 9/17/08 from Assemblyman Nick Perry to Commissioner Grannis
Letter dated 1/10/08 from Council Member Charles Barron to Commissioner Grannis
Letter dated 9/19/08 from NYS Senator John Sampson to Commissioner Grannis
Letter dated 9/15/08 from Carol Browne to Commissioner Grannis and Ms. Moore
- 2f. Letter dated 10/31/08 from Environmental Analyst Michelle Moore to Gershon Klein
re: decision to conduct public hearing
- 2g. Draft Permit
3. 6 NYCRR Part 360 Regulated Medical Waste Transfer Facility Permit Application Package - March 2007 Revised October 2007, March 2008, June 2008 Prepared by Malcolm Pirnie for CMW Industries, LLC
4. Petition for *Amicus* Status by South Canarsie Civic Association, Inc. dated 1/3/08
5. Petition for Full Party Status by the Office of New York City Council Member Charles Barron received by the NYSDEC Office of Hearings and Mediation Services on 1/8/09
6. Petition for Full Party Status by N. Nick Perry, NYS Assembly Member dated 1/13/09 and received by the OHMS on 1/15/09
7. CMW Truck Routing Map
8. CMW Vicinity Map
9. CMW Proposed Facility Layout
10. Photo of Kemach Food Distribution Center across from applicant's facility
11. Photo of Jethro Food Distribution parking lot across from the applicant's facility
12. Public participation plan

CMW Industries, LLC



TO PROVIDE THE NY CITY METROPOLITAN AREA WITH
A SAFE, RESPONSIBLE, EFFICIENT, AND ECONOMICAL
MEANS TO MANAGE MEDICAL WASTE

Who Are We?

- Locally and Family Owned
- Located at 100-02 Farragut Road in Brooklyn
- Common Ownership & Resources for:
 - CMW Industries, LLC
 - Apple Home Care (AHC)
 - Citiwaste, LLC
- Currently Employ 40 People, most from within the Community

What We Do

- Utilize Cargo Vans & Small Box Trucks to collect medical waste from the local community generators including:
 - Medical Offices
 - Dental Offices
 - Nursing Homes
 - Dialysis
 - Laboratories
 - Veterinarians
 - Home Health Care Operations

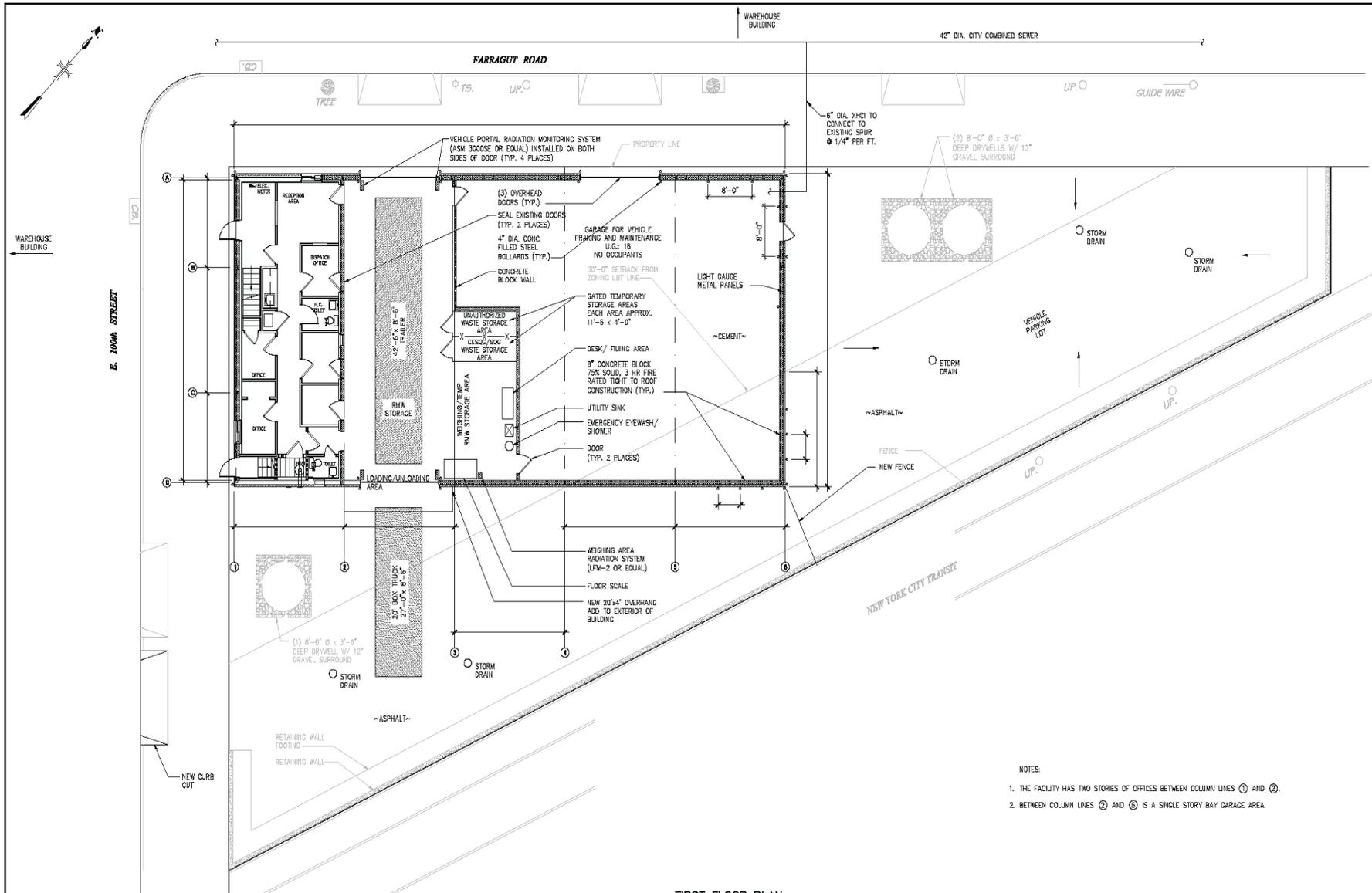
What We Do

- Cargo Vans/ Box Trucks will return to CMW, Industries where the wastes will be transferred into a larger tractor trailer container.
 - Waste picked up from generators will be sealed and boxed prior to pickup.
 - Sealed containers will NOT be opened, but may be placed in larger boxes.
 - All transfer activities will occur inside the transfer area inside a secure building.

What We Do

- The consolidated waste in the tractor trailer will then be taken to a registered disposal facility located in:
 - Baltimore, MD
 - North Carolina
 - New Jersey
- **No waste will be unpackaged, treated, or disposed at CMW Industries.**

PROJECT: 360 NYCRR PART 360 NEW TRANSFER FACILITY (CADD) 03/15/2008
 DRAWN BY: MALCOLM PIRNIE
 CHECKED BY: MALCOLM PIRNIE
 DATE: 03/15/2008
 SCALE: 1/8"=1'-0"
 SHEET: 1 OF 1
 PROJECT: 360 NYCRR PART 360 NEW TRANSFER FACILITY (CADD) 03/15/2008
 DRAWN BY: MALCOLM PIRNIE
 CHECKED BY: MALCOLM PIRNIE
 DATE: 03/15/2008
 SCALE: 1/8"=1'-0"
 SHEET: 1 OF 1
 PROJECT: 360 NYCRR PART 360 NEW TRANSFER FACILITY (CADD) 03/15/2008
 DRAWN BY: MALCOLM PIRNIE
 CHECKED BY: MALCOLM PIRNIE
 DATE: 03/15/2008
 SCALE: 1/8"=1'-0"
 SHEET: 1 OF 1



FIRST FLOOR PLAN
SCALE: 1/8"=1'-0"

- NOTES:
1. THE FACILITY HAS TWO STORIES OF OFFICES BETWEEN COLUMN LINES ① AND ②.
 2. BETWEEN COLUMN LINES ② AND ③ IS A SINGLE STORY BAY GARAGE AREA.

MALCOLM PIRNIE

REVISIONS		DATE	REMARKS

DESIGNED BY: _____
 DRAWN BY: _____
 CHECKED BY: _____

CMW INDUSTRIES, LLC
 BROOKLYN, NEW YORK

6 NYCRR PART 360/ 364 PERMITTING

DATE: MARCH 2007

PROPOSED FACILITY LAYOUT

SCALE: 1/8"=1'-0"

CAD REF. NO. 5781F003









Rendering #1 of Facility



Rendering #2 of Facility



Rendering #3 of Facility



Project Impacts & Mitigation

- Air Emissions
 - No emission releasing processes operated at the facility
- Odors
 - All wastes will be sealed at all times
 - All waste transfer will occur inside the building
- Noise
 - No loud machinery will be used.
 - All operations will occur inside the building

Project Impacts & Mitigation

- Traffic Route
 - Tractor Trailer & cargo vans/box trucks
- Traffic Volume
 - Four vehicle trips per hour (VPH) during peak times.
 - Up to 30 vehicles per day
 - 13 inbound cargo van/ box trucks
 - 13 outbound cargo van/ box trucks
 - 2 outbound tractor trailers
 - 2 inbound tractor trailers
 - Average of 40,000 VPD on Linden Blvd (RT 27)
(As per NYSDOT)
 - The CMW traffic will be insignificant at less than 0.1% of the current traffic flow.

Project Impacts & Mitigation

- Public/Worker Safety
 - Permit application contains a Contingency Plan which includes procedures for unlikely events such as:
 - Spill/Leak Response
 - Utility Failure
 - Fires
 - Exposure to waste
 - Receipt of off-spec waste
 - Also includes coordination procedures for Local, State and County Emergency Agencies

Permit Process

- Submission of:
 - 6 NYCRR Part 360 – Regulated Medical Waste Transfer Facility Permit Application
 - 6 NYCRR Part 364 – Regulated Medical Waste Transporter Permit Application
- State Environmental Quality Review (SEQR)
- City Environmental Quality Review (CEQR)
- NYSDEC Commissioner Policy 29 - Environmental Justice and Permitting

Project Benefits

- Currently employ 40 people and will add 5 additional jobs.
- Additional local taxes
- Safe, efficient, reliable means to handle medical waste

Thank you

CMW Industries, Inc.
100-02 Farragut Road
Brooklyn

Timothy A. Wolf, P.E.
Associate
Malcolm Pirnie, Inc.