STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application of the **NEW YORK CITY DEPARTMENT OF SANITATION** for permits for the proposed converted marine transfer station at East 91st Street, Manhattan.	**RULINGS OF THE ADMINISTRATIVE LAW JUDGE ON ISSUES AND PARTY STATUS**
(Application No. 2-6204-00007/00013)	

BACKGROUND AND BRIEF PROJECT DESCRIPTION

The New York City Department of Sanitation ("DSNY") proposes to construct and operate a converted marine transfer station at East 91st Street in Manhattan, adjacent to the East River and FDR Drive. This solid waste management facility – identified as part of the New York City Solid Waste Management Plan ("SWMP") and DSNY's long-term waste export program – is designed to process 4,290 tons of municipal solid waste per day, allowing for 5,280 tons per day during emergency conditions. The project involves demolishing the existing marine transfer station, which is not in use, and building the proposed containerized waste management facility with a footprint of approximately 63,521 square feet, to provide for barge transfer of municipal solid waste to locations outside of New York City. All solid waste transfer and containerization activities would take place within a newly built, fully enclosed building. The waterway adjacent to the building would be dredged to allow for barge operations, and tidal wetlands would be disturbed for the construction of a new fendering system and over-water access ramps. The Applicant would mitigate wetland habitat losses by creating and restoring additional tidal wetlands at other, not-yet-specified areas within New York Harbor.

- - Permits Requested

To proceed with this project, DSNY requests the following permits from the New York State Department of Environmental Conservation ("DEC"):

1. A solid waste management facility permit, pursuant to Environmental Conservation Law ("ECL") Article 27, Title 7, and Part 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations ("6 NYCRR");
2. An air pollution control (air state facility) permit, pursuant to ECL Article 19 and 6 NYCRR Part 201;
3. A tidal wetlands permit, pursuant to ECL Article 25 and 6 NYCRR Part 661; and

4. A use and protection of waters permit, with associated water quality certification, pursuant to ECL Article 15, Title 5, and 6 NYCRR Part 608.

The project also requires a storm water general permit for construction activities, issuance of which would be considered should the other permits be granted.

- - State Environmental Quality Review Act ("SEQRA") Evaluation

On April 1, 2005, DSNY, as SEQRA lead agency, filed and circulated a Final Environmental Impact Statement ("FEIS") concerning its SWMP, a key initiative of which is the development of this and three other marine transfer stations: two in Brooklyn (the Southwest Brooklyn and Hamilton Avenue marine transfer stations) and one in Queens (the North Shore marine transfer station). DSNY issued a SEQRA findings statement on February 13, 2006. As an involved agency, DEC offered comments on the Draft Environmental Impact Statement ("DEIS"), and the FEIS, with which DEC Staff is satisfied, includes DSNY's responses to those comments.

- - Notice of Complete Application

A Notice of Complete Application was issued by DEC Staff and published in its on-line Environmental Notice Bulletin on May 30, 2007, and in the New York Post during the week of May 28, 2007. This notice allowed for public comments and set a deadline of July 2, 2007, for their submittal.

Based on information presented in the application, DEC Staff determined that the project could be approved subject to terms of a draft permit it had prepared. However, in response to public comments, Staff referred the application to DEC's Office of Hearings and Mediation Services ("OHMS") for the scheduling of a hearing pursuant to 6 NYCRR Part 624. On July 30, 2007, DSNY was informed of DEC's Staff's determination that such a hearing be held. On August 3, 2007, James McClymonds, DEC's chief administrative law judge, informed DSNY and DEC Staff that I had been assigned to this matter.

- - Notice of Legislative Hearing and Issues Conference

A Notice of Legislative Hearing and Issues Conference, dated August 30, 2007, was published in DEC's on-line Environmental Notice Bulletin and also in the New York Post on September 5, 2007. [See Conference Exhibit No. 1, a copy of the notice as

issued by the Chief ALJ; Exhibit No. 2, a copy of the notice printed from DEC's website; and Exhibit No. 3, a copy of the New York Post legal notice.] Also, copies of the notice were circulated to relevant government officials and others known to have an interest in the project. [See Exhibit No. 5, a copy of the distribution list prepared by OHMS.]

LEGISLATIVE PUBLIC HEARING

As announced in the August 30, 2007, notice, a legislative hearing was held during the afternoon and evening of October 9, 2007, in the auditorium of the New York Blood Center at 310 East 69th Street, Manhattan. The hearing, over which I presided, was held to receive the public's unsworn statements about the permit application. Several hundred people attended in the afternoon, and another several hundred people attended in the evening. Among the attendees, project opponents were a clear majority, as evidenced by their applause for those people speaking against permit issuance.

Sixty-two speakers were heard during the afternoon session, and sixty-three speakers were heard during the evening session. Elected officials speaking against permit issuance included State Senator Liz Krueger (26th District), State Assembly Member Micah Z. Kellner (65th District), and New York City Council Members Jessica S. Lappin (5th District) and Daniel Garodnick (4th District). Statements against permit issuance were also read into the record on behalf of U.S. Congresswoman Carolyn Maloney (14th District) and State Assembly Member Jonathan L. Bing (73rd District). Organizations speaking against the project included the Gracie Point Community Council, representing the Yorkville and Gracie Point neighborhoods, and the East 86th Street Merchants/Residents Association. Most of the speakers were people from the neighborhood of the transfer station, and they were particularly concerned about project impacts to public health and safety.

Apart from oral statements made at the legislative hearing, the hearing notice also allowed for written comments that have been mailed or delivered to me and then copied for DSNY and DEC Staff. These written comments have been extensive and entirely negative about the project, particularly its location adjacent to a densely populated residential neighborhood. The comments include hundreds of individual appeals as well as petitions signed by almost 1,000 local residents, including more than 100 doctors, scientists and other medical professionals arguing that no marine transfer station belongs in a residential area. Another 100 people from Gracie Gardens, an apartment complex on

East 90th Street, next to the transfer station, co-signed a letter arguing that the station should remain closed.

I have reviewed the written comments addressed to me, and they are maintained with the transcribed oral statements as part of the legislative hearing record in this matter. That record also includes the many comments received by DEC in response to its notice of complete application, and comments made at the environmental justice informational meeting held by DSNY on April 19, 2007.

Project opponents offer various arguments against permit issuance, and those that were proposed as hearing issues are detailed in my rulings below. Generally speaking, the oral and written comments emphasize certain points, such as the location of the site in a densely populated area adjacent to parks and a recreational and sporting facility, Asphalt Green, that serves large numbers of schoolchildren. According to Senator Krueger, whose district includes the project site, 2000 U.S. census data indicate that 13,500 people live within a quarter mile radius of the proposed site, including 1,850 children, 1,622 senior citizens, and more than 1,500 people living below the poverty line – far more people than live in similar zones around the sites of the three other marine transfer stations proposed by DSNY. Senator Krueger says that the site is just 100 feet from the closest residence, and less than 280 feet from the Stanley Isaacs/Holmes Houses New York City Housing Authority complex which is home to more than 2,200 people.

According to Assembly Member Kellner, the 2000 census data indicate that five blocks to the north and south, from Third Avenue to the East River, the marine transfer station at East 91st Street would be surrounded by a population of just over 40,000 people, about 5,000 of them children. He and other opponents claim that DSNY's FEIS failed to adequately consider the potential impacts on this community from traffic, air pollution, noise, vermin and odors that would be attributable to the facility's renewed operation. Many neighborhood residents are particularly concerned about a steady parade of rumbling trucks – 800 a day, 6 days a week – spilling solid and liquid waste onto their streets, and the potential of that to attract rats and create a stench. Residents say that, while moving, the trucks would pose a safety risk to pedestrians, and, even while idling, would pose a health risk due to their emission of asthma-inducing pollutants. Many residents recall unpleasant experiences from the period when the existing transfer station operated, one of them saying that the idling trucks, traffic congestion, noise and smells from spilled garbage – which

attracted rodents and flies – were an "assault on the senses," distressing to her and her small children when they walked outside. Some say that if the new transfer station is approved, many people – particularly the elderly, children and the disabled – will be more likely to stay indoors rather than venture into the community.

As project opponents point out, the proposed East 91st Street marine transfer station is surrounded by parks as well as open space and recreational resources – Asphalt Green to the west, Carl Schurz Park to the south, and Bobby Wagner Walk to the north. Located between York Avenue and the East River between 90th and 92nd streets, Asphalt Green – a not-for-profit facility run on city property under an agreement with the city's parks department – includes an aquatic center, a recreation center, an outdoor playground for toddlers (DeKovats park), and a regulation-size Astroturf soccer field that is the only year-round playing field in Manhattan north of 8th Street. According to Carol Tweedy, its executive director, Asphalt Green provided sports and fitness opportunities for 47,000 users in 2006, 14,000 of whom were served for free. Ms. Tweedy says these users include public schoolchildren, mostly from East Harlem, who come to the aquatic center during the school day for a learn-to-swim program.

Project opponents are particularly concerned about plans to demolish and replace the truck access ramp for the marine transfer station on its existing footprint, because it bisects the Asphalt Green complex. They also claim that truck staging and queuing will result in noise and fumes, creating health and safety hazards for children who play and exercise on either side of the ramp or cross in front of it. According to Ms. Tweedy, diesel-fueled trucks will queue on York Avenue, idling in the same area where children are unloaded from school buses, a situation Senator Krueger called not only unsafe but negligent in light of children's susceptibility to respiratory ailments.

Project opponents claim that DSNY's FEIS is flawed to the extent it characterizes the proposal as the "reactivation" of a use that continued from the late 1930s, when the former marine transfer station was built, to the late 1990s, when that station ceased operating. According to Assembly Member Kellner, "reactivation" implies that re-opening the facility is as simple as flipping a switch, when in fact the City's SWMP calls for demolishing the existing marine transfer station structure and its ramps and building new ramps leading to a facility that is twice as tall and designed to handle four times as much waste. Critics point out that the new facility would not only be larger

than the existing one, but that the neighborhood's high-density residential development today is different from what existed in the late 1930s, when manufacturing and light industrial uses along the Upper East Side waterfront were common.

Senator Krueger alleges that the FEIS fails to comprehensively examine both the impacts of the marine transfer station and the effectiveness of the mitigation measures. She claims that, among other flaws, the FEIS does not provide even a basic description of how the facility will be designed and operated, does not adequately explain site selection criteria, does not disclose other potential sites that were examined or properly examine alternatives that were proposed by elected officials and community members, and does not contain any sort of cost-benefit analysis weighing multiple options for long-term waste disposal. Senator Krueger says that, as a staunch environmentalist, she supports the efforts of the mayor and city council to incorporate marine transfer stations as part of the city's solid waste disposal solutions in order to decrease the number of sanitation trucks on city streets. She also acknowledges that for too long, as a result of environmental racism and poor planning, Manhattan's garbage has unfairly burdened low-income and minority communities in the outer boroughs, and that the inexcusable concentration of waste disposal facilities in a few neighborhoods has contributed to childhood asthma rates in those communities that are among the highest in the nation and severely undermined economic development.

On the other hand, Senator Krueger and many other commenters say that they oppose operating a marine transfer station in any of the city's residential neighborhoods, particularly next to a children's playground and playing field. According to Senator Krueger, were this a private transfer station, DSNY's own siting regulations (Title 16 of the Rules of the City of New York, Chapter 4, Subchapter C) would absolutely prohibit its placement in a location proximate to residences and parks.

According to critics, the FEIS fails to consider the impact of the facility's construction – expected to continue over 30 months – on adjacent parks. Senator Krueger says it is inconceivable that the proposed demolition of the existing transfer station and the construction of the new one could take place without the closure of some parkland. Furthermore, she argues that New York State's courts, including the Court of Appeals, have repeatedly held that the public trust doctrine prohibits a city from converting public parkland to a non-park use without the specific approval of the State Legislature, even

if the disruption is not permanent. Project opponents have sued DSNY on this issue, alleging that Asphalt Green and the Bobby Wagner Walk are dedicated parkland areas protected by the public trust doctrine, an assertion that DSNY denies. Their lawsuit, Powell, et al v. City of New York, et al., New York County Index No. 108220/06), has survived a motion to dismiss and is being treated by State Supreme Court as a plenary action for declaratory judgment, discovery on which is now occurring. [A copy of the court's June 18, 2007, decision continuing the lawsuit (2007 NY Slip Op 51409U, 16 Misc. 3d 1113A) was received as Exhibit No. 11.]

Critics say that the FEIS improperly limits consideration of offsite impacts to operations in the range of about 1,800 tons of solid waste per day, ignoring the fact that, pursuant to DEC Staff's draft permit, the facility may operate at 5,280 tons per day during so-called emergencies. Critics are concerned that, if it has the capacity to do so, the facility may operate regularly under emergency conditions, particularly if any of the other proposed marine transfer stations are not permitted or, if opened, become unavailable for some reason, even temporarily, due to problems elsewhere in the city's waste disposal system.

Finally, critics maintain there are other flaws in the FEIS, including the following:

- - The FEIS fails to evaluate the potentially dangerous environmental and health effects of flooding at the East 91st Street marine transfer station, given its location in an area considered by the city itself as at high-risk of flooding from hurricane storm surges;

- - The FEIS fails to account for impacts stemming from construction of the Second Avenue subway by the Metropolitan Transportation Authority, which is expected to generate traffic flow problems on the Upper East Side, along the transfer station's trucking route, at least through 2014, and which would involve the removal of spoils from the subway tunnel at a shaft located at 92nd Street.

- - The FEIS fails to account for impacts that would result from the mayor's proposed congestion pricing program, which would alter traffic patterns north of the congestion pricing zone boundary.

- - The FEIS fails to consider air quality impacts on both the East Harlem neighborhood less than six blocks from the site of the proposed marine transfer station, which has the city's highest rates of child hospitalization for asthma and other respiratory ailments, as well as the large senior population that lives in the housing towers less than 300 feet from the site.

- - The FEIS improperly assumes an average three-and-one-half minute period for each truck to enter the site, unload, turn around and exit, when in fact it will likely take much longer, so that trucks will end up queuing on delivery routes, particularly congested York Avenue, as happened before the existing facility shut down in the late 1990s. Project opponents say there is no adequate mitigation proposed for the noise, air pollution and odor problems associated with idling trucks waiting to deliver their waste.

- - The FEIS fails to explain how or where trash would be disposed of after it is containerized for removal by barge.

- - The FEIS fails to provide sufficient detail about pesticides that would be applied at the transfer station and to the barges, and how neighbors and the marine environment would be protected against contamination.

Some commenters, including Senator Krueger, argue that to address its solid waste disposal problems, the city should do more to cut down on the waste it produces, including banning Styrofoam, expanding the bottle redemption law by increasing bottle deposits and covering more types of beverage containers, recycling more types of plastic containers, and decreasing the solid waste stream with models such as urban composting.

While the clear majority of speakers at the legislative hearing – and all of the commenters providing letters – were against permit issuance, some support for the project exists among various environmental and civic organizations.

The Natural Resources Defense Council ("NRDC") says that, apart from meeting DEC permitting standards, the East 91st Street marine transfer station will benefit the environment by cutting waste-related truck traffic and thereby reducing air pollution and congestion on city streets. Also, NRDC says the facility is necessary from an environmental justice standpoint, because it and the others proposed by DSNY will ease the burden on communities of color that shoulder a disproportionate share of the negative effects of the current waste management system.

Also supporting the project is Sustainable South Bronx, which favors equity and justice for communities overburdened with transfer stations. According to Sustainable South Bronx, reconstruction and operation of the East 91st Street marine transfer station is an equitable, responsible and environmentally sound proposal to handle a portion of the waste generated in Manhattan, and permit denial would mean more trucks contributing to air pollution, Manhattan's biggest environmental and public health problem. Sustainable South Bronx maintains that

facilities in the South Bronx currently handle all of the Bronx's waste, as well as 25 percent of Manhattan's, whereas Manhattan does not handle any of its waste, though it generates more waste than any other borough.

Operating this and the other three converted marine transfer stations anticipated by the City's SWMP would significantly reduce the environmental impacts of the current waste management system and ensure that remaining impacts are fairly shared, according to the Organization of Waterfront Neighborhoods ("OWN"). Environmental impacts would be minimized, OWN says, because waste would be handled closer to its point of origin, and because waste would leave the city by barge rather than truck.

According to OWN, DEC's proposed permit for the facility strikes a proper balance between needs to use the city's waterfront both for recreation and municipal infrastructure. The group says the facility would be a significant upgrade of the facility that had operated at the site as recently as 1999, with state-of-the-art environmental controls for emissions, prompt waste containerization, and space for trucks to queue on-site, with sound barriers minimizing noise impacts.

The Environmental Defense Fund ("EDF"), a national organization headquartered in New York City, supports the overall siting of the East 91st Street marine transfer station, but adds that it must be operated in a manner that minimizes impacts on the surrounding community. That is also the position of CIVITAS, a not-for-profit, community-based, all-volunteer organization of some 2,000 supporters concerned with urban planning, zoning and quality of life issues affecting East Harlem and the Upper East Side.

In general, to the extent environmental and civic groups support the project, they agree that the community's legitimate concerns must be addressed both before and after permit issuance. As argued by CIVITAS and EDF, this would involve amending the draft permit, particularly in relation to DSNY's monitoring and reporting requirements.

ISSUES CONFERENCE

As announced in the hearing notice, an issues conference was held on October 16, 2007, at DEC's Region 2 office in Long Island City. The purpose of the issues conference, conducted pursuant to 6 NYCRR 624.4(b), was to determine party status for any person or organization that had properly filed, and to narrow and define

those issues, if any, which may require adjudication concerning the project and the terms of the draft permit that has been prepared by DEC Staff. Participating at the issues conference were counsel and other representatives of DSNY, DEC Staff, and two prospective intervenors.

DSNY was represented by Christopher G. King, Esq., of the New York City Law Department.

DEC Staff was represented by Louis P. Oliva, Esq., Region 2 attorney.

Two petitions for full party status were received.

One petition (Exhibit No. 7) was received on behalf of the Gracie Point Community Council (by its president, Anthony Ard), Anthony Ard individually, 1725 York Owners Corp., Gracie Gardens Owners Corp., Gregory Costello, Suzanne Sanders and Thomas Newman (referred to collectively in these rulings as “Gracie Point”). The petition was prepared and filed by their attorneys Jeffrey L. Braun, Karen L. Mintzer and Kerri B. Folb, all of Kramer Levin Naftalis & Frankel, LLP, in Manhattan, and Ms. Mintzer was their lead attorney during the issues conference discussion and subsequent conference calls I held with the participants.

A second petition (Exhibit No. 8) was filed on behalf of EDF by its general counsel, James T.B. Tripp, and senior policy analyst Ramon Cruz, both of whom appeared at the issues conference.

Gracie Point’s petition was timely filed, consistent with the deadline set in the hearing notice, but EDF’s petition was not. Nonetheless, both DSNY and DEC Staff said they did not object to EDF’s petition on timeliness grounds.

The conference went forward with a discussion of the project, a draft permit prepared by DEC Staff (Exhibit No. 6), and the environmental interests of the petitioners as well as their proposed issues. Because, at the time the matter was referred to my office, DEC Staff had made a tentative determination to approve the application subject to the conditions of its draft permit, and because DSNY did not object to these conditions, most of the discussion addressed the petitions for party status: in the case of Gracie Point, its objections to permit issuance, and in the case of EDF, its requests for permit modification.

Because, when the issues conference began, DEC Staff was still evaluating public comments on the project, the issues conference did not conclude on October 16, but was adjourned at the end of the day to allow for possible adjustments of DEC Staff's position and the terms of its permit, and to afford an opportunity for direct negotiations among the conference participants. Rather than continue the conference on October 17, which had also been reserved for it, the participants' representatives accompanied me that day on a visit to the project site and its immediate surroundings, including Asphalt Green.

Follow-up telephone conference calls were held among me and the parties' counsel on October 29 and November 8, 2007. Just prior to the October 29 call, DEC Staff circulated a revised draft permit, as to which it was agreed there would be further negotiations. Shortly in advance of the November 8 call, DEC Staff provided new and modified permit language addressing various items, and DSNY provided additional language for a condition it had negotiated with EDF, which was also acceptable to Staff. During the call on November 8, DEC Staff confirmed certain understandings about its new permit language and EDF explained why it agreed to the language it and DSNY had developed.

At the end of the November 8 call, DSNY and DEC Staff confirmed that there were no issues between them and agreed that none of the remaining issues proposed by the petitioners were substantive and significant and, therefore, deserving of an adjudicatory hearing. The participants and I then agreed that the conference record would be completed on the basis of written submittals, first from DSNY and DEC Staff (allowing them an opportunity to respond to all remaining claims in the petitions), and then from the petitioners (to answer claims that their issues do not warrant adjudication, and that their proposed conditions should not be added to the permit). Timely written submittals were received from DSNY and DEC Staff on November 30, 2007, and from the petitioners on December 28, 2007.

EDF's submittal, dated December 28, addresses how the concerns in its petition have been addressed to its satisfaction through additions to the draft permit. EDF notes that of the issues proposed in its petition, only one remains, namely, control of diesel emissions from private carter trucks that may use the transfer station. EDF writes that while it is still committed to reducing such emissions on a credible schedule, it has decided not to pursue that issue in this proceeding.

Gracie Point, in its submittal dated December 27, argues that an adjudicatory hearing should be held on the issues raised in its petition or that, in the alternative, the Part 360 permit should be denied as a matter of law due to DSNY's alleged failure to comply with the regulatory requirements applicable to such permit.

On January 3, 2008, I held a conference call with counsel for the parties to confirm the matter's status, indicating that the record was now adequate for me to commence preparing issues rulings. In a follow-up memorandum, I requested clarification of EDF's position and was subsequently provided with revised permit language confirming an understanding between EDF and DSNY addressing community notification when the facility operates under upset and emergency conditions. Also in January 2008, I circulated my proposed corrections to the issues conference transcript, which were subsequently adopted along with others proposed by Gracie Point, there being no objection by the other conference participants.

Finally, on April 2, 2008, I held one last conference call to confirm understandings about permit terms and discuss whether certain further modifications, in relation to Gracie Point's remaining concerns, would be warranted.

Revisions to Draft Permit

Prior to referring this matter to hearing, DEC Staff prepared a draft permit (Exhibit No. 6) that it determined could be issued to DSNY. The availability of this permit for review in conjunction with the permit applications was announced in the hearing notice issued by my office. In their petitions, both Gracie Point and EDF raised concerns about the draft permit. Gracie Point proposed that certain of the conditions be clarified and strengthened, and that additional permit conditions be added. EDF also proposed various amendments to the permit.

The petitioners' proposals were discussed at the issues conference and were the subject of subsequent negotiations among the parties. DEC Staff's submittal of November 30, 2007, includes as Exhibit "A" an updated draft permit that includes new conditions that were added following the issues conference. DSNY accepts the permit as modified and does not object to any of the amendments. Because of the permit modifications, EDF no longer proposes any issues for adjudication. Gracie Point, however, continues to maintain the issues in its petition.

The following discussion addresses EDF's concerns that led to permit revisions as well as the revisions themselves. Gracie Point's concerns and the manner they were addressed by the permit are discussed below, in relation to their proposed hearing issues.

Regulation of Diesel Emissions from Trucks

In its petition and at the issues conference, EDF voiced concern about the potential impact of diesel emissions from trucks accessing the transfer station, both DSNY's trucks as well as privately-owned commercial trucks. In relation to DSNY's trucks, this concern has been addressed by new special condition No. 45, negotiated between EDF and DSNY, which, as included in DEC Staff's draft permit, reads as follows:

"All collection trucks owned and operated by the Permittee and using the facility shall use ultra low sulfur diesel fuel. By the end of 2012, Permittee's collection trucks using the facility and purchased prior to 2007, which are all certified by the original equipment manufacturer to emit no greater than 0.1 grams of diesel particulate matter per brake horsepower-hour, shall be installed with best available retrofit technology certified to achieve reduction of diesel particulate matter emissions by 90 percent or greater. Permittee's collection trucks using the facility and purchased during or after 2007 shall be certified by the original equipment manufacturer to emit no greater than 0.01 grams of diesel particulate matter per brake horsepower-hour."

DSNY maintains that this draft permit condition tracks the requirements of City Local Law 39 of 2005, codified in City Administrative Code Section 24-163.4, and that the condition reflects a proper exercise of the City's procurement powers and policy goals. According to DSNY, a permit condition such as this, requiring retrofit or upgrade of its collection fleet, is redundant, because DSNY is already obligated to achieve a 90 percent reduction in diesel particulate emissions for its entire collection fleet by 2012, around the time the East 91st Street marine transfer station is scheduled to begin operations. On the other hand, confirming this obligation as a permit condition makes it enforceable by DEC as well, and DSNY consents to this arrangement.

In its December 28 submittal, EDF writes that the permit condition accomplishes compliance with 2007 U.S. Environmental Protection Agency ("EPA") diesel truck emission standards by the end of 2012 through regular fleet turnover to the extent that an

increasing number of trucks will have been purchased after the 2007 rule went into effect, and through retrofitting of pre-2007 trucks. In EDF's view, this reflects a significant commitment on the part of DSNY, whose efforts to modernize its fleet and reduce emissions and other impacts of its truck operations EDF says are exemplary. Also, EDF says it means that diesel emission impacts described in the environmental review documents should be less than stated because, to EDF's knowledge, emission factors used in modeling did not reflect this commitment. Finally, EDF argues that fleet turnover also has benefits for truck noise impacts because new trucks operate more quietly than older ones.

The permit condition does not apply to privately-owned commercial trucks that are also used to collect solid waste. EDF says that private carter trucks tend to be older and to have greater emissions than DSNY's trucks, but that DEC's regulatory authority over private carter truck emissions is not so clear, and that DEC Staff acknowledges no such authority for itself under Part 360 or any other state law that it administers.

In fact, DSNY argues that DEC is without authority to impose additional requirements concerning commercial truck emissions under the facility's air permit. According to DSNY, the federal Clean Air Act regulates mobile source air emissions, such as those from collection vehicles that will travel to the facility, and generally preempts state regulation of automobile emissions. See, Motor Vehicle Mfr's Ass'n of the United States, Inc. v. New York State Dep't of Envtl. Conserv., 79 F. 3d 1298, 1302 (2d Cir. 1996) ("In general, state regulation of automotive tailpipe emissions is preempted by the federal Clean Air Act.")

DSNY asserts that DEC may regulate emissions from stationary sources under the air facility permit regulations, but that there does not appear to be any legal basis for DEC to impose conditions related to mobile sources that may travel to and from the facility, absent a voluntary agreement. In support of this claim, DSNY cites ALJs' rulings in Application by Brookhaven Energy Limited Partnership, a matter before the State Board on Electric Generation Siting and the Environment involving a proposal to construct and operate an electric generating facility in Brookhaven, New York. At page 13 of their rulings, dated October 25, 2001, the ALJs excluded as a hearing issue particulate pollution from possible trucking of sanitary waste water offsite for treatment. They did so by noting that the proponent of the issue had not identified any legal standard that could expand the scope of the draft air permit, which addressed the project as a stationary air source, to incorporate additional

conditions related to mobile emission sources that may travel to and from the project site.

DSNY claims it is free to impose emissions-based restrictions on its own fleet of collection vehicles without running afoul of preemption concerns under the "market participant doctrine," which distinguishes between the role of a state (or one of its political subdivisions) as a regulator on the one hand, and its role as a market participant on the other. See, Engine Mfr's Ass'n v. South Coast Air Quality Management District, 498 F.3d 1031 (9th Cir. 2007). Under this doctrine, DSNY claims, provisions directing state or local governments to purchase, procure, lease, and contract for use of vehicles meeting certain criteria, such as those embodied in Local Law 39, are not preempted because they essentially reflect the government's own interest in achieving efficient procurement of needed goods and services.

EDF says the permit condition it has negotiated adequately addresses diesel emission impacts in the context of this hearing, and leaves the door open for other initiatives EDF may pursue. EDF says it remains committed to reducing private carter diesel emissions on a credible schedule, but wants to ensure that any control measure does not run afoul of Clean Air Act preemption constraints. EDF also offers two other reasons for seeking other venues to address its concern. First, EDF says it is seeking a legal strategy that will reduce emissions from all collection trucks using all solid waste transfer facilities in the city, be they owned privately or by DSNY. Second, EDF asserts that as a practical matter, a strategy for reducing private carter truck diesel emissions will work only if all affected parties, including the carter industry, community groups throughout the city and business interests that will carry a good portion of the cost are engaged in framing a solution that will stand up against any legal attack under state or federal law. In its December 28 submittal, EDF writes that its hope is that all who share an interest in "cutting this Gordian knot" will share in framing and implementing a technically sound and credible solution so that communities with transfer stations, rich or poor, in whatever borough, will no longer have to suffer the brunt of collection truck emission impacts.

Queuing of Trucks on Public Streets

Related to EDF's concern about emissions from collection trucks is a concern about such trucks queuing on public streets as they await entrance to the facility. This is prohibited by special condition No. 36 of the draft permit, which states:

"There shall be no truck queuing on a public street in association with the operation of the subject facility." To ensure compliance with this requirement, new special conditions No. 44 and 52 have been added to the permit. Special condition No. 44 states: "Permittee shall station a staff person at the foot of the ramp at all times when trucks are delivering solid waste to the facility to monitor and control truck traffic and to ensure that there is no queuing of trucks on public streets." Special condition 52 states: "Permittee shall install video cameras in locations at or near the Facility to allow for views of the ramp and the north bound and south bound lanes of York Avenue. Permittee shall grant Department Staff unrestricted access to these video cameras on a real time basis via a secure internet link. Such access shall be provided no less than 15 days prior to commencement of operations at the facility. In addition, the Permittee shall grant Department staff access to its electronic records of all the facility's video cameras, data and scale house upon request."

Project opponents are particularly concerned about the possibility of truck queuing on York Avenue adjacent to the Asphalt Green recreational field, and the impact of diesel emissions on children playing on the field. The potential for this is reduced to the extent that delivery traffic is controlled at the foot of the ramp and the video surveillance of York Avenue demonstrates whether trucks queue there. EDF says it understands that licensed private carters authorized to use the facility know that they will have to comply with the no-queuing provision and will obey instructions of DSNY's traffic manager.

Monitoring, Reporting and Enforcement

In its petition, EDF expressed concern that DEC's draft permit did not specify what kind of queuing, daily tonnage, emission, odor and noise and other data will be collected, who will review and analyze the data, what enforcement mechanisms will be invoked, and what kinds of penalties will be imposed if there is non-compliance with the permit's conditions. EDF requested that the Part 360 permit require DSNY to collect data about daily, weekly and annual tonnages, number of trucks, invocation of upset and emergency conditions, truck emissions, odor and noise. Also, it requested that the data be provided not only to DEC, but on a timely basis to the Community Advisory Group ("CAG") that the city council established as part of its approval of the SWMP, or if the CAG is not operating, to the solid waste committee of the local community board. Finally, EDF requested that the permit require DSNY to make $25,000 available

to the CAG to retain one or more consultants to review and analyze the data.

Since the commencement of the issues conference, DSNY and EDF have negotiated a new special condition (No. 17A) which DEC Staff has agreed to add to the permit. As confirmed in an EDF e-mail dated January 17, 2008, that new condition states:

"Permittee is required to notify the Department and the East 91st Street MTS Community Advisory Group (CAG), as soon as practicable, but in no case later than 3 hours, via telephone and e-mail to the Department's Regional Solid Waste Engineer and the Chairperson of the CAG, after the onset of any upset or emergency condition. Such notification shall be on a Department approved form that must list, at a minimum, the following information: the date and time of upset or emergency; type of condition; reason for the need for the condition; detailed underlying cause for the occurrence, if then known; measures taken to address the condition; the expected end date and time of the occurrence; and the name of the person who authorized the condition. At the end of the upset or emergency, the balance of the form must be filled out and e-mailed to the Department and the CAG within two business days. The information provided shall include: the date and time when the condition ended; tons of solid waste received per day during the upset or emergency; number of trucks per hour passing over the scale; and unexpected or unusual occurrences during the condition."

Special condition No. 17A continues by describing what constitutes an upset condition and what constitutes an emergency condition, either of which would allow the facility to receive more waste than would be permitted under ordinary operations.

According to EDF, notifying the CAG promptly after the onset of any upset or emergency condition is particularly important because, with such onset, the number of collection trucks on public streets in proximity to, approaching and exiting the facility may be double or more what it is normally, and residents in the area deserve to know the cause of any observed increase in truck traffic. In addition, EDF points out that, pursuant to new special condition No. 51, DSNY will be posting on a monthly basis information that may be of interest to the CAG. Special condition No. 51 states: "Permittee shall on a monthly basis post on the DSNY website basic public information regarding the operation of the site. This shall include, at a minimum, daily throughput rates and the hourly number of incoming trucks. The posting of such information shall begin 30 days after the commencement of

operation of the facility. The information shall be maintained on the same website for a minimum period of one year."

At the issues conference, EDF acknowledged that it was not looking for DEC's permit to give independent enforcement capability to the CAG, and that DEC could not do so anyway. Only DEC would be able to enforce the permit terms, but EDF argues that if DSNY is under an affirmative duty to provide information to the CAG, the CAG can use that information to alert DEC to perceived permit violations and request that DEC act on them.

While the draft permit condition does not accomplish everything EDF initially sought, EDF has withdrawn all issues pertaining to monitoring, reporting and enforcement from consideration as proposed hearing issues, and indicated that, for purposes of this hearing, all of its issues have been resolved. In particular, EDF has withdrawn its request that DSNY appropriate money for the CAG to hire consultants, acknowledging that this is basically a budgetary matter. In its January 17 e-mail, EDF counsel says that it might make more sense for DSNY, if it were so inclined, to have a fund available that the CAG could look to when the need to retain consultants arises. According to EDF, it remains a good idea for the CAG to have access to such funding so that it can better evaluate the operational data it receives. EDF says it will continue to urge such a policy, quite possibly with the CAG itself.

RULINGS ON ISSUES

Gracie Point Petition

Gracie Point submits that the East 91st Street marine transfer station cannot meet the standards for issuance of DEC permits, and that there are several issues that merit the scrutiny provided by an adjudicatory hearing. Each of the five issues proposed in its petition is addressed in these rulings, as follows.

Issue One: Compatibility With, and Adverse Impact On, the Public Health, Safety and Welfare [Petition, pages 8 - 17]

According to Gracie Point, DEC cannot conclude that the East 91st Street marine transfer station is compatible with, and will have no adverse impact on, the public health, safety and welfare.

First, Gracie Point says that the transfer station is incompatible with its surroundings, which Gracie Point characterizes as a densely populated residential neighborhood filled with parks and tree-lined streets. Gracie Point notes that the access ramp to the facility bisects Asphalt Green, and that trucks queuing on the ramp would spew diesel particulates onto the playing field to the south of the ramp and the playground to the north of the ramp. Also, Gracie Point notes that two other heavily used New York City parks abut the proposed site, whose zoning, which is light manufacturing, Gracie Point considers to be an anomaly and completely inconsistent with nearby residential properties.

Second, Gracie Point says that DSNY failed to analyze impacts to the public health and safety from the maximum permitted capacity of the transfer station – 5,280 tons per day, under which the facility could operate during emergency conditions - - and therefore has not fully gauged the project's health, safety and welfare impacts. Gracie Point and DSNY agree that DSNY analyzed so-called "on-site" impacts – including those related to air quality, noise and odor, from all on-site indoor and outdoor equipment, including collection vehicles inside the building and queuing on the ramps to the processing building, and tugs and cranes servicing barges at the facility – on the basis of a throughput of 4,290 tons per day of waste. For "off-site" impacts – related to traffic, air quality and noise, essentially from collection vehicle traffic to and from the marine transfer station – a throughput of 1,873 tons per day was used as the basis for evaluation. [See FEIS, page 40-78.]

Third, Gracie Point maintains that DSNY inappropriately dismissed as insignificant the noise impacts attributable to the transfer station at Asphalt Green, along the Bobby Wagner Walk, and at apartment buildings on York Avenue and East 90th Street. DSNY performed a City Environmental Quality Review ("CEQR") analysis for these locations, comparing the loudest noise emissions projected from daily facility operations with the quietest anticipated background noise levels. The results of this analysis, shown on page 6-147 of the FEIS, indicate that at none of these locations would there be an increase over existing noise levels greater than 3 dBA, that being a threshold below which, under CEQR, an increase in noise does not qualify as an impact. According to Gracie Point, the analysis depends on a louvered fence along the truck ramp providing a noise reduction of approximately 7 dBA – which Gracie Point says is overstated – for receptors adjacent to the property boundary. Also, Gracie Point claims that, under the CEQR technical manual, 65 dBA may be considered an absolute noise level that should not be

significantly exceeded, and that, even adopting DSNY's analysis, existing noise already exceeds that level at Asphalt Green and the Bobby Wagner Walk, so that projected increases beyond that (by as much as 2.5 dBA at the Asphalt Green building, and 2.7 dBA along the Bobby Wagner Walk) should be considered significant.

RULING: No issue is raised for adjudication. The petition assumes that, to permit operation of the transfer station, DEC must first conclude that it is compatible with, and will have no adverse impact on, the public health, safety and welfare. However, no such conclusion is required, and Gracie Point's argument to the contrary is based on a misreading of the relevant permitting regulations.

The project, as a solid waste transfer station, is governed by the Part 360 regulations for solid waste management facilities. Those regulations contain permit issuance criteria [at 6 NYCRR 360-1.10] as well as a separate section, 360-1.11, addressing the provisions of Part 360 permits. Under a subheading for "mitigation of adverse impacts," Section 360-1.11(a)(1) states that the provisions of each permit issued pursuant to Part 360 "must assure, to the extent practicable, that the permitted activity will pose no significant adverse impact on public health, safety or welfare, the environment or natural resources, and that the activity will comply with the requirements identified in this Subpart and the applicable Subpart pertaining to such a facility, and with other applicable laws and regulations." Gracie Point reads this as saying that DEC must find as a matter of law that the transfer station will have no adverse impact on public health, safety or welfare. However, nothing in Section 360-1.11(a) requires such a finding. Rather, the regulation, which addresses impact mitigation, by its plain terms requires only that a Part 360 permit contain provisions that "assure . . . to the extent practicable" that "no significant adverse impact on public health, safety or welfare" would result from the regulated activity, which is the construction and operation of the transfer station.

As both DSNY and DEC Staff contend, Section 360-1.11(a) provides no basis to deny a solid waste management facility permit; the permit issuance criteria are in Section 360-1.10. Section 360-1.11(a) exists to ensure that a solid waste management facility permit contains practicable measures to mitigate potentially significant impacts. Notably, Gracie Point's offer of proof on Issue One proposes no mitigation beyond what is already included in the permit drafted by DEC Staff. Instead, it is meant to demonstrate that the site is patently incompatible with a waste transfer station, that DSNY did not

analyze impacts to public health and safety from the maximum permitted capacity, and that the proposed facility will have significant noise impacts.

As DSNY points out, essentially the same claims were raised in an unsuccessful Article 78 proceeding challenging DSNY's planned re-opening of the East 91st Street marine transfer station, entitled The Association for Community Reform Now ("ACORN") et al v. Bloomberg, et al, Index No. 114729/05. That challenge was mounted by a group of residents and business owners on Manhattan's Upper East Side, a group that includes the Gracie Point Community Council (by its president, Anthony Ard), 1725 York Owners Corp., Gracie Gardens Owners Corp., Suzanne Sanders and Thomas Newman, all petitioners in this permitting proceeding, as well as others who have not petitioned here.

In the court case, the ACORN petitioners claimed that DSNY's environmental review failed to disclose or properly analyze: (1) adverse impacts to community character near the transfer station site; (2) alleged noncompliance with DSNY's regulations governing the siting of solid waste transfer stations; (3) alleged noncompliance with noise standards in the New York City zoning resolution; (4) air pollution, noise, and traffic impacts resulting from operation of the marine transfer station at its maximum design capacity; and (5) impacts to Asphalt Green and the surrounding area during construction of the new marine transfer station and its ramp. In addition, the ACORN petitioners alleged that DSNY failed to analyze reasonable alternatives to the proposed East 91st Street marine transfer station and that DSNY improperly segmented its review of the SWMP by failing to analyze impacts of the transport and disposal of solid waste after its containerization at the transfer station. [A copy of the ACORN petition and the brief in support of that petition are attached as Exhibits No. 1 and 2 to DSNY's brief, dated November 30, 2007, opposing Gracie Point's petition for party status.]

As DSNY argues, all these claims were rejected by the State Supreme Court and the petition was dismissed in its entirety. [See ACORN et al v. Bloomberg et al., 824 N.Y.S.2d 752; 2006 N.Y. Misc. Lexis 2471 (Sup. Ct. N.Y. Co. 2006) (holding that DSNY "identified relevant areas of environmental concern, took a hard look at them and made a reasoned elaboration of the basis for its determination, thereby fulfilling its responsibilities" under SEQRA and CEQR). The court's decision (a copy of which was received as Exhibit No. 10) has since been appealed to the Appellate Division, First Department, which heard oral argument on the appeal in February 2008. [Copies of the petitioners' briefs in support of the appeal are attached as Exhibits No. 1

and 2 to Gracie Point's reply brief in this permitting matter, dated December 27, 2007.]

DSNY notes correctly that the claims advanced as Issue One in Gracie Point's petition – that the East 91st Street marine transfer station is not compatible with, and would adversely impact, public health, safety and welfare – are basically the same as ones raised and addressed in the ACORN Article 78 proceeding, and that both sets of claims are based on alleged deficiencies in the FEIS.

For instance, Gracie Point's claim that the project site is "patently incompatible with a waste transfer station," due to the neighborhood's residential character and nearby recreational uses (petition for party status, pages 8-13), is essentially identical to the claim made in the Article 78 proceeding, where petitioners maintained that the facility is "irreconcilably inconsistent with the current nature of the densely populated residential community and the numerous public parks," and that the FEIS "ignored impacts to neighborhood character." [ACORN petition at 18, 30-31.]

Likewise, Gracie Point's claim that DSNY failed to analyze impacts from operations at maximum permitted capacity (petition for party status, pages 13-15) is the same claim made in the Article 78 proceeding, which is that DSNY "failed to analyze a reasonable worst case scenario" including air, noise and traffic impacts from operation of the marine transfer station at its "maximum permitted capacity." [ACORN petition at 25.]

Finally, Gracie Point's claim that the proposed facility "will have significant adverse noise impacts" (petition for party status, pages 15-17) is essentially the same as the claim in the Article 78 proceeding that the project will subject the petitioners there "to significant noise" and "create hazards and risks to health." [ACORN petition at 38.]

In sum, DSNY asserts that Gracie Point's effort to raise issues in this permit hearing about potential risks to potential health, safety and welfare is nothing more than an attempt to relitigate issues about traffic, air pollution and noise that were already rejected by the court in ACORN. According to DSNY, adjudicating these issues would be covering old ground through an improper collateral attack on the review of the project under SEQRA.

On the other hand, Gracie Point argues that DEC has its own obligation, separate from SEQRA, to consider issues that are

germane to the regulatory criteria applicable to the various requested permits. According to Gracie Point, all of its issues are raised solely under the permitting standards for the requested permits, and DSNY may not insulate itself from any further review by DEC, and DEC may not avoid its obligation to thoroughly review the permit application based on DSNY's prior SEQRA review.

I agree with Gracie Point that DEC is obliged to consider issues that arise under relevant permitting standards even if those issues also concern a SEQRA review performed by a lead agency other than DEC. DEC's permit hearing procedures [at 6 NYCRR 624.4(c)(6)(ii)(b)] state that where another agency serves as lead agency, and that lead agency has required the preparation of a DEIS, no issue that is based solely on compliance with SEQRA and not otherwise subject to DEC's jurisdiction will be considered for adjudication except in two instances. One instance is where DEC notified the lead agency during the comment period on the DEIS that the DEIS was inadequate or deficient with respect to the proposed issue and the lead agency failed to adequately respond. That is not the case here; though DEC Staff did comment on the DEIS, it was satisfied with DSNY's responses to its comments. The other instance is where DEC is serving as lead agency for purposes of supplementing the FEIS, which also is not the case; DSNY remains the lead agency, and DEC is not supplementing the FEIS, nor is it being petitioned to do so.

While strictly SEQRA issues may not be entertained in this hearing – and, in fact, no such issues are proposed by Gracie Point – issues arising under DEC's permit issuance criteria may be considered even if they are also relevant to SEQRA compliance. On this I agree with Gracie Point, but I disagree as to its claim that Issue One arises under the criteria for issuance of a solid waste management facility permit. As noted above, those criteria are in Section 360-1.10, not Section 360-1.11(a). ECL Section 27-0703(2) provides DEC the power to adopt and promulgate rules and regulations governing the operation of solid waste management facilities, such rules and regulations to be directed at the prevention or reduction of (i) water pollution, (ii) air pollution, (iii), noise pollution, (iv) obnoxious odors, (v) unsightly conditions caused by uncontrolled release of litter, (vi) infestation of flies and vermin, and (vii) other conditions inimical to the public health, safety and welfare. DEC has exercised that power by developing operational requirements for solid waste management facilities generally [see 6 NYCRR 360-1.14] and transfer stations in particular [see 6 NYCRR 360-11.4]. According to the permit issuance criteria at Section 360-1.10, DEC may not issue a permit to authorize construction or expansion

of a solid waste management facility unless the applicant makes various demonstrations, including a demonstration of ability to operate in accordance with the requirements of the ECL and Part 360.

Consistent with its authority under ECL 27-0703(2), DEC has addressed the public health, safety and welfare through the promulgation of regulations embodying operational requirements applicable to this project, but there is no additional requirement, apart from them, that a project be "compatible with, and have no adverse impact on, the public health, safety and welfare," to use the language offered by Gracie Point. The regulation that Gracie Point cites, Section 360-1.11(a), provides only that in those cases where permit issuance criteria are met, the provisions of the permit "must assure, to the extent practicable, that the permitted activity will pose no significant adverse impact on public health, safety and welfare." Section 360-1.11(a) then states that, to provide such assurance, DEC may impose conditions on a permit, including but not limited to or exemplified by the following: inspection, financial assurance, technical data gathering and reporting, data analysis, quality control, quality assurance, sampling, monitoring (including the imposition of on-site environmental monitors), reporting and verification. In fact, many of these types of conditions are incorporated in the permit drafted by DEC Staff.

Apart from Part 360, Gracie Point has raised Part 608 (governing the use and protection of waters permit) and Part 661 (governing the tidal wetlands permit) of DEC's regulations as grounds for consideration of public health, safety and welfare impacts. Section 608.8(b) indicates that whether a proposal will endanger the health, safety or welfare of the people of the state is relevant to whether that proposal is in the public interest and therefore should receive a protection of waters of permit. Section 661.9 (b)(1)(ii) indicates that a proposed activity must be compatible with the public health and welfare in order to receive a tidal wetlands permit.

Protection of waters and tidal wetlands permits are needed for this project because the re-opening of the East 91st Street marine transfer station will require a small amount of dredging of the East River to accommodate barges used in transporting the containerized waste, as well as the placement of steel piles in the bed of the river to support the facility and the access ramp. However, as DSNY points out, the health, safety and welfare claims identified in Gracie Point's offer of proof – concerning such things as air quality, noise and odor – are unrelated to the performance of these activities. The activities regulated under

Parts 608 and 661 – the dredging and placement of piles in the river – are related to project development, whereas the facility's day-to-day operations are the basis for the health, safety and welfare impacts claimed in the petition.

Because none of the evidence offered by Gracie Point relates at all to potential health and safety impacts from dredging and construction activities in the river and its regulated wetland, Gracie Point's reliance on Sections 608.8(b) and 661.9(b)(1)(ii) as support for its claims under Issue One is misplaced. These claims have no potential to result in denial of any permit – the purpose for which they have been offered – and therefore do not raise a significant issue warranting adjudication. [See definition of significant issue at 6 NYCRR 624.4(c)(3).]

This means that further evaluation of the offers of proof is not necessary, though, should my interpretation of the regulations be rejected on appeal, I provide my own assessment of these offers below. For the purpose of this discussion, it should be stressed that DSNY argues that the East 91st Street marine transfer station, if operated under terms of the current draft permit, will not pose any significant impact to the public health, safety and welfare, and that none of Gracie Point's purported proof comes close to demonstrating otherwise. [Pages 22 to 27 of DSNY's brief of November 30, 2007, in opposition to Gracie Point's request for party status, provide DSNY's full response on this point.]

To prove the site is incompatible with a waste transfer station, Gracie Point would offer:

- - Photographs of the site and the surrounding neighborhood;
- - Testimony from Carol Tweedy, executive director of Asphalt Green, about the services Asphalt Green provides to the community;
- - Testimony from Patrick Kinney, a Columbia University environmental health sciences professor, about the impacts of diesel particulates on children at play on Asphalt Green;
- - Testimony from Anthony Ard, president of the Gracie Point Community Council, about neighbors' concerns that the facility will engender severe traffic congestion, air pollution, odors and noise;
- - Testimony from Vince Ferrandino, a planning and development consultant, concerning the proximity of the transfer station to parks, residences, and other so-called sensitive receptors; and

- - Testimony from Gary Jacobs, an officer in a real estate company, about the zoning of the site and surrounding neighborhood.

Of this proposed testimony, only that of Prof. Kinney would be a helpful addition to the impact analysis, though, as DSNY points out, its FEIS already includes an exhaustive analysis of the expected emissions of particulate matter from collection trucks and other diesel engines at the marine transfer station. DSNY's modeling and analysis of diesel particulate emissions in the FEIS found that the marine transfer station would not cause an exceedance of USEPA's health-based National Ambient Air Quality Standards (NAAQS) for particulate emissions, a showing that Mr. Kinney makes no attempt to rebut.

Dr. Kinney claims that children breathing heavily while at play on the fields of Asphalt Green would be particularly vulnerable to respiratory impacts from diesel particulates, and that there is a growing body of studies demonstrating the adverse respiratory impacts among children living or going to school near busy roadways. However, as DSNY argues, Asphalt Green (which grew and thrived while the former marine transfer station was operated) is already surrounded by York Avenue (and its 20,000-plus daily trucks and cars) to the west and FDR Drive (where nearly 150,000 cars pass by every day) to the east. The FEIS indicates that the marine transfer station would make only an insignificant contribution to existing fine particulate matter concentrations, and that DSNY is obliged by city law, provisions of which are incorporated in the draft permit, to achieve a large reduction in diesel emissions from its collection fleet in the years leading up to the transfer station's projected opening. DSNY acknowledges the health risks associated with diesel emissions, particularly for children, the elderly and asthmatics. In fact, its intent is to reduce such emissions on a city-wide basis by shifting away from a truck-based system of transporting waste, and developing a barge and rail transport system instead.

As to the characteristics of the neighborhood, including the proximity of residential buildings, parks and other impact receptors to the transfer station and its ramp, they are not in dispute. Nor is there a dispute about the services provided by Asphalt Green. The neighbors' concerns about the facility need not be the subject of additional testimony, as their concerns are well documented in the record of the legislative hearing and in the voluminous comments that were received in response to DEC's notices. The light industrial zoning of the project site, and the site's proximity to residentially zoned areas, are not in dispute, and while there is no question that the neighborhood has

changed markedly from when the former transfer station first opened at East 91st Street, whether the project site's zoning is anomalous with its surroundings, as Gracie Point maintains, is not for DEC to consider since, at any rate, the zoning can be adjusted only by the City.

On whether impacts were assessed from an appropriate level of operations, Gracie Point offers both (1) the testimony of Leo Pierre Roy, an environmental consultant, that the FEIS did not analyze impacts from operating the transfer station at full capacity (i.e., 5,280 tons per day), a point on which DSNY and DEC Staff agree; and (2) the testimony of Thomas Wholley, an air impacts analyst, showing that, at operations of 5,280 tons per day, the facility would cause an exceedance of a government-established screening threshold value for small particulate matter.

Operations at full capacity would be authorized by DEC only under emergency conditions – defined in the draft permit as those due to circumstances such as fire, explosion, power outage, extreme weather, and acts of terrorism – and represent a very worst case scenario in terms of impacts to off-site receptors. However, in the ACORN case, the court found that an analysis of "on-site" impacts based on a throughput of 4,290 tons per day – an amount far greater than the expected daily usage under normal operating conditions – combined with the expectation that the maximum of 5,280 tons per day would be reached under rare circumstances, satisfied a "reasonable" worst case scenario analysis with a reasonable degree of detail, and concluded that DSNY was not obligated to consider theoretical possibilities associated with possible emergencies.

Although the draft permit sets a maximum peak day limit of 1,860 tons per day under normal conditions, it also allows the facility to operate at up to 4,290 tons per day under "upset" conditions that result from events that reduce the processing capacity of one or more elements of DSNY's waste management system, such as fire or equipment outages, thereby requiring a temporary reallocation of municipal solid waste from other waste sheds to the East 91st Street marine transfer station for a period of a few days. For operations under upset and emergency conditions, DEC Staff's draft permit requires that, at a minimum, DSNY "shall ensure that public health, safety and the environment are adequately protected." [See special condition No. 17-A.].

Finally, Gracie Point seeks to call Thomas Wholley as an expert testifying that the transfer station will create significant adverse noise impacts at sensitive receptors not

identified in DSNY's environmental review. The so-called significance of noise impacts is based on Gracie Point's interpretation of a CEQR technical manual that DSNY, at the issues conference, claimed Gracie Point was reading selectively and improperly. The CEQR technical manual (a copy of which has been provided by DSNY) provides guidelines and recommendations for the determination of impact significance, but it is prepared by the City and intended for use in relation to its environmental quality review process, not in relation to a review DEC would conduct for compliance with its own permitting standards. In this regard, it should be noted that Part 360 includes its own operational requirement for noise attributable to equipment and operations at a solid waste management facility. That requirement [at Section 360-1.14(p)] sets limits for noise beyond the property line at locations zoned or otherwise authorized for residential purposes, and serves to establish DEC's understanding as to what impacts are acceptable and consistent with public health, safety and welfare. [See discussion below in relation to Gracie Point Issue Two, alleging a failure to demonstrate that the marine transfer station would comply with 360-1.14(p).]

Issue Two: Failure to Meet Mandatory Requirements of Part 360

- - Transfer and Disposal of Waste [Petition, pages 18 and 19]

Gracie Point contends that the application does not specify where the waste processed at the East 91st Street marine transfer station will be disposed of or the transfer route that will be followed. In the absence of such information, Gracie Point says DEC lacks authority to deem the application complete and issue a permit for construction of the facility, noting that 6 NYCRR 360-11.2(a)(3) states that an application for initial permits to construct and operate a solid waste transfer station must include, as part of its engineering report, both "a description of the general operating plan for the facility, including where all waste will be disposed of," and "a proposed transfer plan specifying the transfer route, the number and type of transfer vehicles to be used, and how often solid waste will be transferred to the disposal site." [See 6 NYCRR 360-11.2(a)(3)(i) and (iii).]

Special condition No. 20 of the draft permit provides that:

"Ninety days prior to commencement of operations, the Permittee must submit . . . a Final Operations and Maintenance Plan . . . for review and approval. The O & M [Plan] must include the following documents: Final Transfer, Transport, and Disposal Plan with the inclusion of specific waste transport and disposal contractor(s), final disposal sites, inclusive of all necessary authorizations, a Barge Security Plan, Person Overboard Procedure, and Standard Barge Mooring Procedure. The authorizations must include a certified copy of each permit or other authorization pertaining for the operation of the treatment or disposal facility to which the solid waste will be brought, issued by a governmental entity having jurisdiction over that facility. Written approval of the O&M, by the DEC Engineer, is required, prior to operation of the facility."

Gracie Point argues that without knowing where the waste will be disposed of, it is impossible to determine the ultimate environmental impacts of the transfer and disposal plan, the ultimate costs of the plan, and whether the plan is even feasible. Finally, Gracie Point adds that allowing DSNY to defer submittal of the plan until after the permit has been issued deprives the public of the opportunity to comment on the plan and raise legitimate issues.

RULING: No factual issue exists for adjudication, as DSNY concedes it has not yet identified specific disposal facilities that will be receiving waste from the East 91st Street marine transfer station. Moreover, the draft permit adequately addresses this concern by requiring that such information – not only about disposal sites, but how the waste will reach those sites after leaving the facility – be provided 90 days before the transfer station begins operations, and that operations not begin until DEC has approved DSNY's plans.

As a supplement to its Part 360 permit application, DSNY has provided an interim report serving as an interim transfer, transport and disposal plan [see FEIS at pages 40-400 to 40-431], the purpose of which is to show that the available capacity at intermodal terminals in the New York Harbor region and the capacity of rail and/or ocean barge transport that serves these facilities are sufficient to transfer and transport containerized waste from the city's four converted marine transfer stations – two in Brooklyn, one in Manhattan and one in Queens – as proposed in the City's SWMP. The report includes estimates of the equipment requirements for the transfer, transport and disposal system, and describes the available disposal capacities in

various states based on proposals received by DSNY in response to its Request for Proposals ("RFP") to Transport and Dispose of Containerized Waste from One or More Marine Transfer Stations, issued in December 2003.

As the FEIS explains, one of the advantages of transferring waste into sealed, leak-proof shipping containers is that these containers will be barged to one of the New York City metropolitan area's many existing container ports, where they will be transferred to rail or ship like any other shipping container. The investigation described in the City's interim report determined that there was sufficient intermodal capacity to handle about 1,582 containers per day by rail and about 1,185 containers per day by barge – overall, a potential intermodal capacity that exceeds DSNY's projected need (440 containers per day) by approximately a factor of three. [FEIS at 40-415]. Also, it determined that there were about 37,700 tons per day of barge or rail accessible disposal capacity potentially available to DSNY in New York State, Georgia, North Carolina, Ohio, Pennsylvania and Virginia. In its reply brief of November 30, 2007, DSNY notes that the private waste management companies now bidding for contracts to handle the marine transfer stations' waste streams have access to more than 30,000 tons per day of putrescible disposal capacity in New York State, Georgia, Ohio, Pennsylvania, Virginia and Indiana, which is more than enough to accommodate both the waste managed by DSNY as well as commercial waste that would be processed at the marine transfer stations. [See Exhibit No. 10 to DSNY's brief, a summary of disposal capacity with rail/barge access among four marine transfer station RFP proposers.]

As the FEIS explains, DSNY is negotiating with proposers with the objective of entering into 20-year transport and disposal contracts with one or more of them [FEIS, 40-401]. According to DSNY, these contracts are being negotiated in accordance with the City's sealed competitive procurement process, which means that final disposal locations are not yet known. When contracts are finalized, a final transfer, transport and disposal plan will be developed and submitted to DEC, in accordance with special condition No. 20 of the draft permit. In the meantime, DEC Staff indicates it is satisfied with the interim plan provided as part of the FEIS, and agrees with DSNY that there is sufficient disposal capacity, which DSNY says is enhanced because of the ability to access it by rail and oceangoing barge.

Even where, as here, an application has been determined to be complete, DEC's permit hearing procedures allow the ALJ to

require an applicant to provide additional information which is reasonably necessary to make any findings or determinations required by law. [See 6 NYCRR 624.4(c)(7), citing 6 NYCRR 621.14(b).] However, Section 360-11.2 requires only that the applicant for a transfer station permit specify where the waste will go and how it will get there. Based on the language of Staff's draft permit condition, Staff's review of the final plan would be rather limited, primarily to ensure that waste goes to permitted disposal sites. This can be accomplished once those sites are selected and DEC is notified of them; however, there is no apparent need to have this information now, before a decision is rendered on the permit application.

DEC needs to know there is a final transfer, transport and disposal plan in place, but the regulations identify no findings or determinations DEC must make in relation to that plan. Gracie Point says a final plan is needed now because, without it, one cannot determine the environmental impacts of the plan, its ultimate costs, and whether it is feasible. However, this permitting proceeding does not encompass more than a review of the transfer station itself; once the waste leaves the station, it is not governed by DEC's permit. The costs of transfer and disposal of the city's waste are of legitimate concern to the City and its residents, who bear those costs, but not DEC. Gracie Point says that deferring submittal of a final plan until a permit has been issued deprives the public of an opportunity to comment on the plan and raise legitimate issues, but does not explain how such issues would bear on DEC's permitting decision. Significantly, Gracie Point has not indicated any disagreement with the information in DSNY's interim plan, and has not alleged there is not adequate transfer and disposal capacity for the waste from the four marine transfer stations proposed by DSNY.

Neighbors of the East 91st Street marine transfer station have an environmental interest in ensuring that municipal solid waste entering the facility be containerized and removed in a timely manner. However, this is addressed already by both special condition No. 34 of the draft permit, which, with exceptions related to holidays, requires that such waste be containerized within 24 hours of receipt, and special condition No. 33 of the draft permit, which requires that such waste be removed from the facility within 48 hours after receipt, except in the event of a contingency (e.g., barge delay), in relation to which containerized waste may be held for no longer than four days.

To support their claims that submittal of a final transfer, transport and disposal plan can be deferred until after permit

issuance, DSNY and DEC Staff both cite the Commissioner's decision of November 26, 1984, in Matter of the Application of Islip Resource Recovery Agency, a permitting matter involving a proposed incinerator in the Town of Islip, Suffolk County. In that case, the Commissioner allowed a permit to issue despite the fact that the application lacked an identified site or method for the disposal of ash residue or by-pass wastes, noting that the applicant had proposed an agreement with the Town by which the Town would be responsible for proper disposal of all such wastes, and that any option the Town chose in that regard would be subject to SEQRA and the environmental effects of the Town's choice would be explored prior to its implementation. Under these facts, the Commissioner found that the proposed agreement between the applicant and the Town assured that waste disposal would occur in an environmentally safe manner, and that the application was therefore approvable to the extent that approval was conditioned upon the agreement's execution.

As Gracie Point argues, this Commissioner's decision arises from a fact pattern different from the one presented here, where there is no third party that would be responsible for waste disposal. However, as DSNY argues, the decision provides some authority for the idea that the failure to identify waste disposal sites should not preclude permit issuance, if DEC otherwise has a basis – in this case provided by Staff's permit condition – that suitable arrangements for disposal will be made.

- - Operational Noise [Petition, pages 19 and 20]

Gracie Point contends that the application does not demonstrate that the facility can meet the requirements governing noise from solid waste management facilities. These requirements, at 6 NYCRR 360-1.14(p), provide that in a community with urban character, noise levels resulting from equipment or operations at the facility must be controlled to prevent transmission of sound levels beyond the property line at locations zoned or otherwise authorized for residential purposes from exceeding an Leq energy equivalent sound level of 67 decibels (A) between the hours of 7 a.m. and 10 p.m., and 57 decibels (A) between the hours of 10 p.m. and 7 am. The regulation specifies that if the background residual sound level (excluding any contributions from the solid waste management facility) exceeds these limits, the facility must not produce an Leq exceeding that background.

DSNY's Part 360 permit application relies on the noise analysis in the FEIS. However, Gracie Point claims that this

analysis does not adequately or reliably document background residual noise levels. For that reason, Gracie Point contends, DEC cannot conclude whether the facility will produce an Leq exceeding those levels, and therefore, whether the standard for operational noise will be met.

RULING: A noise impact analysis providing a reasonable assurance that the East 91st Street marine transfer station will comply with the requirements of 6 NYCRR 360-1.14(p) must be provided by DSNY as part of this hearing, followed by an opportunity for the other hearing participants to raise issues about that analysis.

Such an analysis, addressed to compliance with Section 360-1.14(p), has not been provided to date, as DSNY itself concedes. DSNY contends that such an analysis is unnecessary in light of guidance in a DEC program policy entitled "Assessing and Mitigating Noise Impacts" (DEP-00-1), issued October 6, 2000, and revised February 2, 2001. In a section of the document addressing noise impact assessment, the policy document states (at page 16) that when a site is contained within an area in which local zoning provides for the intended use as a "right of use" and when the applicant's operational plan incorporates best management practices for noise control, as identified in the document, for all facets of the operation, the need for undertaking a noise impact analysis at any level is eliminated. The document then states that where activities may be undertaken as a "right of use," it is presumed that noise has been addressed in establishing the zoning.

Because DSNY considers the East 91st Street marine transfer station to be an "as of right" use under its existing M-1 zoning designation, it did not perform a Part 360 noise analysis as part of its permit application. However, Gracie Point maintains that a waste transfer station is not an "as of right" use in a M-1-4 zoning district, but is allowed there only if it meets specific performance standards set forth in the New York City Zoning Resolution, including a mandatory performance standard for noise, which it says DSNY has admitted (at page 6-148 of the FEIS) that it does not meet.

Leaving aside the question of whether the marine transfer station is an "as of right" use, DEC's noise guidance document includes the notation (in a footnote on page 1) that because it is not a fixed rule, it does not create any enforceable right by any party using it. In fact, in a review of DEC's regulatory authority for assessing and controlling noise, the document includes (at page 5) a reference to 6 NYCRR 360-1.14(p), which it

says establishes A-weighted decibel levels that are not to be exceeded at the property line of a solid waste management facility.

Gracie Point argues correctly that a DEC program policy cannot override a DEC regulation, and therefore cannot exempt DSNY from performing an analysis that assures the facility's operation will not violate Section 360-1.14(p), one of many operational requirements applicable to all solid waste management facilities. Contrary to DSNY's arguments, Section 360-1.14(p) would apply to operations of the marine transfer station, and reasonable assurance that compliance can be anticipated is required under Section 360-1.10(a), which states that DEC may issue a permit to authorize the construction of a new solid waste management facility only if the application demonstrates an ability to operate in accordance with the requirements of the ECL and Part 360.

In this instance, the Part 360 application indicates that noise will be produced by equipment operating within and outside of the processing building (e.g., wheel loaders, spreader hoisting system, tamping crane, gantry cranes, and shuttle cars) and by collection vehicles arriving to or departing from the marine transfer station. The application notes that high noise levels that may be noticeable on the tipping floor, along the onsite vehicle queuing line or near the gantry crane operations have been analyzed, and that planned maintenance of DSNY's truck fleet would contribute to suppression of noise generated by the vehicles. Furthermore, the application notes that offsite sources, such as increased collection vehicle volumes, have been analyzed to determine the possible impacts on the surrounding area. [See pages 68 and 69 of the engineering report prepared as part of the Part 360 application.]

A refined analysis of noise impacts of collection vehicles queuing on the onsite truck ramp was performed by DSNY. It included a noise reduction of 7 dBA at property boundary points, where applicable, that is expected from a louver fence that has been included in the design as a visual screen for the truck ramp [FEIS, page 6-150]. The louver fence would be about nine feet in height and constructed on top of a three-foot-high concrete base, for a total height of 12 feet.

According to the Part 360 application, noise-sensitive receptors nearest to the facility are:

- - Bobby Wagner Walk, an area directly abutting the facility's property boundary;

- - An apartment building on York Avenue, approximately 131 feet from the property boundary;

- - A playing field owned by Asphalt Green and located on land abutting the facility's truck ramp, as well as the Asphalt Green Aqua Center Recreational Facility; and

- - A playground which is part of Asphalt Green on York Avenue, directly abutting the truck ramp and property boundary.

Also, the application acknowledges, there are additional residential areas immediately north, south and west of the marine transfer station.

Section 360-1.14(p) is concerned only with impacts at off-site locations that are zoned or otherwise authorized for residential purposes, which means that impacts at many of the noise-sensitive receptors noted or evaluated by DSNY may not be relevant to compliance with that regulation. However, there are enough noise-sensitive residential receptors – including apartment buildings housing large numbers of people – in very close proximity to the project site that a noise analysis addressed to Section 360-1.14(p) is especially warranted in this case. The noise analysis included in the FEIS is based on the CEQR technical manual for both on-site and off-site sources, and, for on-site sources only, the performance standards of the New York City zoning code for manufacturing districts and the current New York City noise code [FEIS, page 6-137], and includes no reference to or discussion of 6 NYCRR 360-1.14(p).

DSNY acknowledges that the noise analysis in the FEIS does not address Section 360-1.14(p), at least not directly, but maintains that it shows that noise from the facility will not raise background sound levels at off-site locations of concern to DEC. If so, this needs to be explained in writing, so there is no confusion about how to interpret the existing data. If compliance cannot be determined from existing data, DSNY may supplement it with additional data or perform an entirely new noise analysis addressed to compliance with Section 360-1.14(p).

Employing the reasoning of my issues rulings in Matter of the Application of Sullivan County Division of Solid Waste, addressing permits for that landfill's expansion, DEC needs a reasonable assurance that there will be compliance with applicable Part 360 operating standards, including those governing noise, before a solid waste management facility is permitted. In those rulings, where I identified noise impacts as a hearing issue, I said that if the project did not comply with Section 360-1.14(p) or any other operational standard, the applicant risked a shutdown of the facility or, at the least,

further restrictions on its level of operations, which, even if they were imposed for a short period, would be disruptive to those who depend on the facility. For that reason, I concluded that the applicant should not be allowed to proceed at its own peril, in the absence of a reliable understanding of its project's potential environmental impacts. [See Rulings of the ALJ on Issues and Party Status, January 18, 2007, page 27.]

DEC Staff says that it reviewed and adopted DSNY's noise impact analysis in the FEIS, and, taking into consideration the use of a louver fence, found that the project would be in compliance with Section 360-1.14(p). However, Staff has not explained how it reached this conclusion, and as noted above, the analysis it reviewed was not performed to confirm compliance with this regulation, something Staff counsel acknowledges.

For that reason, an analysis of projected noise impacts, directly addressing compliance with Section 360-1.14(p), is required now from DSNY. Such an analysis is reasonably necessary to determine whether compliance with Section 360-1.14(p) can be expected, and, if it cannot, whether a variance to this requirement is appropriate. [See 6 NYCRR 360-1.7(c), addressing standards for variances to Part 360 requirements.] The analysis needs to consider not only the noise that the project would generate, but the impact of that noise on areas that are residential or are zoned or otherwise authorized for residences.

In performing its analysis, DSNY assumed noise attenuation of 7 dBA from a louver fence along the facility's truck ramp. Gracie Point challenged this assumption in its petition, stating that it was not credible and that, at most, noise attenuation of between 3 and 6 dBA could be achieved, on the understanding that the fence would be non-solid (in other words, that it would have holes in it). During my site visit on October 17, 2007, representatives of DSNY showed drawings of the fence and provided some detail about the fence materials. According to Gracie Point counsel, those drawings appeared more detailed than any renderings of the fence produced previously. In a letter of October 24, 2007, Gracie Point's counsel requested from DSNY's counsel copies of any fence drawings as well as any information that DSNY has regarding the materials to be used to construct the fence and the specifications of the fence relating to noise reduction. I am not aware how DSNY responded to this request, but as part of its reply brief of November 30, 2007, DSNY provided contract specifications for a screen wall fence system to be used at its North Shore marine transfer station, with the apparent understanding that the same system would be used at the East 91st Street transfer station. Those specifications

reference an “ornamental steel fencing system” consisting of inclined horizontal slats backed by round cross bar mesh and formed into framed panels providing “on-site noise reduction of approximately 7 dBA for receptors adjacent to the property boundary and compliance with applicable standards,” to be tested under representative but controlled conditions in the shop or factory using acceptable sound-energy measurement methodology. [See page 02822-8 of Exhibit No. 9, Specifications for Ornamental Fence and Gates, attached to DSNY’s November 30, 2007, reply brief.]

Whether the fence, as described in the specifications, can achieve the noise reduction intended for it must be considered in determining whether operations at the East 91st Street marine transfer station will achieve compliance with Section 360-1.14(p), because the reliability of DSNY’s noise impact analysis depends on it. In its reply brief, DSNY maintains that the use of louver fences to reduce noise impacts is a widespread practice and that such fences can achieve a noise reduction of about 7 dBA. However, at this point, these are merely assertions of counsel, and require substantiation from an expert in sound attenuation.

It may be possible that the information and analysis provided by DSNY can satisfy both DEC Staff and Gracie Point – which has retained Thomas Wholley, a noise engineer, as one of its prospective witnesses – that compliance with Section 360-1.14(p) will be maintained. However, if there is no agreement on this point, an opportunity to raise issues as to DSNY’s analysis will be afforded, and at that point a determination will be made whether adjudication is necessary.

- - Compliance with Local Laws [Petition, pages 20 and 21]

Gracie Point contends that by DSNY’s own admission, the East 91st Street marine transfer station would not meet a performance standard for noise in the City’s zoning resolution which sets maximum permitted decibel levels at or beyond the lot line. The noise analysis in the FEIS (at page 6-148) acknowledges that a lower performance standard must be met at any point along a manufacturing district boundary that adjoins a residential district. According to the FEIS, one location analyzed that is residentially zoned, though use of the property is recreational (not residential), is a point on the promenade between the FDR Drive and the East River to the north of the entrance ramp to the existing marine transfer station, the closest actual residence to this point being across FDR Drive, over 400 feet away on York Avenue. The FEIS states that background noise levels at this

point on the promenade are between 4.9 dB and 42.8 dB higher than the required standard, adjusted for residential zoning, and that at these levels, the exceedance at the boundary – which the FEIS calls "theoretical" – cannot be perceived and, therefore, no impact is predicted.

Gracie Point says that DEC cannot ignore this exceedance and at the same time maintain compliance with 6 NYCRR 360-1.11(a). Under the heading of mitigation of adverse impacts, Section 360-1.11(a) says, among other things, that the provisions of any Part 360 permit must assure, to the extent practicable, that the permitted activity will comply with applicable Part 360 requirements and with "other applicable laws and regulations." Gracie Point contends that, in this instance, these other laws and regulations include the applicable performance standard for noise in the New York City Zoning Resolution.

RULING: No issue exists for adjudication. The exeedance of the performance standard is acknowledged by DSNY in the FEIS, though, as the FEIS also notes, this exceedance is without impact because of existing noise levels at the location in question, which also exceed performance standards by 4.9 dB to 42.8 dB. The same exceedance raised here by Gracie Point was raised in the ACORN litigation in relation to DSNY's compliance with SEQRA and CEQR, and the court there found that DSNY had provided a reasoned elaboration for its finding of no significant impact. Furthermore, the court noted that the City Planning Commission had imposed noise mitigation measures by limiting the number of trucks during the period when the noise is anticipated to exceed the zoning resolution performance standards. (See Exhibit No. 10, page 11.)

Section 360-1.11(a) is clearly addressed to mitigation of significant adverse impacts on public health, safety or welfare, the environment or natural resources, and no mitigation is required where no significant impact is identified. To the extent it is also intended to assure compliance with laws and regulations other than those administered by DEC, DEC satisfies this obligation by conditioning its permits to make this an obligation of the applicant. General condition No. 5 of the draft permit makes DSNY responsible for obtaining any other permits and approvals that may be required for this project, and states that DSNY must comply with all applicable local, state and federal regulatory requirements other than those of DEC. Given DEC's lack of jurisdiction over local land use issues, any further requirement would be impracticable, according to the reasoning of the Executive Deputy Commissioner in an interim decision dated June 14, 2006, in a matter involving DSNY's

proposal for construction and operation of a yard waste composting facility in Spring Creek Park, Brooklyn, where compliance with local zoning was also raised as a proposed issue. [Interim Decision, page 9.]

Issue Three: Project Need [Petition, pages 22 - 25]

According to Gracie Point, DSNY has not met its burden of establishing that the East 91st Street marine transfer station is necessary, considering alternatives that Gracie Point says are reasonable and feasible, have less impact on the environment, and make more economic sense. Gracie Point says that these alternatives include (1) the "no action" alternative, which would involve continuing to transport Manhattan's residential waste to New Jersey, and (2) use of the already constructed and currently operating Harlem River Yard transfer station, less than one-half mile into the Bronx via designated truck routes, which Gracie Point says has more than enough capacity to handle the average daily waste that DSNY proposes to handle at the East 91st Street facility.

Gracie Point's petition identifies several alleged advantages to using the Harlem River Yard transfer station:

- - The Harlem River Yard station has direct truck-to-rail transfer capability, eliminating the need for barges and furthering DSNY's goal of reducing truck-transferred waste;
- - The Harlem River Yard station is located in a heavily industrialized area, immediately surrounded by factory and industrial warehouse buildings, rather than a densely populated residential area with pedestrian-friendly, tree-lined streets, such as the area around the East 91st Street site; and
- - Use of the Harlem River Yard station would be more cost-effective than building and operating a new marine transfer station at East 91st Street, according to an assessment by the City's Independent Budget Office.

Gracie Point's proposed witnesses on this issue are Leo Pierre Roy and Vince Ferrandino, both environmental consultants and planners, who would offer a comparison of DSNY's project with Gracie Point's preferred alternatives. The issue of need is proposed in the petition under the permitting standards for the use and protection of waters program (Part 608) and the tidal wetlands program (Part 661). As DEC Staff points out, permits under these programs are required for construction activities that include dredging the waterway adjacent to the building, which is necessary to allow barge access, as well as driving

pilings into the waterway and constructing platforms over the waterway. In its review, DEC Staff says it took into account the fact that these activities are temporary in nature and that DSNY will be providing mitigation for the impacts.

RULING: No issue exists for adjudication.

Among the permits needed to build the new East 91st Street marine transfer station, DSNY requires both a use and protection of waters permit and a tidal wetlands permit.

A use and protection of waters permit is required for the proposed dredging in the navigable waters of the state. To issue this permit, DEC must determine that the proposal is in the public interest, including in this assessment whether the proposal is "reasonable and necessary" [6 NYCRR 608.8(a)].

Also, a tidal wetlands permit is required for dredging and construction in the state's tidal wetlands. DEC must make various determinations in relation to issuance of a permit for a proposed "regulated activity" in any tidal wetland, including a determination that the activity is "reasonable and necessary, taking into account such factors as reasonable alternatives to the proposed regulated activity and the degree to which the activity requires water access or is water dependent" [6 NYCRR 661.9(b)(1)(iii)].

Addressing the tidal wetlands permit in particular, that a marine transfer station "requires water access or is water dependent" is beyond dispute. As DSNY argues, the marine transfer stations proposed in the SWMP are designed to move the City away from a strictly land- and truck-based waste transfer system and to take advantage of existing infrastructure and access to waterways for barge operations. This is intended to reduce disposal costs for the City as well as truck traffic in its streets.

As explained in DSNY's joint application for permits under Parts 608 and 661, this particular project involves the construction of a new marine transfer station on a pile-supported structure over the East River. The design includes (1) an enclosed processing building, which would include the tipping floor, loading floor and pier level; (2) an outside gantry crane system; (3) an approach ramp with elevated access ramps to the tipping and loading levels; and (4) a new barge fendering system. The main support structure and pier deck for the facility would be constructed using steel pile pipes drilled into the East River, and there would be limited dredging of river sediments to

improve existing water depths at and in the vicinity of the site to allow for the unimpeded operations of barges. Effects upon wetland littoral zone – defined at 6 NYCRR 661.4(hh)(4) as waters less than six feet deep at mean low water – would primarily occur during the removal of the existing facility and subsequent development of the support structure and over-water access ramps for the new facility. [See Joint Application, Section 4.3, pages 20 and 21.]

In developing this project, DSNY weighed this over-water design against an upland design alternative which would involve construction of the marine transfer station as a land-based facility. This alternative would have involved the development of most of the proposed facility within the adjacent upland portions of the site and the development of waterfront activities along the existing shoreline. The upland alternative, however, was deemed unacceptable for several reasons:

(1) Property for upland development is very limited, as existing parkland and the FDR Drive bound the upland portion of DSNY's property;
(2) Achievement of design requirements – such as adequate on-site queuing space for collection trucks and ability to load containers onto flat deck barges – would not be feasible; and
(3) Additional shoreline stabilization would be required, involving construction of a new reinforced bulkhead along the existing shoreline, resulting in significantly increased waterfront construction activities and effects to natural resources. [See Joint Application, Section 4.3, pages 18 and 19.]

DSNY's reasons for choosing the over-water alternative included the following:

- - It would result in less effects to littoral zone than the upland alternative;
- - It would not require additional bulkhead construction, and would require less dredging than the upland alternative;
- - It would represent the best possible use of available DSNY-owned property at the site without displacing existing parkland and roadways; and
- - It would be consistent with DSNY's goals to increase the efficiency of waste management, providing transportation alternatives such as the use of rail and ocean-going vessel transport, thereby reducing reliance on the truck transportation system. DSNY said that a no-action alternative involving keeping the existing, permitted marine transfer station as a truck-to-barge facility – where waste would be transferred loose (not compacted or containerized) from collection trucks to barges –

would limit transportation options, because, with the closure of the Fresh Kills Landfill on Staten Island, very few, if any, facilities are available for the offloading of such waste. Also, the no-action alternative – like the over-water and upland alternatives – would still require dredging to remove accumulated sediments in order to provide adequate draft for barges and tugboats. [See Joint Application, Section 4.3, pages 14, 22 and 23.]

The regulated activities requiring a tidal wetlands permit are defined at 6 NYCRR 661.4(ee). As relevant to this project, these include "any form of draining, dredging, excavation or removal, either directly or indirectly, of soil, mud, sand, shells, gravel or other aggregate," as well as "the erection of any structures or construction of any facilities or roads, the driving of any pilings or placing of any other obstructions, whether or not changing the ebb and flow of the tide" [6 NYCRR 661.4(ee)(1)(i) and (iii), emphasis added].

As demonstrated by DSNY's analysis, the project-related activities that are regulated by the tidal wetlands act may be considered "reasonable and necessary," particularly because water access is a prerequisite to operation of a marine transfer station. Likewise, these same activities may be considered "reasonable and necessary" in relation to the protection of waters permit as well. Dredging is required under all of the alternatives discussed above, and the over-water design, though it involves placing piles in the East River, would have less overall impacts to the natural resources of the East River than the upland alternative, which would involve constructing a new bulkhead at the shoreline.

During project development, DSNY also considered alternative locations for this project, but was constrained by the lack of available, industrially-zoned waterfront space of sufficient size in the vicinity of the existing marine transfer station. According to DSNY, an appropriate alternative site would be one within a geographic area in which the purpose of the project – containerization and transportation of waste in barges from Manhattan – could be realized. [See Joint Application, Section 4.3, page 15.]

The alternatives proposed by Gracie Point – continuing to transport Manhattan's waste to New Jersey, and transporting the waste to the Harlem River Yard transfer station in the Bronx – do not involve wetland impacts, as Gracie Point argues. However, they also are not consistent with the City's SWMP, including its reliance on marine-based waste transport. The SWMP was approved

by DEC in October 2006, and that approval would, as a practical matter, be undone if this hearing were opened to consideration of Gracie Point's preferred alternatives. These alternatives were not evaluated in the joint application for Part 608 and 661 permits because they were outside the scope of the application's alternatives analysis, which assumed the development of a new marine transfer station at or in close proximity to the site of the existing one. However, they were evaluated during the environmental review process for the SWMP, as DSNY points out.

As explained in the FEIS, among the alternatives DSNY considered was a "no action" alternative of continuing to transport Manhattan's waste by truck to a facility in New Jersey. However, this option would not result in the reduction of truck miles or equitable distribution of solid waste infrastructure among the City's five boroughs, both critical objectives of the SWMP. In addition, as recounted in the FEIS, DSNY also considered using the Harlem River Yard transfer station as an aspect of the SWMP, but this alternative was not considered in relation to Manhattan's waste because it violated the principle of borough equity.

In its brief opposing Gracie Point's request for party status, DSNY claims that the Harlem River Yard facility is not a viable alternative to the East 91st Street marine transfer station. DSNY says it has implemented a 20-year contract with Waste Management to use that facility for long-term export of waste from the Bronx; as a result, the facility, which has a maximum permitted capacity of 4,000 tons per day, cannot also reliably accommodate waste from Manhattan. According to DSNY, using the Harlem River Yard transfer station's remaining capacity for some or all of Manhattan's waste that DSNY manages would also displace private commercial waste deliveries from that facility to other transfer stations in the Bronx or other boroughs that may not have rail export capacity, which would exacerbate the waste trucking and inequitable allocation problems that the SWMP is designed to address.

DSNY acknowledges the contrast in character of the neighborhoods surrounding the Harlem River Yard and East 91st Street transfer stations, but notes correctly that the impacts of the East 91st Street facility on a highly residential neighborhood are not relevant to the standards for issuance of a tidal wetlands or protection of waters permit, which instead concern impacts to the East River environment. Also, as DSNY points out, a cost comparison of use of the two facilities, as prepared by the City's Independent Budget Office, says nothing about potential wetland or waters impacts of the East 91st Street

project, nor does it account for borough equity and the other goals of the SWMP.

As is apparent from Gracie Point's offer of proof, its fundamental argument on the issues of need for, and alternatives to, this project relates to impacts on people in the surrounding neighborhood – and that neighborhood's densely residential character – rather than impacts on river life and resources. DSNY claims that, if this project goes forward, there would be no significant impacts to neighborhood character, and in its decision addressing the ACORN challenge to the SWMP, the Supreme Court found that DSNY had provided a reasoned elaboration for this finding in its FEIS. [Exhibit No. 10, page 10.]

As DSNY argues, the SWMP's goal of distributing solid waste infrastructure more equitably throughout the five city boroughs, which is integral to the siting of the East 91st Street marine transfer station, is a policy choice entitled to deference by DEC, which approved the SWMP, as a basis for rejecting the alternatives proposed by Gracie Point. This is in keeping with the reasoning expressed in the Commissioner's Interim Decision of April 2, 2002, in Matter of Oneida-Herkimer Solid Waste Management Authority. At page 17 of that decision, the Commissioner eliminated an issue about need for a proposed landfill, arising in part under DEC's freshwater wetland permitting standards, by citing among other reasons "the appropriateness to give deference to the decision of the Authority, as a governmental entity, that such a project is necessary to fulfill an essential government function."

Issue Four: Impact on the East River [Petition, pages 25 - 29]

According to Gracie Point, DSNY has not met its burden of proof that the East 91st Street marine transfer station will not have an adverse impact on the East River, which, to a depth of six feet at mean low water, is characterized as littoral zone, a form of tidal wetland. [See definition of "littoral zone" at 6 NYCRR 661.4(hh)(4).] The tidal wetlands regulations acknowledge that littoral zones "include areas of extreme variability in their contributions to marine food production and other tidal wetland values, and each such area requires a specific assessment of tidal wetland values" [6 NYCRR 661.2(e)]. Gracie Point contends that such an assessment is lacking in this case, and that the permit application relies instead on incomplete and misrepresented field studies. As a result, says Gracie Point, any conclusions regarding the level of potential impacts to wetlands or the design of suitable compensatory mitigation are

unfounded. Gracie Point's witness on these points would be Dr. Ronald W. Abrams, principal ecologist at Dru Associates, whose resume and analysis of ecological issues concerning the joint application for Part 608 and 661 permits are attached as Exhibit "H" to Gracie Point's petition for party status.

Impacts to the East River are proposed as an issue in relation to both the tidal wetland permit and the use and protection of waters permit. Under 6 NYCRR 661.9(a), an applicant has the burden of establishing that the applicable standards for a tidal wetland permit are met, and DEC can issue such a permit only if certain determinations are made, including a determination that the regulated activity is compatible with the policy of the tidal wetlands act "to preserve and protect tidal wetlands and to prevent their despoliation and destruction in that such regulated activity will not have an undue adverse impact on the present or potential value of the affected tidal wetland . . . . taking into account the social and economic benefits which may be derived from the proposed activity" [6 NYCRR 661.9(b)(1)(i)]. Similarly, before issuing a use and protection of waters permit, DEC must determine, among other things, that "the proposal will not cause unreasonable, uncontrolled or unnecessary damage to the natural resources of the State, including soil, forests, water, fish, shellfish, crustaceans and aquatic and land-related environment" [6 NYCRR 608.8(c)].

According to DEC Staff, the construction and dredging associated with the new marine transfer station would not have an unreasonable or undue impact on the tidal wetland or aquatic resources of the East River. Staff maintains that water-borne transportation of municipal solid waste is a practical and conventional undertaking and a reasonable proposal. Staff notes that DSNY has reduced the footprint of the facility to the minimum necessary to support the proposed facility, and that, given an over-water marine transfer station already exists on the site, the small incremental increase in overall footprint would have equally small incremental impacts on aquatic resources. Based on the materials provided by DSNY and the experience of DEC's marine resources staff with conditions at the site and elsewhere on the East River, DEC Staff says the project's impacts would not be excessive in scale or scope, and that, overall, the habitat quality and functions provided at the current site are expected to persist, with only minimal diminution attributable to the proposed facility. In addition, Staff emphasizes, the draft permit requires DSNY to perform appropriate compensatory mitigation for the remaining unavoidable impacts.

RULING: No issue exists for adjudication.

Turning first to the tidal wetland permitting standards, Gracie Point is correct that the construction of a commercial or industrial use facility, even one requiring water access, in a littoral zone is deemed presumptively incompatible with that zone, according to the applicable use guidelines [6 NYCRR 661.5(b)(47), (48)]. However, as DSNY points out, such a designation does not necessarily indicate that a proposed action cannot be permitted, as the regulations also allow for that presumption to be overcome upon a demonstration that the proposed activity will in fact "be compatible with the area involved and with the preservation, protection and enhancement of the present and potential values of tidal wetlands" [6 NYCRR 661.9(b)(1)(v)]. Here, DSNY has met this burden because development of the new marine transfer station, in conjunction with removal of the existing marine transfer station, will result in a net increase in littoral zone of approximately 419 square feet. In addition, because much of the East River in the site vicinity is greater than six feet in depth at mean low water, only 8,161 square feet of the proposed overall project footprint of 78,145 square feet would be in state-designated littoral zone. [See Joint Application, section 4.3, page 7, and section 5, page 2.]

Also, as DSNY points out, the area subject to dredging would be quite small, involving the removal of 828 cubic yards of material, a smaller volume than has typically been removed during previous maintenance dredging at the facility. [See Joint Application, section 4.3, page 6.] Moreover, the draft permit contains various control measures for the dredging operation, which are not addressed in Gracie Point's offer of proof. These measures, intended specifically to minimize water quality impacts, include use of an environmental bucket to minimize loss of material during transport through the water column and into the barge, and limitation of the bucket's hoist speed.

As both DSNY and DEC Staff point out, the impacts from construction of the marine transfer station would be temporary, and after they are over benthic organisms will begin to recolonize the sediment and epibenthic organisms will colonize the new marine transfer station structure. [See FEIS, pages 6-56 and 6-57, and page 32-38.] The draft permit also requires DSNY, shortly after permit issuance, to develop and submit to DEC a plan for wetland restoration elsewhere, as compensation for unavoidable impacts of its project.

In sum, the application and draft permit adequately demonstrate, consistent with 6 NYCRR 661.9(b)(1)(i), that the

activities regulated by the tidal wetlands permit will not have an "undue adverse impact on the present or potential values" of the impacted littoral zone, particularly taking into account the social and economic benefits which may be derived from the project, which include anticipated savings in waste disposal costs and the reduction of air pollution associated with truck traffic. They also demonstrate, consistent with 6 NYCRR 608.8(c), that DSNY's activities will not cause "unreasonable, uncontrolled or unnecessary damage to the natural resources of the state," in relation to the protection of waters permit, which addresses impacts to the East River more generally.

Dr. Abrams's offer of proof does not challenge these demonstrations directly, as DSNY points out, but instead presents a critique of DSNY's presentation on impacts to the aquatic environment. Gracie Point argues that DSNY has not established there will be no adverse impact on the present or potential value of the East River for, among other things, marine food production, wildlife habitat or recreation. However, DSNY must demonstrate only that there will be no "undue" adverse impact, taking into account the project's social and economic benefits. There is no question that there will be impacts (in fact, for those that are unavoidable, DEC Staff is seeking a plan that compensates for them); however, as DSNY emphasizes, the regulation establishes a standard by which these impacts are weighed against the public interest served by the project. Also, the impacts are expected to be temporary, so that after construction-related environmental disturbance ends, the benthic and epibenthic communities should quickly reestablish themselves, according to DEC Staff.

Gracie Point maintains that DSNY has not provided a specific, reliable assessment of the tidal wetland values at the East 91st Street site. According to Dr. Abrams, no adult finfish and only limited epibenthic macroinvertebrate data were collected, DSNY's studies relied on non-randomly sampled patches of habitat (rather than complete communities or ecosystems), under-pier and less accessible areas were left out, and background study was limited to one year, so that variation between years was not accounted for. DEC Staff acknowledges some shortcomings in the site surveys, but attributes them to the nature of the East River, which, with its high current velocities and turbulent flow patterns, Staff says is a notoriously difficult place in which to conduct marine survey work. According to DEC Staff, recent nearby sampling efforts on behalf of the New York City Department of Parks and Recreation and Verdant Power have also been hampered by the extreme conditions within this portion of the river. Still, Staff says it is

confident that enough information was presented or is otherwise known about the aquatic habitat and species utilization in the river to adequately assess project impacts.

Despite the lack of data on adult finfish, Staff says it is known that an assemblage of finfish species, common to the New York Harbor environment, are present in the river, but that none are known to inhabit it for extended periods of time due to strong flows. According to DEC Staff, adult spawning activity and movement by early life stages (i.e., larvae and juveniles) are especially hampered in the river. Staff adds that the river bottom is generally scoured clean of sediments and supports a minimal benthic community, and that the seemingly stable bottom habitat located near the East 91st Street site exists only because the existing marine transfer station slows and diverts the waters that would otherwise wipe it clean. Staff acknowledges that some species of finfish would avoid the under-platform areas of the new marine transfer station, but adds that the area of impact is small and the relative level of use is expected to be minor.

For its part, DSNY states that site topography prevented sampling of adult finfish, and that study options were limited by the strong tidal currents in the channel in the south reach of Hell's Gate directly adjacent to the site. As to an alleged lack of site-specific data, DSNY points to a field program undertaken in 2003 to fully characterize the marine biological resources of the study area, which included monthly sampling for finfish eggs and larvae and water quality, and quarterly sampling for both benthic and sessile colonizing organisms. [See FEIS, pages 6-52 to 6-55, as well as a March 2004 report by EEA, Inc., confirming marine biological studies at the East 91st Street marine transfer station site.]

Gracie Point argues that without better information about the project's impacts to the aquatic environment, designing adequate, suitable mitigation will not be possible. However, DEC Staff is not relying merely on DSNY's work to assess impacts, but also on what Staff itself knows more generally about the affected environment, not just at the site but in the general area. DEC Staff's analysis, as part of the issues conference record, may be relied on in determining whether a proposed issue – even one like this, which is based on proposed expert testimony – is substantive and therefore adjudicable. [See 6 NYCRR 624.4(c)(2), definition of "substantive"; and In the Matter of Waste Management of New York, Decision of the Commissioner, October 20, 2006, page 5.]

Dr. Abrams says that the lack of site-specific data precludes DEC from concluding that impacts from construction of the new facility would be temporary. On the other hand, he offers no basis to suggest that such impacts would be permanent.

In summary, the studies and analysis that are part of the application, coupled with Staff's independent assessment, provide a reliable basis for gauging impacts on the East River, particularly in the absence of information tending to refute them.

Issue Five: Sufficiency of Permit Conditions [Petition, pages 29 - 33]

Gracie Point said in its petition that the conditions of the draft permit, as prepared prior to this hearing, were insufficiently protective of the public health, safety and welfare. If the permit is not denied, Gracie Point said certain of its conditions should be clarified and strengthened, and new conditions should be added. The following discussion addresses Gracie Point's proposals, the extent to which they were addressed through permit revisions negotiated between DSNY and DEC Staff, and Gracie Point's responses to these revisions. Remaining disputes about permit terms have been considered in relation to the mandate of Section 360-1.11(a) that the provisions of solid waste management facility permits "must assure, to the extent practicable, that the permitted activity will pose no significant adverse impact on public health, safety or welfare, the environment or natural resources, and that the activity will comply with the requirements identified in this Subpart and the applicable Subpart pertaining to such a facility, and with other applicable laws and regulations."

- - Special Condition No. 36

Special condition No. 36 of the permit, as prepared prior to this hearing, prohibited truck queuing on a public street in association with operation of the East 91st Street marine transfer station. Gracie Point expressed concern in its petition that the draft permit did not address enforcement of this condition or penalties for noncompliance. Gracie Point said there should be conditions specifying how DSNY will prevent queuing on public streets, requiring DSNY to have a staff member stationed at the foot of the access ramp to the facility, and providing penalties for noncompliance, including cessation of operations if there are too many violations of the no-queuing requirement.

Gracie Point's concern about truck queuing, particularly along York Avenue, was shared by EDF. To address both petitioners' concerns in this regard, special conditions No. 44 and 52 have been added to the draft permit. As noted above in relation to EDF's petition, special condition No. 44 requires DSNY to station a staff person at the foot of the facility's ramp to monitor and control truck traffic when waste deliveries are occurring, for the explicit purpose of preventing trucks from queuing on the street. Also, special condition No. 52 requires the installation of video cameras allowing DSNY and DEC Staff real-time views of the ramp and both the northbound and southbound lanes of York Avenue.

According to DEC Staff, these new conditions, combined with DEC's enforcement authority under the ECL and Part 360, provide Staff with sufficient tools to enforce the no-queuing requirement. However, Gracie Point remains dissatisfied with the conditions. As to condition No. 44, it questions how DSNY's staff person will know when a truck is about to arrive at the facility unless that person is permanently stationed at the foot of the ramp to control truck traffic. During conference calls on November 8, 2007, and April 2, 2008, among me and counsel for the issues conference participants, DSNY's counsel offered assurances that DSNY could dispatch someone on short notice to be present when trucks arrive, even outside the times when they are regularly expected. However, Gracie Point says that, if that person is coming from one of DSNY's sanitation garages, how would that person know a truck is about to arrive at the transfer station? If that person has other duties, will he or she be available to depart for the ramp, and how will the staff person even know that garbage is on its way? How long will it take for the staff person to arrive at the ramp, and what if he or she is caught in traffic? Gracie Point says that, unless one of DSNY's staff people is stationed at the foot of the ramp during all hours of facility operations, or at the least during all operations under upset or emergency conditions, public safety will not be adequately protected. Also, Gracie Point continues to assert that the permit lacks an enforcement mechanism for situations where DEC Staff observes a violation of the prohibition against trucks queuing on the streets.

RULING: No further amendment of the permit is warranted.

Requiring that DSNY station a staff person at the foot of the facility's ramp to control truck traffic when waste deliveries are occurring, as now required by the draft permit, is sufficient to ensure, to the extent practicable, that the permitted activity poses no significant adverse impact in

relation to the safety of people crossing in front of the ramp. According to the "description of authorized activity" in DEC's draft permit, the facility would be authorized to operate 24 hours a day, Monday through Saturday, with Sunday operations limited to prescribed emergency situations. Nonetheless, waste deliveries are not expected to occur continuously, and therefore it is unreasonable to expect that a staff person be stationed at the foot of the ramp at all times. DSNY will have to arrange for adequate coverage so that the permit requirement is met, but how it does so, short of stationing a person at the foot of the ramp during all hours of operation, is for DSNY to determine as a matter of staff allocation.

Furthermore, video surveillance of the ramp and York Avenue will confirm whether on-street queuing or other problems associated with waste delivery are occurring. If trucks queue on York Avenue, the video cameras will provide evidence of this instantaneously to DEC Staff, who have existing mechanisms for enforcement action, including administrative proceedings under 6 NYCRR Part 622. Whether enforcement action is undertaken, and what penalties are sought in any action that is commenced, are matters within DEC Staff's discretion, and not typically dictated by permit terms. On the other hand, given the safety and health hazards created by queuing of trucks on public streets, I recommend that Staff consider any violations in this regard to be serious, and take whatever steps are necessary to ensure they are promptly corrected.

- - Special Condition No. 17

In relation to municipal solid waste that can be accepted at the East 91st Street marine transfer station, special condition No. 17 of the permit, as prepared prior to this hearing, set a weekly limit of 9,864 tons that could not be exceeded in any calendar week, and a maximum peak day limit of 1,860 tons per day that could not be exceeded on any day. However, higher per day limits were set for what the permit describes as upset and emergency conditions. In particular:

- - An upset condition limit of 4,290 tons per day "that is the result of an event that reduces the processing capacity of one or more elements of the Permittee's waste management system, such as a fire or equipment outages, thereby requiring a temporary reallocation of MSW from other wastesheds to this transfer station for a period of a few days duration"; and

- - An emergency condition limit of 5,280 tons per day "caused by public emergency event affecting the entire or a large

part of the Permittee's waste management system thereby requiring the Permittee, acting on the basis of protecting the public health, to use the maximum design capacity of this transfer station to remove accumulated refuse from the streets as quickly as possible."

In its petition, Gracie Point said these definitions of upset and emergency conditions were too vague, and that DSNY should be required to provide examples in the draft permit of what would constitute an upset or emergency condition. Gracie Point also said the condition should impose limitations on the duration and frequency of such conditions, and automatic penalties if the limitations are exceeded. Finally, Gracie Point said that DSNY should have a reporting obligation pursuant to which, within 24 hours of the commencement of the upset or emergency condition, DSNY would be obligated to provide a written justification to DEC and the public for using the upset and emergency capacities.

In response to Gracie Point's arguments, special condition No. 17A has been added to the draft permit. Addressing the definitions of upset and emergency conditions, it states that an upset condition is "a diversion of waste to this facility from other waste transfer stations that are unable to accept and process waste material due to circumstances such as fire, explosion, power outage or severe weather, which results in an increase in waste material brought into the subject facility beyond its permitted daily throughput capacity." It also states that an emergency condition "results when the Commissioner of DSNY or his her/designee declares that an emergency condition exists, due to circumstances such as fire, explosion, power outage, extreme weather (hurricanes, significant snow fall amounts, ice storms, flooding, etc.), and acts of terrorism."

Special condition No. 17A requires that, during upset and emergency operations, "at a minimum, Permittee shall ensure that public health, safety and the environment are protected," language DEC Staff says it incorporated to address any unforeseen consequences of such operations, and not as a substitute for any other permit requirement.

Furthermore, special condition No. 17A requires DSNY to notify DEC's regional solid waste engineer via telephone and e-mail as soon as practicable, but in no case later than 3 hours after the onset of any upset or emergency condition, such notification to include the date and time of the upset or emergency, the type of condition, the reason for the need for the condition, detailed underlying cause for the occurrence (if then

known), measures taken to address the condition, the expected end date and time of the occurrence, and the name of the person who authorized the condition.

Special condition No. 17A requires that DEC be notified of the end of an upset or emergency condition within two business days of its conclusion, but does not limit the duration and frequency of such conditions. DEC Staff says the inclusion of such limits would unduly hinder DSNY in the operation of citywide solid waste management.

According to DEC Staff, it has the authority to find that an upset or emergency condition does not exist or no longer exists, and to find DSNY in violation of the permit if it does not comply with DEC directives to resume normal operations. During the conference call of April 2, 2008, DSNY counsel confirmed that this was his understanding as well.

Special condition No. 17A requires that DSNY explain to DEC why it is operating under upset or emergency conditions within three hours of such operations' onset; however, it requires no justification to the public, as requested by Gracie Point. DEC argues that written justification to the public is not required by Part 360 or any other regulation administered by the agency, and that such a requirement could not easily be implemented, particularly without an identification of who would be notified on the public's behalf. DEC also notes that interested members of the public could obtain information about the facility's operation through requests to DEC under the Freedom of Information Law, and by visiting DSNY's website, where DSNY would be required, under special condition No. 51, to post operating information on a monthly basis, including, at a minimum, daily throughput rates and the hourly number of incoming trucks.

According to Gracie Point, special condition No. 17A is still insufficient because it does not adequately define upset and emergency conditions, does not provide for limitations on the duration of each condition, and does not provide for penalties if the special condition is violated. Gracie Point would like to add language to special condition No. 17A stating that the facility may not operate at upset level capacity for longer than 48 hours, at which point, if the upset still exists, the waste must be diverted to another waste transfer station; and that the facility may not operate at emergency level capacity for longer than 72 hours, at which time, if the emergency still exists, DSNY must propose alternatives to operating the facility at emergency level capacity and implement the chosen alternative within 48 hours. If these provisions or others already in the special

condition are violated, Gracie Point would like the permit to set a penalty of $10,000 per each day that the violation persists.

Gracie Point acknowledges DEC Staff's concern that permit limits on the duration of upset or emergency conditions could hinder the Applicant's ability to manage solid waste, but claims that such hindrance cannot justify the adverse impacts to the surrounding residential neighborhood that would result from the facility operating under such conditions, especially given the fact that DSNY admittedly has never analyzed the off-site impacts from the facility operating at upset or emergency levels.

RULING: With one exception, as noted below, no further amendment of the permit is warranted.

DSNY understands that while it would determine when operations under upset or emergency conditions should commence, DEC retains authority to determine when they shall cease.

Gracie Point would like more definition of upset and emergency conditions: however, the permit, as amended, is sufficiently clear in regard to the circumstances that could trigger them. The permit should not set time limits for operations under upset and emergency conditions; these operations should continue as long as the conditions warrant, with DEC the ultimate decision-maker on this point. Should DSNY continue to operate under such conditions after DEC has given ample notice that it should stop, DSNY should be subject to penalties; however, enforcement discretion should remain with DEC Staff.

DSNY also understands that the language requiring it, at a minimum, to ensure that the public health, safety and the environment are adequately protected during upset and emergency conditions, does not relieve it of its obligations under other permit terms while such conditions exist. Confirming this understanding is important because one can anticipate it may be more difficult to maintain compliance with certain conditions protective of the neighborhood (such as special condition No. 36, prohibiting truck queuing on public streets) when normal waste acceptance limits are exceeded.

While DEC Staff's language about protecting the public health, safety and the environment is vague to the extent it is divorced from particular impacts, it is meant to address conditions not now foreseen and not addressed by other permit requirements. Also, Staff's language is not objectionable to DSNY, though it leaves open the possibility of future disputes as to what adequate protection requires. For these reasons, the

language shall be maintained, though the words “at a minimum” must be removed, as they could suggest that a separate, lower floor is being established for compliance, and additional language added stating that DSNY is not relieved of its obligations under other permit conditions during upsets and emergencies.

If any of the issues conference participants objects to these modifications, they shall state their objections in an appeal of these rulings.

- - Special Conditions No. 23 - 27

In its petition, Gracie Point alleged that the special conditions of the draft permit addressing construction of the marine transfer station (conditions No. 23 - 27) did not provide for a safety buffer around the construction area perimeter to protect the users of Asphalt Green, the Bobby Wagner Walk and the East River Esplanade. With respect to reconstruction of the access ramp, Gracie Point maintained that generally acceptable safety standards would require a buffer that is at least as wide as half the height of the old ramp and the new ramp in order to ensure safety at Asphalt Green.

In response to Gracie Point’s concern, DEC Staff has added special condition No. 27A to the permit, which reads as follows:

“Permittee shall have a Professional Engineer licensed in the State of New York review the construction plans for the subject facility and make recommendations on ways to provide a safety buffer or barrier, as appropriate, around the perimeter of the construction site. These recommendations shall be issued, with his/her Professional Engineer’s stamp, within six months of the issuance of this permit, and before the commencement of any construction. Such recommendations shall be made known to the public via the DSNY website (www.nyc.gov/sanitation), and shall be strictly followed by the Permittee.”

Acknowledging Gracie Point’s particular concern for users of Asphalt Green, DEC Staff says that the safety buffer or barrier is intended to protect them and the public generally during construction of the facility.

DSNY accepts the permit condition, while noting that the project’s FEIS (at pages 32-6 and 32-7) also identifies various possible measures to mitigate construction impacts, including isolation of the work area within temporary construction fences

and barriers, and construction of a temporary steel tunnel to maintain service at the southwest Aqua Center building entrance. DSNY maintains that its design drawings, which are still in draft form, and the construction drawings, when developed, will afford adequate protection, adding that Staff's new permit condition allows for a "fresh look" by another engineer before construction goes forward.

RULING: Special condition No. 27A shall be maintained in the final permit, as it reasonably addresses Gracie Point's concern and because Gracie Point has expressed no objection to it.

- - Special Conditions No. 33 and 34

Special conditions No. 33 and 34 of the draft permit, as prepared prior to this hearing, said that, as a general rule, all municipal solid waste must be removed from the facility within 48 hours after receipt (No. 33), and must be containerized within 24 hours of receipt (No. 34). Gracie Point maintained in its petition that these conditions should impose reporting obligations if they are violated as well as penalties for non-compliance. DEC Staff has responded by modifying both conditions to require that DSNY maintain a record of any exceedances of the time limits. However, Gracie Point says this does not provide sufficient protection to the community because there is no affirmative requirement that DSNY provide records of exceedances to the public and the CAG established to monitor the facility's operations. Additionally, Gracie Point continues to recommend that there be specified penalties imposed automatically for exceedances, a permit addition DEC Staff has declined to make.

RULING: No further permit amendment is warranted. In terms of self-reporting, it is sufficient that DSNY maintain a record of any exceedances of the time periods set out in special conditions No. 33 and 34. That record will be available to DEC's environmental monitor, who can use the information to address with DSNY why any exceedance happened, with the goal of preventing recurrences. Pursuant to the Freedom of Information Law it should also be available to the CAG and the public generally, upon request to DSNY. The permit shall not specify penalties for exceedances, as this is an enforcement matter within DEC's discretion.

- - 24-Hour Hotline

In its petition, Gracie Point requested that there be a permit condition requiring the establishment and maintenance of a 24-hour hotline for the public to report nuisance conditions or

violations of permit conditions to DSNY. Gracie Point said the condition should include requirements that complaints be responded to within a certain period of time, and that signs be posted alerting the public to the hotline number.

According to DEC Staff and DSNY, establishment of a new hotline is unnecessary, as the City already has a 24-hour call-in number, 311, through which residents can access government information and register complaints. Also, DEC Staff maintains that it may be contacted directly about alleged permit violations.

RULING: No special hotline is necessary, as other avenues exist to register complaints with DSNY and DEC Staff.

- - Citizens Committee

In its petition, Gracie Point said there should be a permit condition establishing a citizens committee to bring public concerns to DEC's attention. DEC Staff says such a committee is not necessary because any individual or group can communicate their concerns to DEC Staff directly. DSNY also points out that the community is already served by a CAG established under the SWMP to both represent community boards, environmental organizations, business organizations, property owners, other local community groups and concerned members of the general public, and advise the mayor and other elected officials on the construction and operation of the marine transfer station. [See SWMP at ES-7.]

RULING: Another citizens committee is unnecessary, as its purpose is fulfilled by the CAG established by the city council as part of its approval of the SWMP. Also, citizens may communicate their concerns and suggestions directly to DEC, without the filter of a committee.

- - Noise Controls

In its petition, Gracie Point requested a permit condition limiting the number of trucks that can use the facility between the hours of 3 a.m. and 4 a.m., based on a noise impact projected in DSNY's noise analysis for York Avenue between East 90th Street and East 91st Street. Due to this impact, the FEIS [at page 6-156] states that only the number of trucks that can be routed through this location without causing an impact would be allowed, a commitment Gracie Point said in its petition should be confirmed as a permit condition.

DEC Staff responded by adding special condition No. 41 to the permit, which limits the facility to a maximum of four inbound and four outbound trucks between 3 a.m. and 4 a.m. According to DSNY's noise analysis, this condition would ensure a reduction to less than 2 decibels of the increase in noise from existing background levels during that hour. [See Table 6.17-11, FEIS page 6-156.] However, Gracie Point maintains that the condition does not sufficiently protect the community, because it does not require that additional trucks trying to access the facility between 3 a.m. and 4 a.m. be rerouted to other facilities or back to their points of origin. According to Gracie Point, there is nothing to stop trucks from idling on nearby streets until they can access the facility at 4:01 a.m. Also, Gracie Point says penalties should be imposed if the permit condition is violated.

RULING: There shall be no further amendment of the permit, as special condition No. 41 adequately addresses Gracie Point's concern, as stated in its petition. DEC lacks both the authority and ability to control the activity of trucks except those at or about to access the facility. Furthermore, Staff's permit already prohibits the queuing of trucks on public streets – including York Avenue, where noise concerns have been highlighted – in association with the facility's operation.

- - Fuel and Emission Controls

In its petition, Gracie Point requested a permit condition requiring that all diesel fuel powered trucks accessing the facility comply with the standards set forth in New York City Administrative Code Section 24-163.4, relating to the use of ultra low sulfur diesel fuel and the best available retrofit technology to reduce particulate matter emissions. As noted above in relation to EDF's concern on this same issue, this has been accomplished – though only in relation to the collection trucks owned and operated by DSNY – through the addition of special condition No. 45, which tracks the code requirements.

DSNY argues that DEC lacks authority to impose a similar requirement on privately-owned commercial trucks that would access the facility. DEC adopts DSNY's analysis on this point, which is explained above, again in relation to EDF's concern on this issue. DEC Staff maintains that in light of the case law cited by DSNY and DEC's limited authority in this area, the condition cannot be expanded, as Gracie Point would like, to cover vehicles other than DSNY's own.

According to DSNY and DEC Staff, the federal Clean Air Act regulates mobile source air emissions, such as those from collection vehicles that will access the facility, and generally preempts state regulation of automobile emissions. However, Gracie Point says that the Clean Air Act does not prohibit the condition it proposes, in that such condition does not impose a standard relating to the control of emissions from "new" motor vehicles or "new" motor engines.

Gracie Point says that DSNY and DEC Staff, while citing no particular provision of the Clean Air Act, apparently rely for their argument on Section 209, 42 U.S.C. Section 7543(a), which provides that "no State . . . shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." According to Gracie Point, this provision, which applies only to new motor vehicles or new engines, does not apply to its proposed permit condition, noting that in Allway Taxi, Inc. v. City of New York, 340 F. Supp. 1120, 1124 (S.D.N.Y.), aff'd, 468 F.2d 624 (2d Cir. 1972), the court held that the Clean Air Act's definition of "new motor vehicle" reveals

> a clear congressional intent to preclude states and localities from setting their own exhaust emission control standards only with respect to the manufacture and distribution of new automobiles. That narrow purpose is further suggested by the remainder of the section, which prohibits states and localities from setting standards governing emission control devices before the initial sale or registration of an automobile. Finally, congress specifically refused to interfere with local regulation of the use or movement of motor vehicles after they have reached the ultimate purchasers [citing Section 209(d)].

As noted by Gracie Point, the Clean Air Act also provides that "[n]othing in this part shall preclude or deny any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles" [42 U.S.C. Section 7543(d)], and the courts have recognized that the "longstanding scheme of motor vehicle emissions control has always permitted the states to adopt in-use regulations – such as carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles – that are expressly intended to control emissions." [Engine Mfrs. Assoc. v. U.S. Envt'l Protection Agency, 88 F3d 1075, 1094 (D.C. Cir. 1996). See also 42 U.S.C. Section 7408(f).]

Gracie Point argues that DEC is not prohibited from protecting public health by restricting access to a DEC-permitted facility based on emissions from vehicles already owned by commercial carters, and that such a permit condition is akin to an "in-use" condition. As Gracie Point notes, its proposal would not require commercial carters to purchase different types of trucks or even retrofit trucks that might not meet the standards, and these carters could choose to use other facilities that do not have the requirements Gracie Point would want imposed in the permit for the East 91st Street marine transfer station. Gracie Point reasons that because this facility would be the only waste transfer station in Manhattan, which DSNY points out generates 40 percent of the City's commercial garbage, it is certainly possible that many commercial carters would choose to comply with the condition, if imposed, particularly as ultra low sulfur fuel is widely available in the marketplace and trucks meeting 2007 EPA emission standards are already available, and will certainly be widely available by 2012, when the facility is projected to be completed.

According to Gracie Point, the facility's location justifies special measures to reduce health impacts to the residents and users of Asphalt Green (who exercise immediately adjacent to the facility's truck ramp) and the toddler playground. Gracie Point argues that commercial carters have no legal right to access a DSNY-operated waste transfer station, and that if they use the facility, pursuant to contractual arrangements with DSNY, they certainly have no right to do so with trucks that are dirtier than DSNY's own trucks. Gracie Point maintains that DEC may restrict access to trucks that have high particulate emissions to protect air quality, just as it may restrict access between certain hours to control noise, which it has done in the draft permit. [See special condition No. 41, added during the issues conference.]

Gracie Point says that Motor Vehicle Mfr's Ass'n of the United States, Inc. v. New York State Dep't of Envtl. Conserv., 79 F.3d 1298, 1309 (2d Cir. 1996), cited by DEC Staff and DSNY for the general proposition that state regulation of automotive tailpipe emissions is preempted by the federal Clean Air Act, is not relevant here as the proposed permit condition would not require the commercial carters to redesign or purchase new vehicles. According to Gracie Point, in that case the Second Circuit addressed whether New York's adoption of California's low emission vehicles plan without adopting its low sulfur fuel scheme, compelled manufacturers to redesign California cars in violation of the "third vehicle" prohibition of Section 177 of the Clean Air Act.

Gracie Point also says that Engine Mfr's Ass'n v. South Coast Air Quality Management District, 498 F.3d 1031 (9th Cir. 2007), also cited by DEC Staff and DSNY, is not relevant to its proposed permit condition, which does not pertain to the purchase of vehicles, but prohibits already in use diesel fuel trucks from accessing the facility unless the trucks use ultra low sulfur diesel fuel and use the best available retrofit technology. According to Gracie Point, in that case the Ninth Circuit addressed whether California's Fleet Rules – which required state and local operators of various types of vehicle fleets to purchase vehicles meeting specified standards when adding to their fleets – would be preempted by the Clean Air Act. According to Gracie Point, the court held that the provisions of the rules that constitute actions taken by the state in its capacity as a market participant (in essence, as the purchaser of new vehicles) were not preempted.

Finally, Gracie Point attempts to distinguish the pending application from another matter cited by DEC Staff and DSNY, involving Brookhaven Energy Limited Partnership's application to construct and operate an electric generating facility in Brookhaven, New York. In that matter before the State Board on Electric Generation Siting and the Environment, the presiding ALJs issued rulings dated October 25, 2001, which excluded as a hearing issue particulate pollution from possible trucking of sanitary waste water offsite for treatment, and did so because the issue's proponent had not identified any legal standards that could expand the scope of the draft air permit, which addressed the project as a stationary air source, to incorporate additional conditions related to mobile emission sources that may travel to and from the project site.

DEC Staff and DSNY say the Brookhaven rulings suggest that there is no apparent basis for DEC to impose conditions on mobile emission sources. However, as Gracie Point argues, that case involved an air permit, not a permit for a solid waste management facility, where Part 360, addressing permit provisions, says that the provisions of each permit issued pursuant to that part "must assure, to the extent practicable, that the permitted activity will pose no significant adverse impact on public health, safety or welfare, the environment or natural resources" [6 NYCRR 360-1.11(a)]. Here, Gracie Point says that DEC is fully authorized to consider air quality impacts caused by vehicles using the proposed facility, as it is directly relevant to whether the permit can assure the permitted activity will pose no significant adverse impact on public health.

RULING: No further permit amendment is warranted.

While the facility is intended to attract privately-owned commercial trucks in addition to DSNY's own collection vehicles, the privately-owned commercial trucks should not be considered part of the facility, or part of the activity permitted under Part 360, particularly as their operators are not obliged to use the facility. There is a dispute between Gracie Point on the one hand and DSNY and DEC Staff on the other as to whether the federal Clean Air Act would preempt DEC efforts to regulate emissions from collection trucks accessing the facility. However, as a practical matter, DEC has not attempted to exercise such authority in its Part 360 regulations. In fact, the emissions restrictions addressing DSNY's own collection trucks were added to the permit as part of a negotiation between DSNY and EDF, and not at DEC Staff's insistence. Nor are truck emissions regulated by the air pollution control permit, which is instead directed at stationary onsite sources, not mobile sources traveling to and from the facility.

- - Truck Queuing on Access Ramp

In the air quality analysis in the FEIS, DSNY reduced the number of trucks expected to queue on the ramp from 19 in the DEIS to 17 in order to "eliminate potential conflict at the bottom of the ramp." [FEIS, page 6-122.] In its petition, Gracie Point requested that the permit include a condition limiting the number of trucks queuing on the ramp to 17, which DEC responded to by adding special condition No. 42, which states: "Permittee is restricted to a maximum of 17 inbound waste trucks on the ramp at any one time during non-upset and non-emergency conditions." The permit also has a condition (No. 36) prohibiting queuing on public streets, which was a concern of both Gracie Point and EDF, and a condition (No. 44) requiring that DSNY have a staff member at the foot of the ramp at all times when trucks are delivering solid waste to the facility, to monitor and control truck traffic.

DEC Staff says a limitation on the number of inbound waste trucks on the ramp during upset and emergency conditions would unduly hinder DSNY's ability to manage solid waste. Gracie Point would like the permit to impose significant penalties if more than 17 trucks queue on the ramp at one time, but DEC Staff says such a provision is unnecessary, as the law and regulations give DEC sufficient tools to enforce the permit provision.

RULING: No amendment of this condition is warranted. Upset and emergency conditions involving daily waste receipt that exceeds normal operations may present particular problems in terms of compliance with the 17-truck limit, which is why an

exception for these conditions is warranted. On the other hand, as noted above, DEC must retain ultimate authority in determining when operations under these conditions must cease, as noted above. Again, the issue of penalty assessment is a matter within DEC's enforcement discretion.

- - Pesticide Use

In its petition, Gracie Point maintained that to the extent DSNY intends to use pesticides and rodenticides, a condition should be imposed to ensure that chemicals will not be harmful to people living in close proximity to the site and using Asphalt Green and the East River Esplanade/Bobby Wagner Walk.

DEC Staff declined to add such a condition, saying that the ECL and DEC's regulations regarding pesticide application combined with DEC's enforcement authority are sufficient to regulate the use of pesticides and rodenticides that could be harmful to people living in close proximity to the site. DSNY acknowledges it is obligated to comply with state law, including DEC's existing regulations governing the use of pesticides and rodenticides, and argues that Gracie Point has not explained how these rules are inadequate.

RULING: No permit amendment is necessary. Existing regulations governing the application of pesticides and rodenticides are adequately protective of the public, and DEC has authority to enforce them.

- - Automatic Penalties for Non-Compliance

In its petition, Gracie Point said that for all conditions, substantial penalties should be imposed on a per day basis if DSNY is not in compliance with them, and DSNY should be required to report any instances of violations, with penalties for failure to do so on a timely and adequate basis.

DEC Staff has declined to establish penalties for violations in the permit, adding that its enforcement authority under the ECL and Part 360 is sufficient on this point. DEC Staff also maintains that the conditions in its draft permit, particularly as revised during the issues conference, provide reporting requirements and mechanisms for DEC oversight greater than what is required by Part 360.

DSNY agrees with DEC Staff that DEC's enforcement authority over the terms of the permit need not be specified as a permit condition, and adds that the special condition requiring an

environmental monitor will ensure adequate oversight and enforcement of the permit's terms. That condition (formerly No. 46, now No. 53) requires DSNY to provide DEC with funding for its environmental compliance activities related to construction and operation of the facility.

RULING: No such permit amendment is warranted. DEC Staff shall retain discretion as to whether to undertake enforcement action for any violations it finds, and, where it does undertake enforcement action, to determine what relief, including monetary penalties, is justified. Fixing penalties for non-compliance in the permit does not allow for consideration of the full range of relevant circumstances that are present when a violation occurs.

-- Special Condition No. 43

Special condition No. 43 of the final draft permit, added following the issues conference, states that DSNY shall maintain records of the number of inbound waste trucks that cross the inbound scale on a per hour basis. Gracie Point says this cannot provide sufficient protection to the community if DSNY is not required to make these records available to the public on a monthly basis.

RULING: No such additional requirement is necessary, as the records will be available to the environmental monitor as they are prepared.

-- Special Condition No. 51

Special condition No. 51 of the final draft permit, added following the issues conference, states that DSNY shall on a monthly basis post on its website basic public information regarding site operations, including, at a minimum, daily throughput rates and the hourly number of incoming trucks. Gracie Point says this cannot provide sufficient protection to the community in the absence of a procedure for the public to communicate with DSNY or DEC regarding that information, a requirement that the information include records specified in special conditions No. 33 and 34 (addressing time frames for waste containerization and removal), and a requirement that DSNY establish a fund to pay for an expert to analyze the data on behalf of the CAG.

RULING: No permit amendment is necessary. There are existing avenues for the public to communicate with DSNY or DEC, as well as to receive operational data available under the Freedom of Information Law. Because DEC Staff, not the CAG,

would enforce the terms of DEC's permit, requiring DSNY to fund experts for the CAG is not reasonable. Should the CAG perceive that the facility is operating in violation of its permit, it can alert DEC, which can perform its own analysis of operational information.

RULINGS ON PARTY STATUS

According to 6 NYCRR 624.5(d)(1), to secure full party status, a prospective intervenor must:

(1) file an acceptable petition pursuant to 6 NYCRR 624.5(b)(1) and (2);
(2) raise a substantive and significant issue or be able to make a meaningful contribution to the record regarding a substantive and significant issue raised by another party; and
(3) demonstrate adequate environmental interest.

Each of these elements is discussed below in relation to the petitions filed on behalf of Gracie Point and EDF.

- - Acceptable Petition

Both Gracie Point and EDF filed petitions addressing all the elements contemplated by the regulations. Neither DSNY nor DEC Staff contested the petitions on this point.

- - Substantive and Significant Issue

Gracie Point argued correctly in its petition that DSNY has not shown that noise levels from the transfer station will comply with Part 360's operational requirements. This point must be addressed through an additional submittal from DSNY, to which Gracie Point is entitled to respond. Though noise has not yet been identified as an issue requiring adjudication, it remains possible that it will be, and Gracie Point has retained a noise expert whose testimony could be helpful if adjudication is required.

Noise impacts were not identified as a particular concern in EDF’s petition, nor has EDF identified a noise expert who could meaningfully contribute to the record on this issue. EDF’s petition proposed various issues, but those issues have been addressed to EDF’s satisfaction, for purposes of this hearing, through negotiations with DSNY and DEC Staff. Nonetheless, during the conference call of April 2, 2008, EDF counsel expressed an interest in participating in any future proceedings

addressing any of Gracie Point's issues, and being part of any future discussions on permit terms.

- - Environmental Interest

The environmental interests of the individuals and groups that constitute the Gracie Point petitioners, and the environmental interest of EDF, were not contested by DSNY or DEC Staff, with one exception. That exception concerns the lack of identified disposal locations for the containerized waste, as to which DSNY argues that the Gracie Point petitioners, who pointed out this omission, have no environmental interest in pursuing it. According to DSNY, the Gracie Point petitioners cannot raise this as an issue because they have not alleged that they will suffer harm from any of the barging or rail activities associated with waste transport, or from any of the activity associated with disposal of the waste at landfills or incinerators outside of New York City. As noted above, I find that the draft permit adequately addresses Gracie Point's concern by requiring that information about disposal sites, and how the waste will reach those sites after leaving the marine transfer station, be provided 90 days before the facility begins operations, and that operations not begin until DEC has approved DSNY's plans. Should my ruling be reversed on appeal, and such information must be provided as part of this hearing, both Gracie Point and EDF should have the opportunity to raise issues as to any submittal DSNY makes, and an opportunity to show their interest in those issues' resolution.

RULING: Because the Gracie Point petitioners have identified a potential issue concerning compliance with Part 360's requirements governing operational noise, and have a noise expert who could contribute to the record on that issue should it require adjudication, they are granted full party status, it being noted also that, as neighbors of the facility, they have an interest in ensuring compliance with relevant noise standards. Party status shall entitle them to respond to DSNY's submittal addressing compliance with 6 NYCRR 360-1.14(p).

EDF is also granted full party status. While it did not propose noise impacts as an issue of its own, EDF may be able to contribute to the record's development on this issue, and, given its interest in ensuring that project impacts are adequately mitigated, should also be afforded an opportunity to respond to DSNY's submittal. Also, EDF, having played an important role in developing the current draft permit, should be part of any discussions about further permit amendments.

APPEALS

A ruling of the ALJ 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 on an expedited basis [6 NYCRR 624.8(d)(2)]. Ordinarily, such appeals are made to the Commissioner; however, the Commissioner has recused himself from all decisions in this matter, and has delegated his decision-making authority to Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services. [See Commissioner's recusal memorandum of October 9, 2007, Exhibit No. 9.]

According to 6 NYCRR 624.6(e)(1), expedited appeals must be filed within five days of the disputed ruling. However, to avoid prejudice to any party, all rules of practice involving time frames may be modified by direction of the ALJ, pursuant to 6 NYCRR 624.6(g).

Allowing extra time due to the length and complexity of these rulings, any appeals of these rulings must be received by Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services, at the New York State Department of Environmental Conservation, 625 Broadway, Albany, New York, 12233, no later than 4 p.m. on May 5, 2008. Any responses to appeals must be received by 4 p.m. on May 27, 2008. One copy of each submittal must be sent to me, to DEC's Chief Administrative Law Judge, James T. McClymonds (also at my address), and to all others on the service list at the same time and in the same manner as the submittal is sent to the Assistant Commissioner. Service of papers by facsimile transmission (FAX) or by e-mail is not permitted, and any such service will not be accepted.

Appeals should address my rulings directly, rather than merely restate a party's contentions. To the extent practicable, submittals should include citations to transcript pages and exhibit numbers. A list of marked conference exhibits is attached to these rulings. The record also includes all materials submitted as part of the permit applications as well as all correspondence between me and the parties, which I have retained separately.

ORDER OF DISPOSITION

DEC's permit hearing procedures state that there will be no adjournment of the hearing during appeal except by permission of the ALJ [6 NYCRR 624.8(d)(7)]. Recognizing DSNY's interest in

securing a timely decision about its project, further proceedings shall not be stayed pending resolution of appeals of these rulings. Once DSNY provides its analysis concerning compliance with the operational noise requirement at 6 NYCRR 360-1.14(p), I will conduct a conference call with all parties' counsel to establish a schedule for their responses to DSNY's submittal, it being unclear at this point whether an adjudicatory hearing will be required.

/s/

Albany, New York
April 7, 2008

Edward Buhrmaster
Administrative Law Judge

ISSUES CONFERENCE EXHIBIT LIST

NEW YORK CITY DEPARTMENT OF SANITATION
EAST 91St STREET MARINE TRANSFER STATION

Project Application No. 2-6204-00007/00013

1. Notice of Legislative Hearing and Issues Conference (8/30/07) (file copy)
2. Notice of Legislative Hearing and Issues Conference as published in DEC's on-line Environmental Notice Bulletin (9/5/07)
3. Notice of Legislative Hearing and Issues Conference as published in the New York Post (9/5/07), with affidavit of publication
4. Letter transmitting Notice of Legislative Hearing and Issues Conference to Applicant and DEC Staff (8/30/07)
5. DEC Notice of Hearing Distribution List (8/31/07)
6. DEC Draft Permit as forwarded with hearing referral
7. Petition for Full Party Status by Gracie Point petitioners (10/5/07), with attached exhibits
8. Petition for Party Status by the Environmental Defense Fund (10/12/07)
9. Recusal Memorandum of DEC Commissioner Grannis (10/9/07)
10. Decision of the State Supreme Court in ACORN matter (9/19/06)
11. Decision of the State Supreme Court in Powell matter (6/18/07)