

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
625 BROADWAY  
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Application for Permits for the Proposed  
Converted Marine Transfer Station at  
East 91<sup>st</sup> Street, Manhattan, New York

- by -

**NEW YORK CITY DEPARTMENT OF SANITATION,**

Applicant.

DEC Application No. 2-6204-00007/00013

DECISION OF THE ASSISTANT COMMISSIONER

July 27, 2009

DECISION OF THE ASSISTANT COMMISSIONER<sup>1</sup>

The New York City Department of Sanitation ("DSNY" or "applicant") proposes to construct and operate a converted marine transfer station at East 91<sup>st</sup> Street in Manhattan, adjacent to the East River and FDR Drive (the "facility"). The facility, which would consist of a new, fully enclosed building accessed by a truck ramp connecting to York Avenue, is part of the New York City Solid Waste Management Plan ("SWMP") and DSNY's long-term waste export program.

The facility would require the following permits from the New York State Department of Environmental Conservation ("DEC" or "Department"):

- (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 of the State of New York ("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;
- (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; and
- (5) a storm water general permit for construction activities.

The matter was referred to the Office of Hearings and Mediation Services and assigned to Administrative Law Judge ("ALJ") Edward Buhrmaster. A legislative hearing and issues conference were subsequently held.

In his Ruling on Issues and Party Status dated April 7, 2008 ("April Ruling"), Judge Buhrmaster determined that no issues were subject to adjudication, except that he required further information with respect to the facility's compliance with the operational noise requirement in the State's solid waste regulations (see 6 NYCRR 360-1.14[p]). The ALJ directed DSNY to

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<sup>1</sup> By memorandum dated October 9, 2007, Commissioner Alexander B. Grannis delegated decision making authority in this proceeding to Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services. The memorandum was forwarded to the service list by letter of same date.

provide a noise impact analysis, which was to be followed by an opportunity for the other issues conference participants to raise issues about that analysis. In a Supplemental Issues Ruling dated December 10, 2008, ALJ Buhrmaster concluded that no issue existed with respect to the facility's ability to comply with the operational noise requirement ("Noise Ruling"). Accordingly, the ALJ concluded that no adjudicatory hearing would be required for DSNY's application.

Participating in this proceeding, in addition to Department staff and DSNY, were a group of petitioners that included both individuals and corporate entities (collectively referred to as "Gracie Point")<sup>2</sup> and the Environmental Defense Fund ("EDF"). Gracie Point filed an appeal dated May 2, 2008 from the April Ruling. Replies to the appeal dated May 27, 2008, were received from Department staff ("Department Staff Reply") and DSNY ("DSNY Reply"), respectively. EDF filed responding papers dated May 23, 2008 ("EDF Response"). Gracie Point filed papers dated June 6, 2008 in response to the submissions of Department staff, EDF and DSNY ("Gracie Point Response").

Gracie Point has raised various environmental matters in this proceeding. I appreciate the concerns that Gracie Point has raised and, by its participation, Gracie Point has ensured a full discussion of matters of concern to the surrounding community.

Nevertheless, upon consideration of the record before me, including the petition for party status submitted by Gracie Point and its other submissions and arguments, I conclude that Gracie Point has not demonstrated that the ALJ misapplied the standards for identifying adjudicable issues and has not otherwise rebutted the ALJ's analysis. The ALJ's analysis in the April Ruling is comprehensive, detailed and well-reasoned, and correctly applies the applicable statutory and regulatory requirements. I hereby affirm the April Ruling, subject to my comments in this decision. Because no appeal was taken from the ALJ's subsequently issued Noise Ruling, that ruling is unchallenged and need not be addressed.

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<sup>2</sup> The Gracie Point petitioners included 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.

## BACKGROUND

According to DSNY, the proposed facility is an integral part of its long-term waste export program (see, e.g., DSNY Joint Application for Permit dated February 2007, at 2-2 to 2-5 and Section 4.3 [East 91<sup>st</sup> Street Converted MTS]). As described in the draft permit, the facility would be authorized to accept up to 4,290 tons per day of municipal solid waste ("MSW") and 5,280 tons per day of MSW under emergency conditions. Full operations at the facility were expected to commence in 2012 (DSNY Reply, at 11 fn5).

DSNY proposes to demolish the existing marine transfer station at this location (which is not currently in use) and construct a new containerized waste management building to provide for barge transfer of MSW to locations outside of New York City. Solid waste transfer and containerization activities would take place within the new building. Dredging of the waterway adjacent to the building would be undertaken to allow for barge operations. The access ramp to the site currently bisects Asphalt Green, a park and community facility complex, and the ramp to the proposed facility would utilize the existing footprint.

DSNY conducted an environmental review of its SWMP, which included a detailed environmental review of each of the proposed marine transfer stations (including the [East 91<sup>st</sup> Street] facility), in accordance with the State Environmental Quality Review Act ("SEQRA", ECL Article 8), SEQRA's implementing regulations (6 NYCRR Part 617), and the Rules and Procedures for City Environmental Quality Review ("CEQR"). Following receipt of public comment, DSNY prepared and circulated the Final Environmental Impact Statement for the New York City Comprehensive Solid Waste Management Plan ("FEIS") on the SWMP, issuing its findings statement on February 13, 2006.<sup>3</sup> DEC, which was an involved agency in the SEQRA review of the SWMP, provided comments on the draft environmental impact statement on the SWMP (see FEIS, at § 40.3.3.1). The Department approved the SWMP by letter dated October 27, 2006.

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<sup>3</sup> Legal challenges to the City's decision to build a new marine transfer station at the site of the former East 91<sup>st</sup> Street marine transfer station and the City's compliance with applicable environmental review procedures have been rejected (see Association for Community Reform Now ["ACORN"] v Bloomberg, 13 Misc3d 1209[A] [New York Co Sup Ct 2006], aff'd, 52 AD3d 426 [1<sup>st</sup> Dept 2008], lv den'd, 11 NY3d 707[2008]; see also Matter of New York State Assemblyman Powell v City of New York, 16 Misc3d 1113[A] [New York Co Sup Ct 2007]).

Department staff circulated a modified draft permit for the facility under cover of a letter dated November 30, 2007 that included modified and new special conditions that were added following the issues conference. Following further negotiations between DSNY and EDF, DSNY and EDF jointly proposed special permit condition 17A to provide for notification in the event of any upset or emergency condition. The special permit condition was incorporated into a revised draft permit that was circulated under cover of an e-mail dated February 12, 2008 from Department staff attorney Louis Oliva. The revised draft permit in one omnibus document incorporates the following: a solid waste management facility permit (ECL Article 27, Title 7; 6 NYCRR Part 360); an air state facility permit (ECL Article 19); a water quality certification (6 NYCRR Part 608); a tidal wetlands permit (ECL Article 25); and a protection of waters permit (ECL Article 15, Title 5). The draft permit includes numerous general and special conditions that address construction and operational activities at the facility.

EDF supports the siting of the proposed new East 91<sup>st</sup> Street marine transfer station as part of the City's SWMP, but it has emphasized the need for operational permit conditions to minimize air quality and other community impacts (see EDF Response, at 1; see also EDF application for party status dated October 12, 2007, at 2 [Issues Conference Exh 8]). EDF noted that several of the permit conditions, to which DSNY has agreed, address issues that EDF raised in its petition for party status (EDF Response, at 2). During consideration of DSNY's application, DSNY and EDF discussed various permit conditions for the facility. As was the case here, such discussions can assist the review process and result in environmentally protective special conditions. These efforts are to be commended, and similar approaches to achieve resolution through negotiation are encouraged for other permit application proceedings.

## **DISCUSSION**

### **Applicable Standards Governing Identification of Issues**

In accordance with the Department's permit hearing regulations (see 6 NYCRR Part 624), where contested issues are not the result of a dispute between an applicant and Department staff, but are proposed by a third party, an issue must be both "substantive" and "significant" to be adjudicable (see 6 NYCRR 624.4[c][1][iii]).

An issue is substantive "if there is sufficient doubt

about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry" (6 NYCRR 624.4[c][2]). In determining whether an issue is substantive, the ALJ "must consider the proposed issue in light of the application and related documents, the draft permit, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments authorized by the ALJ" (id.). An issue is significant "if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit" (6 NYCRR 624.4[c][3]).

Pursuant to 6 NYCRR 624.4(c)(4), where Department staff has determined that "a component of the applicant's project, as proposed or as conditioned by the draft permit, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on a potential party proposing any issue related to that component to demonstrate that it is both substantive and significant." A potential party's burden of persuasion at the issues conference is met with an appropriate offer of proof supporting its proposed issues.

Any assertions that a potential party makes must have a factual or scientific foundation. Speculation, expressions of concern, or conclusory statements are insufficient to raise an adjudicable issue. Equally important, even where an offer of proof is supported by a factual or scientific foundation, "it may be rebutted by the application, the draft permit and proposed conditions, the analysis of Department staff, or the record of the issues conference, among other relevant materials and submissions" (Matter of Waste Management of New York, LLC, Decision of the Commissioner, October 20, 2006, at 5). In areas of Department staff expertise, its evaluation of the application and supporting documentation is an important consideration in determining the adjudicability of an issue (see Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, December 29, 2006, at 6).

As noted, DSNY (and not the Department) served as lead agency and prepared an environmental impact statement on the SWMP. In this circumstance, "no issue based solely on compliance with SEQRA and not otherwise subject to the department's jurisdiction will be considered for adjudication unless . . . the department notified the lead agency during the comment period on the [draft environmental impact statement] that [it] was inadequate or deficient with respect to the proposed issue and the lead agency failed to adequately respond" (6 NYCRR

624.4[c][6][ii][b][1]). Department staff was satisfied with DSNY's FEIS, and did not identify any inadequacies or deficiencies (see Issues Conference Transcript ["Tr"], at 71).

### Gracie Point Appeal

Gracie Point, in its appeal, raises five issues, which are addressed below:

#### 1. Facility's Compatibility with the Public Health, Safety and Welfare

Gracie Point argues that the facility is incompatible with the public health, safety and welfare because of its proximity to a densely populated residential community and public parkland. Gracie Point contends that the proposed site is an inappropriate location for a new waste transfer station (see Gracie Point Appeal, at 10), noting, in particular, to the location of the access ramp to the facility with respect to Asphalt Green (see id., at 11).

Gracie Point cites provisions of the ECL (e.g., ECL § 27-0101 [expressing the legislative purpose that the treatment and management of solid waste be accomplished in a manner "consistent with the protection of the public health"]; ECL § 27-0106 [state solid waste management policy established "[i]n the interest of public health, safety and welfare"]; and ECL § 27-0703[2] [solid waste management rules and regulations directed at the "prevention or reduction" of air, water and noise pollution, odors, unsightly conditions, infestations, and "other conditions inimical to the public health, safety and welfare"]). Gracie Point cites to 6 NYCRR § 360-1.10 and 360-1.11 as further support for its contention that the permit should be denied based on a significant adverse impact on public health, safety or welfare. It criticizes the April Ruling for: too narrowly reading the cited Part 360 regulations (see Gracie Point Appeal, at 18); and apparently relying on the fact that the claims regarding public health, safety and welfare had been rejected in related SEQRA litigation (see id., at 19).

The ALJ, in the April Ruling, fully addressed the arguments regarding public health, safety and welfare, and I concur with his analysis that no adjudicable issue was raised (see April Ruling, at 18-28). With respect to the application of 6 NYCRR 360-1.11(a) on which Gracie Point relies as part of its argument, that regulatory section states that the provisions of each solid waste management facility permit must assure "to the extent practicable" that the permitted activity "will pose no

significant adverse impact on public health, safety or welfare." The ALJ concluded that this narrative statement does not provide a basis to deny a solid waste management facility permit, noting that permit issuance criteria are referenced at 6 NYCRR 360-1.10, and I agree.<sup>4</sup>

Section 360-1.11(a) of 6 NYCRR states that the Department may impose conditions on a permit, which was accomplished here. The draft permit contains numerous special conditions that address such issues as tonnage, storage limits, and a variety of stringent construction and operational requirements. These conditions, which have been drafted to address and ensure compatibility with the public health, safety and welfare, are reasonable, appropriate and well-considered. Even assuming, for purposes of argument, that 6 NYCRR 360-1.11(a) constituted a specific public health, safety and welfare standard (which it does not), the conditions in the draft permit will assure, to the extent practicable, that the permitted activity will not result in a significant adverse impact on public health, safety and welfare.<sup>5</sup>

Gracie Point also cites to ECL § 15-0505(3) and 6 NYCRR 608.8(b) (relating to the use and protection of waters permit) and ECL § 25-0403(1) and 6 NYCRR 661.9(b)(1)(ii) (relating to the tidal wetland permit) as further grounds to consider public health, safety and welfare impacts (see Gracie Point Appeal, at

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<sup>4</sup> A review of the Final Environmental Impact Statement and Responsiveness Summary for Revisions to 6 NYCRR Part 360 dated August 1988 ("Responsiveness Summary") further confirm that this regulatory provision does not provide an independent basis upon which a permit application could be denied (see Responsiveness Summary, at RS 1-46).

<sup>5</sup> Gracie Point identifies eight conditions which it deems "so complex to be unworkable" (see Gracie Point Appeal, at 14-15 [including having a safety buffer or barrier around the perimeter of the site during construction, restricting the number of trucks between 3:00 a.m. and 4:00 a.m., restricting the number of inbound trucks on the access ramp, keeping records relating to inbound trucks, stationing a person at the foot of the access ramp to control traffic and to ensure no queuing on public streets, posting information on DSNY's website regarding the facility's operation, requiring City vehicles to use ultra low sulfur diesel fuel and to install best available retrofit technology, and installing video cameras to allow for a view of York Avenue and granting the Department unrestricted access to the video cameras on a real-time basis]). Gracie Point does not explain how these may be unworkable and, based on this record, all of the identified conditions are reasonable. No impediment to their implementation or subsequent compliance by DSNY has been identified.



19 fn3). I concur with the ALJ that Gracie Point's offer of proof with respect to these two permit programs is unrelated to those impacts (see April Ruling, at 24-25). Accordingly, its contentions fail to raise any substantive and significant issue.

Gracie Point also contends that the ALJ "improperly relied" on the court's arguments in the SEQRA litigation on the SWMP to exclude consideration of the full permitted capacity of the facility (see Gracie Point Appeal, at 20, 22). Gracie Point's argument misconstrues the April Ruling. The ALJ agreed with Gracie Point that the Department is obliged to consider issues that arise under relevant Department permitting standards even if those issues also involve a SEQRA review performed by a lead agency other than the Department (see April Ruling, at 23). The ALJ analyzed, as reflected throughout the April Ruling, the issues, including full capacity, in the context of the applicable DEC permitting standards and proposed permit conditions (see, e.g., April Ruling, at 27).

## 2. Facility's Compliance with the Requirements of Part 360

Gracie Point contends that the failure of DSNY's application to state where the waste processed at the facility will be disposed, and the lack of a transport and disposal plan for the facility, mandate a denial of the application (see Gracie Point Appeal, at 22). In support of its position, Gracie Point cites language in the Department's solid waste regulations establishing additional permit application requirements for transfer stations. The language states that the engineering report for a transfer station must include "a description of the general operating plan for the proposed 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] & [iii]).

Gracie Point's arguments do not raise an adjudicable issue. The ALJ addressed this concern relating to waste disposal, and the transport and disposal plan (see April Ruling, at 29-32). The ALJ noted that Special Condition 20 of the draft permit provides conditions relating to submission of a Final Operations and Maintenance Plan ("FOMP") for the Department's review, ninety days prior to the commencement of operations at this facility. The FOMP will include specific waste transport and disposal contractors and final disposal sites, among other information. Furthermore, Department staff is required to approve the FOMP prior to the commencement of operations at the

facility.

DSNY, as a supplement to its Part 360 permit application has also provided a report serving as an interim transfer, transport and disposal plan (see DSNY Engineering Report dated January 2007, Vol 1, Appendix I [addressing system requirements, rail capacities, intermodal terminal and disposal facility components]; see also FEIS, § 40.3.5, at 40-400 to 40-431). The interim report shows the available capacity at intermodal terminals in the New York region, as well as the sufficiency of the capacity of rail and/or ocean barge transport that serves those facilities to transfer and transport containerized waste from the City's marine's transfer stations. The report also describes the available disposal capacities in various states based on proposals that DSNY received in response to its "Request for Proposals to Transport and Dispose of Containerized Waste from One or More Marine Transfer Stations" that was issued in December 2003.

The facility itself is not estimated to begin operations until 2012 at the earliest, and it would be impracticable to provide a description of the final disposal facilities years in advance of the transfer station's operation, and prior to the completion of the required City competitive procurement process. As set forth in the FEIS, DSNY is negotiating with the objective of entering into long term transport and disposal contracts. Once these contracts are finalized in accordance with the City's procurement process, the final transport and disposal plan will be developed and submitted to DEC in accordance with Special Condition 20 of the draft permit.

Department staff's interpretation of the permit application requirements to condition the permit to provide for the pre-operational submission of this information is reasonable and an appropriate application of the regulation. The proposed condition provides a basis to ensure that suitable arrangements will be made (see Matter of the Islip Resource Recovery Agency, Decision of the Commissioner, November 26, 1984, at 2-3 [providing for the conditioning of the permit upon subsequent execution of a residue and bypass disposal agreement]).

In addition, the proposed permit contains other conditions that address the operation of the facility with respect to the transfer and containerization of waste. For example, Special Condition 31 addresses unauthorized waste, Special Condition 33 requires that all MSW be removed from the facility within 48 hours of receipt (except in the event of a

contingency), and Special Condition 34 provides that all MSW must be containerized within 24 hours of receipt, subject to certain exceptions.

Gracie Point also contends that the facility does not meet the requirements of "the New York City Zoning Resolution" and therefore violates local law and the State's Part 360 regulations (see Gracie Point Appeal, at 24). Gracie Point further states that DSNY has "admitted" that the facility fails to comply with local zoning laws (see id.), a claim which DSNY rejects (see DSNY Reply, at 24). With respect to this argument, the Department does not have the authority under the Environmental Conservation Law to adjudicate legal issues concerning compliance with local government zoning (see Matter of New York City Department of Sanitation [Spring Creek Yard Waste Composting Facility], Interim Decision of the Deputy Commissioner, June 14, 2006, at 8). It is well established that interpretation of zoning codes, issues of prior non-conforming use, and similar questions must be decided by the local government having jurisdiction, subject to any judicial review (see, e.g., Matter of 4-C's Development Corp., Interim Decision of the Commissioner, May 1, 1996, at 3; see also Matter of Town of Poughkeepsie v Flacke, 84 AD2d 1, 5-6 [2d Dept 1981], lv denied, 57 NY2d 602 [1982]).

Moreover, General Condition 5 of the draft permit provides that DSNY will be "responsible for obtaining any other permits, approvals, lands, easements and rights-of-way that may be required for the subject work," and "must comply with all applicable local, State, and federal regulatory requirements." Accordingly, as a condition of the DEC permit, DSNY must comply with local laws and other governmental requirements and obtain all necessary approvals.

### 3. Protection of Waters and Tidal Wetland Regulations

Gracie Point states that DSNY has the burden of establishing that the proposed facility is reasonable and necessary, considering such factors as the existence of reasonable alternatives, before the Department may issue permits pursuant to the protection of waters and tidal wetlands regulations (citing, respectively, 6 NYCRR 608.8[a] & 661.9[a])(see Gracie Point Appeal, at 27). According to Gracie Point, DSNY wrongfully rejected reasonable alternatives "without adequate consideration" (see id.). Gracie Point further maintains that the April Ruling erroneously concluded that DSNY had to consider only alternatives to the in-water project activities, and not alternatives to the project as a whole (see

id., at 29).

Gracie Point contends that the April Ruling "erroneously deferred" to an aspiration of "an equitable allocation of responsibility for waste disposal that does not disproportionately burden low-income and minority communities," or "borough equity" (see Gracie Point Appeal, at 27). It maintains that the Harlem River Yard site in the South Bronx would be a feasible and preferred alternative to this upper East Side Manhattan location (see, e.g., Gracie Point Petition for Party Status dated October 5, 2007, at 22-25).

The record before me demonstrates that Gracie Point's offer of proof was insufficient. The application documents and the FEIS demonstrate that the project-related activities are "reasonable and necessary." DSNY, pursuant to the requirements of the State Solid Waste Management Act, prepared the SWMP (see ECL § 27-0107 [setting forth the components to be addressed by local solid waste management plans]). Based on a comprehensive review of solid waste needs, the SWMP, which was approved by DEC, provides for a reliance on marine-based waste transport, in place of a waste transfer system that is land-based and truck-based. The distribution of solid waste infrastructure throughout the City's five boroughs is a critical element of the SWMP, to which the selection of the proposed East 91<sup>st</sup> Street facility adheres.

I concur with the ALJ that the alternative Bronx location that Gracie Point seeks to advance does not raise an adjudicable issue, in part due to the Department-approved SWMP that establishes the manner in which DSNY is proposing to locate its solid waste infrastructure (see, e.g., FEIS, at 1-1 to 1-34). Furthermore, the record demonstrates that DSNY undertook an extensive and responsive alternatives analysis in its environmental review process in the siting of marine transfer stations. The thorough analysis undertaken with respect to solid waste infrastructure siting in the development of the SWMP and the appropriateness of deferring to the DEC-approved SWMP have not been offset by Gracie Point's arguments regarding alternatives. Furthermore, the courts have held that DSNY's analysis of alternatives to the proposed East 91<sup>st</sup> Street marine transfer station was sufficient, that a reasonable range of alternatives was considered, and that the Harlem River Yard site in the Bronx was "rationally rejected" (Alcon v. Bloomberg, 52AD3d 426, 428-29 (1<sup>st</sup> Dept 2008), lv den'd, 11 NY3d 707(2008)).<sup>6</sup>

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<sup>6</sup> ALJ Buhrmaster in the April Ruling also reviewed an upland location alternative at the East 91<sup>st</sup> Street site (see April Ruling, at

Gracie Point's arguments do not raise sufficient doubt about DSNY's ability to meet applicable statutory or regulatory criteria, such that a reasonable person would require further inquiry, or provide any basis for Gracie Point's contention that this issue would result in the denial of the requested permit, a major modification to the proposed project or imposition of significant permit conditions in addition to those proposed in the draft permit. Accordingly, no adjudicable issue has been raised with respect to the "reasonable and necessary" requirement of the Department's tidal wetland and protection of waters regulations.

Gracie Point also argues that the April Ruling is inconsistent with recent positions that the Department has taken with respect to certain over-water construction projects (citing projects that are part of the Hudson River Park, the East River Waterfront and the Brooklyn Bridge Park)(see Gracie Point Appeal, at 30). Gracie Point provides no showing that these other projects are water-dependent or have any relevance to the SWMP-related solid waste activities under consideration here.

#### 4. Impacts on the East River

Gracie Point states that DSNY failed to meet its burden to demonstrate that the facility would not have "an undue adverse impact on the present or potential value of the affected tidal wetland area" (6 NYCRR 661.9[b][1][i]) and would not cause "unreasonable, uncontrolled or unnecessary damage to the natural resources of the State" (6 NYCRR 608.8[c])(see Gracie Point Appeal, at 31). Gracie Point further argues that its offer of proof, as presented through its proposed witness Dr. Ron Abrams, demonstrates that serious questions exist about whether the facility would adversely impact the East River and the tidal wetlands in the area (see id., at 32-34).

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

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41-42 [discussing relevant factors in the selection of the over-water proposal in lieu of an upland alternative]; see also id., at 43 [reviewing the "no action" alternative]]. Both the over-water proposal and the upland alternative for the marine transfer station would require water access and dredging. Dredging required by the over-water design, however, "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" (see id., at 42).

the applicable use guidelines (see 6 NYCRR 661.5[b][47], [48]). However, this does not mean that a proposed action in a littoral zone cannot be permitted, as the regulations allow for the 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][iv]; see also 6 NYCRR 661.9[b][1][i][tidal wetland permitting standards to take into account the "social and economic benefits which may be derived from the proposed activity"])).

Gracie Point failed to meet its burden on this issue. With respect to the facility, only a small area is to be dredged and the impacts are expected to be temporary (see, e.g., Tr at 199).<sup>7</sup> The draft permit contains numerous control measures that provide environmental protections with respect to the dredging operation (see Draft Permit, at ¶¶ 54-62 [addressing the type and manner of equipment to be used, the handling of excavated sediments, and submission of pre-dredging documentation, among other conditions]). The ALJ notes that the proposed measures are "intended specifically to minimize water quality impacts" (April Ruling, at 46). The application and the draft permit, in conjunction with the independent evaluation of Department staff, demonstrate that the activities regulated by the tidal wetlands permit will not have an "undue adverse impact on the present or potential values" of the affected wetland area and that the facility will not cause "unreasonable, uncontrolled or unnecessary damage to the natural resources of the state." Based upon the record before me, Gracie Point's offer of proof in this proceeding is insufficient to raise any adjudicable issue relating to impacts on the East River.

I note that the proposed permit requires DSNY to develop and submit a plan to the Department for wetland restoration elsewhere as compensation for unavoidable impacts of its project (see April Ruling, at 46; see also Draft Permit, at ¶¶ 63-65 [natural resource mitigation provisions]). The draft permit, however, does not appear to specify when such restoration work is to be completed. To avoid any confusion regarding the completion date, I hereby direct that the draft permit be amended to confirm that, prior to the receipt of waste at the facility, tidal wetland restoration sufficient to mitigate impacts created at this site, as well as any related Department staff review and approval of that restoration work at the site, be completed.

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<sup>7</sup> The new construction is expected to result in more surface area for epibenthic communities (see, e.g., FEIS, at 6-57).

5. Adequacy of Specific Conditions in the Draft Permit

Gracie Point contends that two additional permit conditions should be added to the draft permit:

(1) a condition requiring that a 24-hour hotline be maintained for the public to use to report unsafe or unsanitary conditions or violations of permit conditions to DSNY; and

(2) a condition prohibiting diesel trucks from accessing the facility unless the trucks (a) use ultra low sulfur diesel fuel, and (b) use the best available retrofit technology or be equipped with an engine certified to meet the 2007 U.S. Environmental Protection Agency standard for particulate matter (see Gracie Point Appeal, at 34-38).

- Hotline

With respect to the proposed 24-hour hotline, the ALJ concluded that no special hotline was necessary in that other avenues existed to register complaints with DSNY and Department staff. Specifically, the ALJ noted that the City of New York already has a 24-hour call-in number (311) which is available to City residents to register complaints. Department staff also indicated that it could be contacted directly (see April Ruling, at 56-57).

DSNY, in its reply, argues that establishing an additional hotline is not necessary given the existing avenues to communicate concerns regarding the facility's operations, in addition to the incorporation of monitoring and reporting requirements in the draft permit (see DSNY Reply, at 35).

I concur that no additional hotline needs to be established. As noted, the City already maintains a call-in number for its residents by which complaints can be lodged, and that number is accessible to any member of the local community who may have a complaint regarding the facility's operation.

In addition, the draft permit contains several special conditions that will ensure information regarding the facility's operations, including any operational difficulties, is expeditiously communicated or otherwise made available. For example, proposed Special Condition 17(a) would require DSNY to notify the Department as soon as practicable, but not later than three hours, after the onset of any upset or emergency condition. Proposed Special Condition 51 requires DSNY to post monthly public information regarding the facility's operation on its

website. Other special conditions provide for the installation of video cameras to monitor the facility access ramp, as well as York Avenue, and for funding for environmental monitoring of the facility (see Special Conditions 52 and 53). Department staff also referenced Special Condition 52 by which staff will be given unrestricted access on a "real time basis" to the video cameras (which will provide the ability to identify any potential truck queuing violations)(see Department Staff Reply, at 8).

In light of the foregoing, an additional hot-line to register complaints is not necessary.

- Truck Fuel/Technology

Regarding Gracie Point's truck-related condition, proposed Special Condition 45 in the draft permit addresses concerns with respect to trucks that DSNY owns and operates. The condition requires the use of ultra low sulfur diesel fuel by DSNY trucks and by the end of 2012, establishes specific best available retrofit technology requirements relative to trucks that it purchased prior to 2007 and emission certification requirements for trucks that it purchased during or after 2007.

With respect to the trucks that are owned and operated by commercial carters, Department staff maintains that it lacks the authority to impose a limitation on non-stationary sources at the facility. Accordingly, it contends that it can not impose the requested restrictions on commercial carters using the facility. Based on a review of the arguments on this appeal, the April Ruling (see April Ruling, at 58-62), the Department's solid waste regulations (see 6 NYCRR Part 360), and the circumstances related to this matter, no basis is found to authorize such a condition here.<sup>8</sup>

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To the extent that Gracie Point has raised other issues on its appeal, these have been considered and rejected.

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<sup>8</sup> Federal regulations establishing highway diesel fuel sulfur control requirements will result in lower sulfur levels in diesel fuel prior to the commencement of facility operations (see Federal Register, Vol 66, January 18, 2001, at 5001-5193 [Control of Air Pollution from New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements]; see also 40 CFR 80.500 [establishing implementation dates for diesel fuel sulfur control program], 80.501 & 80.520).



**CONCLUSION**

Because no substantive and significant issues have been raised for adjudication, this matter is hereby remanded to Department staff. Department staff is directed to issue the permits and the water quality certification for the East 91<sup>st</sup> Street marine transfer station, consistent with the draft permit prepared by Department staff as modified by this Decision and in accordance with all applicable laws and regulations, including but not limited to SEQRA. Because the Department is a SEQRA involved agency with respect to this project (for which an environmental impact statement has been prepared), Department staff is to file a findings statement in accordance with ECL Article 8 and 6 NYCRR Part 617.

New York State Department of  
Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Louis A. Alexander,  
Assistant Commissioner

Dated: July 27, 2009  
Albany, New York