

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.

**SUPPLEMENTAL  
ISSUES RULING**

(Application No. 2-6204-00007/00013)

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Background

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. Identified as part of the New York City Solid Waste Management Plan and DSNY's long-term waste export program, the facility would consist of a new, fully enclosed building accessed by a truck ramp connecting to York Avenue. The project requires several permits from the New York State Department of Environmental Conservation ("DEC"), including 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").

In rulings on issues and party status dated April 7, 2008, I said that a noise impact analysis providing a reasonable assurance that the 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 [Rulings, page 33]. According to 6 NYCRR 360-1.14(p), in a community with urban character, noise levels resulting from equipment or operations at a solid waste management 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 a.m. However, 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. [See NYCRR 360-1.14(p)(1).]

By letter of May 2, 2008, DSNY counsel forwarded to me and the other parties a noise analysis report dated April 21, 2008, which was prepared for DSNY by Henningson, Durham & Richardson ("HDR"), an architecture and engineering firm in White Plains.

Results of that analysis indicated that facility-related noise levels would be less than the applicable noise standard for all noise receivers analyzed.

On May 8, 2008, I held a conference call with counsel for the parties to this proceeding: DSNY, DEC Staff, a group of project opponents referred to collectively in my issues rulings as "Gracie Point" (for the Gracie Point Community Council, one of the group's members), and the Environmental Defense Fund ("EDF"), a project supporter which also maintains that the facility must be operated in a manner that minimizes impacts on the surrounding community. EDF said that, as it had not proposed noise as a hearing issue and had no expertise concerning noise, it would not comment on DSNY's analysis or participate in further discussions on the topic. Gracie Point said that its previously retained noise engineer, Thomas Wholley, would respond to the analysis after reviewing supporting information that DSNY subsequently provided.

On July 10, 2008, Gracie Point counsel provided a response to DSNY's noise analysis report. According to this response, which relied on Wholley's expert opinion, DSNY's analysis improperly underestimated the sound levels produced by trucks on the facility's access ramp by employing a "soft ground" reduction factor for the path between the trucks and the property line, when in fact a "hard ground" reduction factor should have been used. Employing a "hard ground" reduction factor, Gracie Point argued, would result in an exceedance of the Part 360 noise requirements between the hours of 6 and 10 a.m., particularly along East 90th Street, south of the facility.

DSNY and DEC Staff were provided an opportunity to respond to Gracie Point's contentions. In a submittal dated September 25, 2008, DEC Staff said it lacked expertise to comment on Gracie Point's specific challenge, and offered no further comment. DSNY, however, offered an affidavit, dated September 26, 2008, by an HDR engineer, G. Noemi Santiago, who had participated in development of DSNY's April 21 report. Santiago disagreed with Wholley's argument for using a "hard ground" reduction factor, but did a refined analysis employing that factor and accounting for the acoustical properties of the louvered fence along the access ramp based upon the fence's detailed design, rather than the fence manufacturer's noise reduction value, which had been used in the initial analysis, and then only for receptors adjacent to the fence. The revised noise analysis was presented in a supplemental report by HDR, also dated September 26, which concluded that the facility would comply with the Part 360 noise requirement at all 24 receptor locations that were evaluated,

regardless of whether a "hard ground" or "soft ground" reduction factor is used.

Because the supplemental report relied on new data and a refined analysis to support DSNY's position, Gracie Point requested an opportunity to review the report and supporting spreadsheet information before I made any determinations. During a conference call on October 7, I granted this request, and allowed Gracie Point an opportunity to make an additional submittal, which came in the form of an affidavit of Thomas Wholley, dated November 5, 2008.

Wholley's affidavit said that HDR's September 26 report and the supporting information provided by DSNY "appear to substantiate DSNY's claim that the proposed East 91st Street marine transfer station facility will comply with [DEC's] operational noise requirements," but that, even so, the proposed noise barrier (consisting of three-foot concrete parapet topped by a nine-foot louvered fence) "appears to be too short to provide adequate noise reduction for the residential receptor locations along East 90th Street." [Wholley affidavit, page 2.]

During a conference call on November 12, Gracie Point counsel requested that DSNY raise the fence by an additional three feet, which Mr. Wholley said is necessary to achieve a 7 decibel noise reduction at receptors along East 90th Street, the minimum reduction that would qualify as "substantial" under a 1998 New York State Department of Transportation ("DOT") "noise analysis policy" cited in Wholley's affidavit. DSNY counsel agreed to consider this request and report back to me and the parties.

On December 5, 2008, DSNY counsel sent an e-mail adding that DSNY had considered Gracie Point's request that the noise barrier be raised from 12 to 15 feet as an additional means of reducing sound, and had concluded that "while a higher fence would provide some additional noise attenuation, this additional noise reduction cannot be justified based on the costs of the redesign and construction," which DSNY estimated to be approximately \$425,000. The e-mail said that DSNY, along with other city agencies, has been and will be continued to be required to reduce its capital and expense budgets as a result of New York City's current severe budgetary constraints. Therefore, DSNY declined the request to raise the barrier, while maintaining that, at its currently proposed height of 12 feet, the barrier would ensure that the marine transfer station complies with 6 NYCRR 360-1.14(p), and that no changes to the fence are required by DEC regulation.

Gracie Point urged DSNY to reconsider its determination in a letter dated December 9, 2008, from its counsel to DSNY's counsel. In that letter, which was copied to DEC counsel and me, Gracie Point counsel said that given the facility's location in a dense residential neighborhood, and the fact that the facility ramp abuts the playing field at Asphalt Green, the noise barrier should provide maximum noise attenuation, and that a cost of \$425,000 to achieve this "is very small relative to the overall cost to construct the facility -- last estimated to be at least \$20 million -- and considering the fact that the facility is likely to operate, and impact the surrounding neighborhood, for at least 20 years."

### Discussion

As noted above, my issues ruling required that DSNY provide a noise impact analysis providing a reasonable assurance that the marine transfer station will comply with the requirements of 6 NYCRR 360-1.14(p). DSNY has done so with HDR's September 26 report, which finds that, even employing a "hard ground" reduction factor (as proposed by Gracie Point), regulatory compliance is achieved on the basis of an analysis accounting for the acoustical properties of the louvered fence. During the November 12 conference call, Gracie Point counsel confirmed that, with the barrier proposed by DSNY, Gracie Point has no basis to dispute whether the transfer station will comply with 6 NYCRR 360-1.14(p). Neither do DEC Staff or EDF, as they both acknowledge no expertise in this area.

Gracie Point would prefer that DSNY raise the access ramp barrier by three feet for the sake of additional attenuation of noise from trucks' exhaust stacks. However, DEC has no basis to insist on this, as there is no dispute that the barrier, as currently proposed, ensures compliance with the Part 360 standard governing the project as a solid waste management facility.

### Ruling

No issue exists with regard to the ability of the marine transfer station, as currently designed, to ensure compliance with 6 NYCRR 360-1.14(p). As this was the only remaining matter on which adjudication could be required in this matter, no adjudicatory hearing shall be held on DSNY's application for this project.

Appeals

A ruling of the Administrative Law Judge ("ALJ") to include or include or exclude any issue for adjudication may be appealed on an expedited basis [6 NYCRR 624.8(d)(2)(i)]. 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.

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 a short extension due to the pending holidays, 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 December 19, 2008. Any responses to appeals must be received by 4 p.m. on December 29, 2008. One copy of each submittal must be sent to me, to DEC's Chief Administrative Law Judge, James T. McClymonds (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.

Order of Disposition

Gracie Point's appeal of my April 7, 2008, rulings which excluded from adjudication certain issues proposed in its petition, is pending before Assistant Commissioner Alexander. Assuming my rulings are affirmed, the application shall be remanded to DEC Staff for continued processing consistent with relevant statutes and regulations, and for permit issuance. Should DSNY reconsider its determination not to raise the access ramp barrier, any revised plan for that barrier shall be submitted to DEC Staff.

Albany, New York  
December 10, 2008

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/s/  
Edward Buhrmaster  
Administrative Law Judge

TO: Attached Service List