

In the Matter of the Application of the
NEW YORK CITY DEPARTMENT OF SANITATION
for permits for the proposed converted
marine transfer station in Southwest
Brooklyn.

RULINGS OF THE
ADMINISTRATIVE
LAW JUDGE ON ISSUES
AND PARTY STATUS

(Application No. 2-6106-00002/00022)

BACKGROUND AND BRIEF PROJECT DESCRIPTION

The New York City Department of Sanitation ("DSNY") proposes to construct and operate a converted marine transfer station in the Bensonhurst section of Brooklyn, on a lot it owns bounded by 25th Avenue to the north, Bay 41st Street to the south, and Gravesend Bay to the west. 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 ("MSW") per day, allowing for 5,280 tons per day during emergency conditions. The proposed facility, with a building footprint of 62,856 square feet (88,290 square feet inclusive of building, pier level and access ramps), would be built entirely over land at the location of DSNY's Southwest Brooklyn incinerator, which was demolished in 2005, and is intended to facilitate the transfer of municipal solid waste from collection vehicles into sealed and leakproof containers for export by barge and rail to out-of-city locations. All solid waste transfer and containerization activities would take place within a newly built, fully enclosed three-level building, the top level serving as the tipping floor. The waterway adjacent to the building would be dredged to allow for barge operations, and tidal wetlands would be disturbed for bulkhead rehabilitation, replacement of an existing stormwater outfall to support facility operations, and construction of a king pile wall and armor stone placement to protect adjacent private marine structures. DSNY would mitigate wetland habitat losses by creating and restoring additional tidal wetlands at other, not-yet-specified areas within New York Harbor, in accordance with mitigation ratios provided in its application.

- - 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 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; 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 solid waste management facility permit governs the facility as a transfer station regulated by DEC. The air pollution control permit addresses emissions from stationary sources described in the permit as "exempt combustion sources and trivial activities," and not emissions from mobile sources such as trucks going to and from the facility. The tidal wetlands permit, the use and protection of waters permit, and the water quality certification associated with the use and protection of waters permit all address construction and dredging activities in Gravesend Bay.

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: one in Brooklyn (the Hamilton Avenue marine transfer station), one in Queens (the North Shore marine transfer station), and one in Manhattan (the East 91st Street 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"). DSNY responded to these comments as part of its FEIS, and DEC Staff is satisfied with DSNY's responses.

- - DEC Approval of SWMP

On October 27, 2006, DEC Deputy Commissioner Carl Johnson issued a letter approving the SWMP, determining that it conforms with the required elements of ECL 27-0107(1). The SWMP, he said, "sets an unprecedented vision for the future of the City's solid waste management. [It] reinforces the State's commitment to sustaining and managing our resources, environment and economic competitiveness by placing emphasis on waste reduction and recycling, while providing an equitable waste management infrastructure where the needs of its residents, businesses and industry are met."

- - Notice of Complete Application

A Notice of Complete Application was issued by DEC Staff and published in its on-line Environmental Notice Bulletin on August 29, 2007, and in the New York Post on August 31, 2007. The notice allowed for public comments and set a deadline of October 1, 2007, for their submittal.

Based on information presented in the application, DEC Staff determined that the Southwest Brooklyn marine transfer station could be approved subject to terms of a draft permit it prepared. However, in response to what it considered to be significant public comments, including more than 3,000 pieces of correspondence from community residents and elected officials, 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 November 2, 2007, DEC Staff informed DSNY of its determination that the hearing be held. James McClymonds, DEC's chief administrative law judge, then informed DSNY and DEC Staff that I had been assigned to conduct the hearing.

- - Notice of Legislative Hearing and Issues Conference

A Notice of Legislative Hearing and Issues Conference, dated November 27, 2007, was published in DEC's on-line Environmental Notice Bulletin and also in the New York Post on November 30, 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 November 27, 2007, notice, a legislative hearing was held during the afternoon and evening of January 15, 2008, in the auditorium of the Shore Parkway Jewish Center at 8885 26th Avenue, Brooklyn, New York. 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 an overwhelming majority, as evidenced by their applause for people speaking against permit issuance.

Twenty speakers were heard during the afternoon session, and thirty-eight speakers were heard during the evening session. Elected officials speaking against permit issuance included State Assembly Members William Colton (47th Assembly District) and Dov Hikind (48th Assembly District), and New York City Council Member Domenic Recchia (47th Council District). A statement against permit issuance was read into the record on behalf of State Senator Diane Savino (23rd Senate District). Organizations speaking against the project included the Bensonhurst West End Community Council, Concerned Citizens of Bensonhurst, and various groups that petitioned for party status, whose names and interests are discussed below.

Project opponents said that operating another garbage facility at this site would be an injustice to a neighborhood they said was already "environmentally burdened" from pollution associated with the incinerator's operation. They said that the incinerator, which operated from 1957 to 1991, had spewed contaminants, including dioxin, throughout the community, causing cancers and respiratory problems for local residents. According to project critics, no marine transfer station should be located in an area they describe as residential and recreational in character. Some proposed that the facility be moved to an industrial area of the Brooklyn waterfront, along the Gowanus Expressway, or to a commercial area, so that people, particularly senior citizens and children, are not affected.

According to many speakers, DSNY's FEIS unreasonably limited its study of off-site impacts to a quarter-mile radius of the proposed transfer station, ignoring the large residential community on the other side of Shore Parkway. Assembly Member Colton said that there are 100,000 people within one mile of the project site, 48,000 of whom are non-whites, 26,000 of whom have incomes below the poverty level, and 16,000 of whom are above the age of 65, according to census data.

Charles Ragusa, a co-chair of Colton's anti-waste-transfer-station task force, provided a map showing the neighborhoods close to the project site, as well as Dreier-Offerman Park, about 700 feet from the site, which includes a bird sanctuary as well as ballfields used by hundreds of children. According to Mr. Ragusa, there are thousands of people, including many seniors, living in five large co-op buildings near the project site, who suffered greatly from ash and poisons he said were emitted from the former incinerator. He said there are also thousands of small one, two and three family homes nearby, as well as the Haym Solomon and Sephardic nursing homes.

Fifty residents, staff and family members of residents at the Haym Solomon home, at 2430 Cropsey Avenue, signed a letter addressing concerns they have about noise, odor and traffic impacts they associate with the proposed transfer station. According to their letter, creation of a new garbage facility in the neighborhood will diminish the landscape and their physical and mental well-being.

Mr. Ragusa said that the general neighborhood also includes two senior apartment buildings, Sons of Italy Residence and Regina Pacis Residence, where hundreds of seniors live; Bay View Manor, a home for "special needs" adults; and the Block Institute, which provides services to developmentally disabled children and adults. The Block Institute, on Bay 44th Street, is of special concern to project opponents because it is only a few short blocks from the project site, and includes two group homes (Hunter 1 and 2) housing 28 people, a day program for 100 adults, and a pre-school program for 150 children who are three to five years old. Scott Barkin, the Block Institute's executive director, said that the developmentally disabled require special attention because they are more fragile and their health is more compromised, which puts them at greater risk when walking through the community and enjoying the parks and playgrounds.

Dreier-Offerman Park is used extensively for youth soccer, and soccer league officials voiced concern about the impact of air pollutants on children, particularly when they are exercising. According to project critics, the City is investing tens of millions of dollars to restore the park, and that effort is inconsistent with the location of a transfer station nearby.

The park also includes a nature sanctuary that is an important resting and feeding area for migratory birds, said many people at the hearing. Speakers said that shore birds depend on the area for fish and crustaceans, and that species such as the peregrine falcon, cooper's hawk, bald eagle, osprey, black

skimmer and western reef heron have been sighted there. A speaker for the New York State Ornithological Association said the project would affect important, yet limited, habitat that remains for breeding, wintering and migrating birds, which would be at risk from toxins released during the transfer station's construction and operation. One speaker said that falcons, eagles and other birds of prey could be affected to the extent rodenticides are used at the facility and on barges that access it. There were also concerns that crustaceans (including horseshoe crabs) could be impacted by pesticides, and that fish could be impacted by detergents and other cleaning products used on ramps and piers.

A widespread concern among speakers was that project-related dredging of Gravesend Bay would stir up and release poisons that may be in the underlying sediments. These toxins, it is claimed, would contaminate the water and bioaccumulate in the fat of fish who some speakers said are a source of food for many local residents. One speaker said that of the four marine transfer station sites selected by DSNY, only this one contains essential fish habitat as well as extensive opportunities for recreational and commercial fishing, including a 200-boat marina, which abuts the site to the south.

Project opponents say that, during the operation of the former incinerator, toxic ash was carelessly deposited in the area to be dredged, and that the waters near the project site have been subject to numerous oil and chemical spills, the combination of which has turned sediments into a "black mayonnaise" full of mercury, lead, polychlorinated biphenyls ("PCBs") and other carcinogens. Dredging, they say, risks resuspending these contaminants and dispersing them throughout the bay, particularly because of swift water currents. Also, they say it risks detonating live ammunition unrecovered after a military barge overturned in Gravesend Bay in March 1954.

Many speakers said that DSNY is an unfit applicant, having operated its incinerator without a permit and in violation of DEC consent orders that were issued because of persistent failures to meet air quality regulations. Speakers said that, even after the incinerator was demolished, the site was poorly maintained, with salt piles spilling out of their containment areas, and an abandoned sanitation truck, with garbage still in it, left at the site for years before it was finally removed.

Project opponents say that the traffic study included in the FEIS is flawed because it was done during the winter and accounted only for weekday traffic, though the facility will also

operate on Saturdays, which has its own traffic patterns. Opponents say that automobile, bicycle and pedestrian traffic is much higher in the summer months, much of it attributable to Dreier-Offerman Park, the Marine Basin boat marina, and a shopping center and children's amusement park which are close to the proposed facility. They argue that eastbound Exit 5 from the Shore Parkway and the nearby intersection of Cropsey Avenue and Bay Parkway are already clogged with traffic much of the time.

According to project opponents, the location of the transfer station on fill material, with a bulkhead that is only slightly above sea level, creates a risk that the facility would collapse during a severe storm. Also, they say that the fill creates a risk of collapse during an earthquake like the one that occurred beneath Gravesend Bay in 1836, which is reported to be the strongest earthquake to affect New York City.

Of all the public speakers at the two hearing sessions, only one, the operator of a tugboat company in New York Harbor, spoke in favor of the project. Gerald Thornton, president of Thornton Towing and Transportation, commended DSNY for its plan to use marine transfer stations, saying that the best way to move garbage in the city is by barge, as it will help alleviate congestion on the streets and at bridges and tunnels.

ISSUES CONFERENCE

As announced in the hearing notice, an issues conference was held on January 23, 2008, at DEC's Region 2 office in Long Island City. The purpose of the 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 had been prepared by DEC Staff. Participating at the issues conference were counsel and other representatives of DSNY, DEC Staff, and prospective intervenors.

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

DEC Staff was represented by John Nehila, Esq., assistant Region 2 attorney.

Four petitions for full party status were filed.

One petition (Exhibit No. 7) was filed on behalf of Raritan Baykeeper, Inc. (d/b/a NY/NJ Baykeeper), Natural Resources Protective Association, Wake Up and Smell the Garbage, Urban Divers Estuary Conservation, the No Spray Coalition, and New York State Assembly Member William A. Colton. The petition was prepared and filed by their attorney, Joel Kupferman of the New York Environmental Law and Justice Project.

A second petition (Exhibit No.8) was prepared and filed by Stephen A. Harrison, Esq., on behalf of himself and the SIBRO Civic Association. Mr. Harrison is a life-long resident of Bay Ridge, Brooklyn, a former chair of New York City Community Board 10, and founder of SIBRO Civic Association, which was organized in 2007 to address issues common to political districts that span both sides of the Narrows in southwest Brooklyn and Staten Island.

A third petition (Exhibit No. 9), also prepared by Mr. Harrison, was filed on behalf of American Heritage Democratic Organization ("AHDO"), a Democratic club incorporated under the name of American Heritage Political Organization, Inc. Mr. Harrison is president of AHDO, which was organized more than 10 years ago and is associated with the 60th State Assembly district, which includes parts of Brooklyn and Staten Island.

A fourth petition (Exhibit No. 10) was prepared and filed on behalf of the Environmental Defense Fund by James T. B. Tripp, EDF's general counsel, and Ramon Cruz, an EDF senior policy analyst. EDF, a national environmental organization with headquarters in New York City, asserts various interests including proper management of the city's solid waste and the sediments in New York Harbor.

Of the four petitions, only the one prepared by Mr. Kupferman was filed with me, DSNY and DEC Staff in a timely manner, before the deadline of January 14, 2008, which was announced in the hearing notice. The two petitions prepared by Mr. Harrison were timely filed with me, but, due to his mailing oversight, were not timely filed with DSNY and DEC Staff. Nonetheless, DSNY and DEC Staff received copies of the petitions prior to the issues conference, and neither party objected to them on grounds of timeliness. The petition prepared by Mr. Tripp was filed with me, DSNY and DEC Staff in an untimely manner, on the day before the issues conference, but again neither DSNY nor DEC Staff objected to it on timeliness grounds.

The conference went forward with a discussion of the project, a 29-page draft permit prepared by DEC Staff (Exhibit

No. 6), and the issues proposed by the petitioners. DEC Staff considers its permit to be both a new permit for the proposed, not-yet-constructed marine transfer station, as well as a modification of a current permit for the existing, non-operating marine transfer station, also at the subject property, which had been used to move uncontainerized waste to the now-closed Fresh Kills landfill. According to DSNY, the existing transfer station, which is built over Gravesend Bay at the western end of the project site, would not be demolished, though its future use has not been determined.

Because, at the time the issues conference commenced, DEC Staff had made a tentative determination to approve the application subject to special conditions in its draft permit, and because DSNY did not object to those conditions, most of the discussion addressed the petitions for party status: in particular, the objections to permit issuance, as stated in the petitions prepared by Mr. Kupferman and Mr. Harrison, and the requests for permit modification, as stated in the petition prepared by Mr. Tripp. At the outset of the issues conference, counsel for all the petitioners agreed that none of their issues were proposed under SEQRA. Instead, they said, each of their issues arose under the relevant permitting standards in Part 360 (for the solid waste management facility permit), Part 608 (for the use and protection of waters permit), and/or Part 661 (for the tidal wetlands permit). No issues are proposed under Part 201 (for the air pollution control permit).

Mr. Kupferman wrote in his petition that the project site should be treated as one contaminated with hazardous waste from emissions, spills and leaks associated with the incinerator's operation, and should be investigated as such, with all the precautions and procedures used for contaminated site investigations under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), commonly known as Superfund, or the Resource Conservation and Recovery Act ("RCRA").

At the issues conference, Mr. Kupferman produced a petition, dated January 22, 2008, that he said he had filed with U.S. Environmental Protection Agency ("EPA") Region 2 on January 23, requesting that EPA conduct a preliminary assessment of the release of hazardous contaminants at the site. Filed on his own behalf and on behalf of Assembly Member Colton as well as William Hershkowitz and Vicki Grubman, founding members of Wake Up and Smell the Garbage, the petition (Exhibit No. 11) expressed concern that the excavation, construction and dredging associated with the new marine transfer station would disturb contaminated

sediments and distribute contamination in the air, soil and water.

Neither DSNY nor DEC Staff are treating the site as a brownfield whose redevelopment or reuse may be complicated by the presence of hazardous waste or petroleum. DEC Staff said that the project location is not a hazardous waste site, though Staff also acknowledges that it is contaminated and that soils there need to be addressed appropriately. DSNY had a Phase II site investigation done in support of its efforts to demolish the incinerator, and the follow-up report prepared by its consultant (and attached to Mr. Kupferman's petition to EPA) indicated that there were "minimum amounts of contamination" in the soils in the area surrounding the incinerator, and that no additional testing was considered necessary. The draft permit has special conditions (Nos. 23 - 27) addressing construction of the facility, including conditions for dust suppression, particulate monitoring, erosion and sedimentation control, and the use and disposition of excavated soils, as well as special conditions (Nos. 47 - 56) addressing dredging of the waterway adjacent to the project site. According to DSNY, the new transfer station would be built above the 100-year flood plain, on steel piles down to bedrock, though Mr. Kupferman said the incinerator infrastructure below the site surface still exists and will need to be excavated.

Due to DSNY's interest in negotiating with the petitioners for party status, with the goal of addressing some of their concerns by changes in the draft permit, the issues conference did not conclude on January 23, but was adjourned at the end of the day with the understanding that a conference call would be held on February 13, 2008, to give me a status report on any discussions that occurred and any agreements that were reached. DSNY and DEC Staff proposed that they be given an opportunity to respond to the petitions fully in writing, and I said that opportunity would be provided through a briefing schedule allowing first DSNY and DEC Staff, and then the prospective intervenors, to make a written record on all proposed issues that were not settled by agreement of the conference participants.

Prior to the conference adjournment on January 23, Mr. Harrison requested that he, AHDO, and the SIBRO Civic Association be considered consolidated with the group of petitioners represented by Mr. Kupferman, and Mr. Kupferman consented to this arrangement. This brought all of the project opponents under one attorney, and Mr. Harrison removed himself as an active participant in these proceedings.

Rather than continue the conference on January 24, which had also been reserved for it, counsel and other representatives of the conference participants accompanied me that day on a visit to the project site, from which we viewed surrounding properties and Gravesend Bay from various points, including the top of the ramp of the existing marine transfer station. The visit also included a walk through Dreier-Offerman Park, whose planned restoration and refurbishment Mr. Kupferman's clients say is incompatible with development of the new marine transfer station, particularly in light of the increased traffic that both projects would generate.

On January 31, 2008, Mr. Kupferman sent me an e-mail requesting permission to file a supplemental petition with additional information and supporting exhibits. I responded in a memorandum of February 3 that if any petitioner wanted to supplement its petition, it should provide the supplemental information along with an explanation as to why there is good cause for the late filing, including any explanation why the information could not have been provided sooner, preferably before the filing deadline. I said that if any new issues were proposed, they should be identified as such, and if the information was merely meant to substantiate claims that had been made previously, that should be indicated as well. By papers dated February 7, Mr. Kupferman filed a supplement to his initial petition, stating that it did not involve the introduction of new issues, only the clarification of previously raised issues that he was unable to develop fully when the initial petition was filed due to the "ongoing and unfolding" nature of those issues.

On February 13, 2008, I initiated a conference call with counsel for the issues conference participants. DSNY and DEC Staff confirmed their availability for discussions with the prospective intervenors and requested that they provide language for new and revised conditions they would like to see included in any permit that is issued. I initiated a follow-up conference call on March 5, 2008, which provided an update on the parties' negotiations, and resulted in a briefing schedule to complete the conference record. That schedule was extended by consent of all parties as their discussions continued into the spring of 2008.

Consistent with the revised schedule, DSNY and DEC Staff both provided briefs dated May 30, 2008, contending that no substantive and significant issues existed and, therefore, no adjudicatory hearing should be held. As I directed, DEC Staff's brief included a revised draft permit with new and amended special conditions that were added following the issues conference. Issuance of that permit was supported by both DSNY

and DEC Staff, DSNY maintaining that the permit addressed nearly all of the concerns raised in the petitions for party status, and that the remaining conditions suggested in the petitions were unnecessary or beyond DEC's authority to impose.

On June 16, 2008, Mr. King forwarded to me and the other counsel an e-mail received by DSNY from EPA. The e-mail informed DSNY that EPA had determined that no further remedial action under the federal Superfund program was warranted at the project site. EPA said its determination was based upon a preliminary assessment report, dated April 25, 2008, which was prepared under CERCLA.

Upon receipt of the e-mail, I requested the April 25 report from Mr. King, who then furnished it to me in hard copy. I said in a memorandum dated June 18 that I considered EPA's determination and report to be relevant to the extent that they respond to the petition Mr. Kupferman filed with EPA requesting that the preliminary assessment be conducted.

EDF replied to the briefs of DSNY and DEC Staff in a short submittal dated July 15, 2008, and the project opponents represented by Mr. Kupferman replied in a longer submittal dated July 25, 2008, both meeting the deadlines I had established for their papers. EDF reported that DEC Staff's revised draft permit addressed most of its concerns, but Mr. Kupferman's clients said the revised permit conditions were insufficient and required extensive modifications. Mr. Kupferman's July 25 submittal also included allegations of new information about the potential for soil vapor intrusion at the project site, and about use of a portion of the site or land adjacent to it, at or near the Nellie Bly children's amusement park, for new parking associated with Coney Island's redevelopment.

On August 6, 2008, I sent a memorandum to the parties confirming my understandings of the petitioners' positions, and indicating that another conference call would be scheduled. That call occurred on August 26, 2008, and was confirmed in a memorandum of September 3, 2008, in which I set a schedule for additional submittals. During the call, EDF, DSNY and DEC Staff expressed interest in negotiating settlement of EDF's remaining concerns through further modifications of the draft permit. I allowed an opportunity for this and set a deadline of September 26, 2008, for DEC Staff to report on any permit changes that were made, and for DSNY and EDF to indicate whether it agreed to those changes. That same deadline was also established for DEC Staff and DSNY to respond to the new information in Mr. Kupferman's July 25 submittal, both in terms of whether it raised potential

issues for adjudication, and whether it had been timely presented, to the extent the information was not part of Mr. Kupferman's initial petition. Finally, I gave Mr. Kupferman a deadline of October 20, 2008, to respond to any new permit changes, as well as to any objections raised by DSNY and DEC Staff to the new issues proposed in his July 25 submittal, noting that for those issues, as for the ones he had proposed earlier, he had the burden of persuasion that such issues are substantive and significant.

On September 26, 2008, I received briefs from DSNY and DEC Staff, and a newly revised draft permit from DEC Staff, the terms of which DSNY said it accepted. DSNY and DEC Staff reported that, with the further revisions, the draft permit addressed all of EDF's concerns - - except possibly its concern about dredging - - as well as some of the concerns of Mr. Kupferman's clients.

On October 20, 2008, I received Mr. Kupferman's response to DSNY's and DEC Staff's submittals of September 26. It reconfirmed his request that there be an adjudicatory hearing on the issues proposed in his papers, and that his clients be granted party status to participate at that hearing. It indicated continuing disagreement with the terms of the draft permit and reiterated claims that DSNY is a "bad actor" by virtue of the operational history of the former incinerator. It also repeated claims about the environmental risks of dredging, and about other concerns related to vapor intrusion, future pesticide applications, the adequacy of testing for existing site contaminants, and traffic safety hazards.

On October 28, 2008, I issued a memorandum requesting that EDF confirm its position with regard to DEC Staff's revised draft permit. In an e-mailed response that same date, James Tripp, EDF counsel, said that he had reviewed the permit and that it addressed the specific issues raised in EDF's petition. Even so, he added, EDF continues to be concerned with the successful resolution of all issues so that the facility can be designed and built in a manner that minimizes community impacts.

According to EDF, the siting of any basic infrastructure in New York City is always a challenge when a planned facility will be close to a residential community. However, EDF says that it supports this enterprise, as reflected in the city's SWMP, in order to moderate the concentration of older facilities that do not begin to incorporate the kinds of standards set forth in the revised permit for the Southwest Brooklyn marine transfer station.

While EDF no longer proposes any issues of its own, it maintains a continuing interest in this project and requests that it be granted party status in the event that any issues are identified for adjudication. Given the absence of issues between DSNY and DEC Staff, those would be issues proposed by the other petitioners, all now represented by Mr. Kupferman.

Transcript Corrections

With my June 18, 2008, memorandum, I circulated copies of the issues conference transcript, indicating a number of mostly minor proposed corrections. None of the participants objected to these corrections or offered additional ones of their own, though they were provided the opportunity to do so. The transcript has been reviewed along with the conference exhibits and post-conference submittals as the basis for my rulings on issues and party status. A list of the conference exhibits is attached to the rulings.

EDF CONCERNS, AND RELATED DRAFT PERMIT REVISIONS

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. Concerns about the draft permit were raised in each of the petitions for party status, and these concerns were the subject of negotiations among the petitioners, DEC Staff and DSNY. DEC Staff provided a revised draft permit which was attached to its brief of May 30, 2008, and another draft permit, with additional revisions, on September 26, 2008. EDF is satisfied with the revised draft permit, though Mr. Kupferman's clients are not.

EDF's concerns -- and the draft permit revisions intended to address those concerns -- are discussed below.

Minimizing Truck Diesel Emissions

In its petition for party status, EDF maintained that since diesel-powered trucks have a substantial potential to produce significant amounts of oxides of nitrogen and fine particulate emissions, the Southwest Brooklyn marine transfer station, like the other marine transfer stations that are part of the City's SWMP, should be designed and operated so as to minimize those emissions from trucks accessing the facility on the surrounding blocks, on its ramp, and within the facility itself. EDF said

that this is especially important for trucks that DSNY operates and whose emission levels DSNY can control.

Addressing EDF's concern, DEC Staff added a new special condition (No. 45-B) to the draft permit. This condition, agreed to between EDF and DSNY, is essentially the same condition that DEC Staff, EDF and DSNY agreed to as part of the draft permit for DSNY's East 91st Street marine transfer station. It reads as follows:

"All collection trucks owned and operated by the Permittee that use the facility shall use ultra low sulfur diesel fuel. By the end of 2012, Permittee's collection trucks that use the facility and that were purchased prior to 2007, all of which are certified by the original equipment manufacturer to emit no greater than 0.1 grams of diesel particulate matter per brake horse-power 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 that use 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 reports that this condition, which limits diesel emissions from DSNY trucks using the facility, tracks requirements embodied in the City's existing local law. DSNY maintains that DEC is without authority to impose additional requirements concerning commercial truck emissions under the facility's air permit, in that the federal Clean Air Act regulates mobile source air emissions, such as those from the 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 Env'tl. 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 is no 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, as well as

my own issues rulings involving DSNY's proposed marine transfer station at East 91st Street, Manhattan.

At page 13 of the Brookhaven 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.

At page 62 of my East 91st Street rulings, dated April 7, 2008, I said that while DSNY's marine transfer station, like the one proposed here, 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 the Part 360 regulations for solid waste management facilities, particularly as their operators are not obliged to use the station. As to whether the Clean Air Act would preempt DEC efforts to regulate emissions from collection trucks accessing the facility, I added that, as a practical matter, DEC had not attempted to exercise such authority under Part 360, noting that there, as here, the emissions restrictions addressing DSNY's own collection trucks were added to the permit as a result of negotiations between DSNY and EDF, and not at DEC Staff's insistence.

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 City law, are not preempted because they essentially reflect the government's own interest in achieving efficient procurement of needed goods and services.

In its July 15 submittal, EDF said it was satisfied with new special condition No. 45-B, noting that it confirms that no later than the end of 2012 all DSNY trucks using the marine transfer

station will use ultra low sulfur fuel and will meet the 2007 EPA diesel truck emission standards, either because they are post-2007 trucks or because they have been retrofitted. Since DSNY's trucks make up a significant portion of the trucks expected during the morning and afternoon periods, this will make a massive difference in total emissions, in particular particulate emissions, from the trucks using the facility under upset or emergency conditions, as well as during average daily use, EDF contends.

EDF says it remains concerned about private carter diesel emissions, but adds that such emissions have to be addressed outside the context of this hearing, perhaps by action of the City Council.

Reducing Truck Congestion

To help ensure that delivery trucks do not queue on public streets, DEC Staff has included a condition (No. 40-A) in its draft permit requiring that those trucks be monitored by computer upon arrival and departure. In comments dated July 15, 2008, EDF questioned whether or not this monitoring would apply to DSNY trucks only, or whether, as EDF prefers, it would extend to private carters' trucks as well. With its September 2008 submittal, DEC Staff revised the condition further so that it now reads as follows:

"In order to minimize facility truck traffic, the Permittee will use an electronics package with both inbound and outbound scales to uniquely identify all trucks using the facility, including privately-owned trucks. A computer will accept and record the data sent from both the inbound and outbound scales, including: date and time of weighing transaction; unique truck identifier; measured weights; and calculated "refuse received" weight. A keypad, ticket printer and intercom system will be installed as a contingency in the event that the automatic identification system is not operable."

As DSNY points out in its September 2008 submittal, the condition now confirms that information on trucks using the facility will be recorded for both DSNY and privately-owned trucks. EDF says it is satisfied with the revised language, which also addresses other petitioners' questions as to whether privately-owned trucks are subject to the condition.

Monitoring, Reporting, Enforcement and Community-Based Participation

In its petition for party status, EDF expressed concern about the adequacy of draft permit conditions addressing monitoring, reporting, enforcement, and empowerment of the Community Advisory Group ("CAG") that will be informed about conditions at the facility. According to the SWMP, DSNY will establish CAGs for each of the four new marine transfer stations. Intended to represent community boards, environmental and environmental justice organizations, business organizations, property owners, other local community groups and concerned members of the general public, the CAGs would advise the mayor and other elected officials on the construction and operation of the transfer stations. (See SWMP, ES-7.)

EDF noted that the draft permit did not specify what types of information would be collected (in relation to tonnage throughput, truck queuing, emissions, odor and noise, for example), who would review and analyze that information, what enforcement mechanisms would be invoked, and what kinds of penalties would be imposed for non-compliance.

EDF claimed in its petition that the Part 360 permit should require collecting data about daily, weekly and annual tonnages, number of trucks, invocation of upset and emergency days, truck emissions and queuing, and odor and noise issues. EDF said such data should be available not only to DSNY and DEC Staff, but to the CAG as well, on a timely basis, perhaps through posting on DSNY's web page. According to EDF, instituting an upset or emergency condition could have a significant impact on the surrounding community because of a significant increase in the number of trucks using the facility. EDF said that while such conditions are unavoidable, it would be reasonable for DSNY to apprise the CAG as well as DEC on a real time basis of the commencement of such conditions, their likely duration and termination. EDF proposed that this be ensured by amending special condition No. 17 of the draft permit, an approach adopted by DEC Staff.

Special condition No. 17 of the initial draft permit (now No. 17-A, with the permit's revision) limits the tonnage of waste that the marine transfer station is authorized to accept under normal operations as well as during upset and emergency conditions. For normal operations, there is both a weekly limit of 11,148 tons that shall not be exceeded in any calendar week, and a maximum peak day limit of 2,106 tons per day that shall not be exceeded on any day. Also, there is a daily limit of 4,290

tons per day for upset conditions that result from "an event that reduces the processing capacity of one or more elements of the Permittee's waste management system, such as 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." Finally, there is a daily limit of 5,280 tons per day for emergency conditions caused by a "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."

New special condition No. 17-B has been added to the draft permit, and reads as follows:

"Permittee is required to notify the Department and the Southwest Brooklyn 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; the name of the person who authorized the condition; and the expected number of daily truck trips during the condition. If the expected end date of the condition is delayed, then the Permittee shall notify the Department and the CAG of the reasons for the delay and the modified end date within 24 hours of learning of the expected delay. 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. The above information concerning upset and emergency conditions also shall be posted on the DSNY website within 7 days of any required submittals to the Department and the CAG."

New special condition No. 17-B continues by describing what constitutes an upset and emergency condition:

"For the purposes of this special condition, 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 to the subject facility beyond its permitted daily throughput capacity.

"For the purposes of this special condition, 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."

New special condition No. 17-B also notes that during both upset and emergency conditions, "Permittee shall ensure that the public health, safety and the environment are adequately protected."

In relation to reporting, DEC Staff has also added to the draft permit special condition No. 40-C, which requires DSNY on a monthly basis to post on its website "basic public information regarding the operation of the site," including, at a minimum, daily throughput rates, and hourly and daily numbers of incoming trucks. The posting of such information is to begin 30 days after the commencement of the operation of the facility, and the information is to be maintained on the same website for a minimum period of one year.

According to EDF, these revisions to the draft permit adequately address the concerns expressed in its petition.

Dredging Procedures and Requirements

In its petition for party status, EDF said that project-related dredging must be undertaken with great care given the history of industrial uses at and close to the site, and that every effort should be undertaken to minimize resuspension of contaminated sediments. In particular, EDF proposed that DEC clarify the process under which the dredging plan would be developed, so that interested members of the public would have an opportunity to review it.

As revised most recently in September 2008, special condition No. 47 of the draft permit states that no less than 60 days prior to the proposed dredging start date, DSNY must submit for DEC review two copies of a detailed description of the dredging, including:

- - A bathymetric survey conducted within the previous three months;
- - Existing sediment sampling data, and a sediment sampling plan providing for additional sediment sampling prior to the commencement of dredging, including sampling locations and methods;
- - Sampling results from the additional sampling in the form of bulk sediment chemistry and grain size analysis, and including additional testing required for the dredge deposition or placement at an upland location, with specific testing for volatile organic compounds ("VOCs"), semi-volatile organics, PCBs and aroclors, pesticides, metals, and dioxins and furans and their congeners;
- - An estimate of the amount of material to be dredged;
- - A site plan and cross-sectional diagram with axes, mud lines, dredge lines (historical and proposed), wetlands, and all other pertinent information clearly labeled;
- - The name and address of the dredged material placement location as well as a "letter of acceptance" from the named facility, with the understanding that DSNY will conduct all sediment sampling and analysis as required by the selected disposal location; and
- - A copy of the permit or other authorization for the activity.

Also, as a result of negotiations involving EDF, new special permit conditions have been added which prohibit new or maintenance dredging between November 15 and July 15 (special condition 56-A) and requiring the use of silt curtains during dredging operations (special condition 56-B). The permit requires that the silt curtains be configured according to tide directions to minimize dispersal of re-suspended sediments, and inspected daily to ensure proper alignment and function (special condition 56-B).

In its July 15 submittal, EDF said that information to be provided under special condition No. 47 - - about the physical and chemical attributes and volumes of sediments to be dredged - - may be pertinent to the adequacy of the specific steps that DSNY takes to comply with special conditions No. 56-A and 56-B and the potential to remediate and restore the site, the goal being not only to minimize any dispersal of sediment contaminants but to improve sediment conditions across the site. Therefore, EDF proposed that special condition 47 be amended to provide that any such new information provided pursuant to that condition and not already furnished to the public be provided to the parties, including EDF, with an opportunity to comment at least 30 days before any dredging commences.

EDF's proposal was taken up during a conference call I had with the parties' counsel on August 26, which was summarized in my September 3 memorandum. During that call, DSNY said it was willing to agree to a side letter (in lieu of a permit condition) committing it to provide the documentation referenced in special condition 47 to the petitioners at the same time it is provided to DEC Staff, so that they would have an opportunity to comment before dredging begins. However, both DSNY and DEC Staff said they opposed reconvening the issues conference once the information is provided; they contend the record is sufficient to support permit issuance now, and that no issues require adjudication. DEC Staff said it anticipated that once it received the documentation required under special condition No. 47, it would review the documentation and dredging would not proceed without Staff's approval. To confirm this understanding, the language of the condition has since been revised so that, in the September 2008 version, it states that "dredging shall not proceed without prior approval of the Department," such approval to be dependent on the receipt and review of this additional documentation, which does not now exist.

With its submittal of September 26, which included the most recent draft permit, DEC Staff argued that DSNY's commitment to send its proposed dredging plan to the petitioners at the same time that the plan is provided to DEC should allay EDF's concerns about the dredging issue. DSNY, in its September 26 submittal, said that EDF's request for a 30-day comment opportunity is unnecessary, and, if enshrined in the permit, might be wrongly interpreted as an allowance for an adjournment and reconvening of the issues conference. DSNY said that, as indicated in the August 26 conference call, it agrees to provide the sediment data referenced in condition No. 47 to the petitioners, albeit not as a permit condition or within the context of the permit proceeding, and that, once the information is provided to DEC, it will be available to other interested members of the public under New York State's Freedom of Information Law. DSNY adds that it will consider all comments submitted on the data, whether submitted to itself or to DEC.

In its submittal of July 15, EDF said the information provided pursuant to special condition No. 47 may be pertinent to the adequacy of the specific steps that DSNY is taking to comply with special conditions 56-A and 56-B and the potential to remediate and restore the site. EDF said the goal should be not only to minimize any dispersal of contaminants now trapped in the sediments but to improve sediment conditions at the site, a point reaffirmed in its October 31 submittal, where EDF expresses hope that the proposed dredging "will leave a bay bottom that is

substantially free of contaminants relative to existing conditions, i.e., a net improvement."

According to EDF, the revised permit addresses its concerns relating to dredging, with the understanding that DSNY will provide it in a timely manner with copies of any additional reports, sampling results and analysis to which the permit refers. EDF says that if it has any further questions or concerns at that time, it will duly apprise DSNY and DEC.

RULINGS ON ISSUES

The following rulings address the issues proposed in the petitions filed by Mr. Kupferman and Mr. Harrison. For purposes of this discussion, the petitioners named in the petitions filed by Mr. Kupferman are referred to collectively as Baykeeper, since Raritan Baykeeper is the first named petitioner in Mr. Kupferman's papers. Baykeeper's proposed issues are discussed first, followed by the issues proposed in the two petitions Mr. Harrison prepared. Because Baykeeper filed a supplement to its petition and proposed additional issues in subsequent briefing, the rulings cite Baykeeper's supporting documents for each issue.

Baykeeper Petition

According to Baykeeper, the Southwest Brooklyn marine transfer station cannot meet the standards for issuance of DEC permits, and there are various substantive and significant issues for which an adjudicatory hearing is required. Baykeeper requests that permits be denied or, at the least, that DEC require DSNY to perform further studies and submit additional information before permitting decisions are made. Finally, Baykeeper says that, in various respects discussed below, the conditions of the draft permit must be clarified and strengthened, and additional significant conditions should be imposed.

Baykeeper's submittals include its petition, a supplement to its petition (intended to clarify and support certain of the petition's claims), and two briefs (one dated July 25, 2008, and the other dated October 20, 2008) which respond to those of DSNY and DEC Staff opposing Baykeeper's request for party status. As noted above, Baykeeper's petition was filed in a timely manner prior to the issues conference, though the supplement was filed after the petition deadline. According to DSNY, the petition supplement and Baykeeper's brief of July 25, 2008, include new issues not proposed in the petition, which should be excluded not

only for lack of merit, but for lack of good cause to excuse Baykeeper's tardiness in raising them.

In the following discussion, I review each of Baykeeper's claims against DEC's permitting standards to determine whether any of them warrant adjudication or require the provision of additional information from DSNY prior to a permitting decision. At the end of the discussion, I address DSNY's arguments that certain of these claims were not raised in a timely manner and, for that reason, should not be given substantive consideration. To the extent that Baykeeper has made any other claims not addressed explicitly in this discussion, those claims have been considered and rejected as bases for further inquiry.

Issue One: Compatibility with, and Adverse Impact On, the Public Health, Safety and Welfare [Petition, pages 12 - 48; Supplement to Petition, pages 2 - 10.]

Baykeeper says that the Southwest Brooklyn marine transfer station would not be compatible with, and would have an adverse impact on, the health, safety and welfare of the people living along Gravesend Bay. With respect to the transfer station itself, this issue is proposed under 6 NYCRR 360-1.11(a), which provides, in relation to the provisions of solid waste management facility permits, that such provisions "must assure, to the extent practicable, that the permitted activity will pose no significant adverse impact on public health, safety or welfare." In addition, the issue is proposed under both:

- - 6 NYCRR 608.8(b), which requires, in relation to proposals to excavate fill from navigable waters, that such proposals "not endanger the health, safety or welfare of the people of the State of New York," and
- - 6 NYCRR 661.9(b)(1)(ii), which provides, in relation to permits for proposed regulated activities on tidal wetlands, that such activities must be "compatible with the public health and welfare."

According to Baykeeper, the marine transfer station would compromise the public health, safety and welfare because of its location in what Baykeeper describes as "a residential and recreational neighborhood," on a site contaminated by the former incinerator, in an area prone to severe flooding. Baykeeper says that the proposed facility would have significant adverse noise, air pollution and traffic impacts, would expose residents to pesticides, and would jeopardize the health of residents who regularly consume fish from the bay. Finally, Baykeeper says that, from an environmental justice perspective, the project

would have disproportionate and discriminatory impacts on a surrounding low-income community.

RULING: No issue is raised for adjudication. First, for impacts related to the transfer station itself, Baykeeper's reliance on 6 NYCRR 360-1.11(a) is misplaced, as I have previously ruled in the matter involving DSNY's application for the East 91st Street marine transfer station. Second, Baykeeper's reliance on 6 NYCRR 608.8(b) and 661.9(b)(1)(ii) is also misplaced, to the extent that its claims are not related to the dredging and construction activities in Gravesend Bay, for which the use and protection of waters and tidal wetlands permits are requested. Third, to the extent that Baykeeper's claims are not related to DEC's permitting standards and are based solely on SEQRA compliance, they are not adjudicable by DEC, and should have been pursued in a court challenge to DSNY's SEQRA review, which has long been completed.

Addressing the first point, almost all of the claims under Issue One concern the transfer station itself, as to which the Part 360 permitting standards apply. The Part 360 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. Baykeeper reads Section 360-1.11(a) 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" will result from the regulated activity.

As both DSNY and DEC Staff contend, and as I have ruled in relation to DSNY's proposed East 91st Street marine transfer station, 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. (See East 91st Street issues rulings, page 20.) Section 360-1.11(a) exists to ensure that a solid waste management facility permit contains practicable measures to mitigate potentially significant impacts. Notably, Baykeeper'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, and that the facility will adversely impact the surrounding community.

According to DSNY, adjudicating the claims under Baykeeper's Issue One would amount to an improper collateral attack on DSNY's review of the project under SEQRA, a review which has been completed, and which Baykeeper did not challenge in court. On the other hand, Baykeeper argues that DEC has its own obligation, unrelated to SEQRA, to consider issues that are germane to the regulatory criteria applicable to the various requested permits. According to Baykeeper, all of its issues are raised solely under the permitting standards for the requested permits, and DSNY's prior SEQRA review should not preclude consideration of these issues by DEC.

I agree with Baykeeper 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 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, 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 Baykeeper, but I disagree as to its claim that any part of 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 27-0702(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 separate requirement that a project be "compatible with, and have no adverse impact on, the public health, safety and welfare," to use the language offered by Baykeeper. The regulation that Baykeeper 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, Baykeeper has raised the permitting standards under Parts 608 and 661 as grounds for consideration of public health, safety and welfare impacts. Permits under Parts 608 and 661 are required for construction and dredging activities in Gravesend Bay. However, for the most part, Baykeeper's claims under Issue One have no apparent connection to these activities. To that extent, 6 NYCRR 608.8(a) and 661.9(b)(1)(ii) have no application for this issue.

Baykeeper's particular claims are addressed below.

- - Neighborhood Character. [Petition, pages 12 - 14; Supplement to Petition, pages 6 - 8.] Baykeeper says that the transfer station would be out of character with its surrounding neighborhood, which Baykeeper characterizes as a residential and recreational area containing, among other things, one and two family homes of working class people, high-rise apartment buildings, public housing, approximately 10 public parks (including, of particular concern, Dreier-Offerman Park, whose

planned renovation is discussed in the petition supplement), the privately-run Nellie Bly amusement park, two schools for developmentally disabled children, a home for handicapped children, a junior high school, a community residential opportunities facility, a religious school, three nursing homes, two senior citizen residences, and a "Family Head Start" facility. Baykeeper acknowledges that the project site is in an area along Gravesend Bay that is zoned "industrial," but claims that, other than Bayside Fuel, there are no major industrial facilities there, though there are many businesses nearby, including Caesar's Bay Shopping Center, which includes stores of varying sizes, restaurants and two banks.

DSNY addressed the issue of neighborhood character in its FEIS, noting that the project site is on Gravesend Bay in Bensonhurst, which the FEIS describes as a large mixed-use community featuring mostly residential uses and water-related residential activities. The FEIS points out that the site and other waterside uses are physically separated from the primary residential area inland by Shore Parkway, a six-lane arterial. For that reason, the study area assessed by DSNY was defined by the mix of industrial, commercial, institutional, recreational and open space land uses west of the parkway, including uses along the waterfront and including Bensonhurst Park to the north and Dreier-Offerman park to the south. (FEIS, page 5-32.)

The FEIS concluded that generally, no change to the mixed neighborhood character would be expected because the operation and appearance of the proposed marine transfer station would resemble those of the existing marine transfer station, and DSNY and other collection agency vehicles would follow the same neighborhood routes as before. Therefore, as stated in the FEIS, no significant adverse impacts to neighborhood character would result from the reactivation of the site's historic use for waste management purposes. (FEIS, page 5-34.)

On the subject of neighborhood character, Baykeeper's offer of proof consists of photographs of the surrounding neighborhood of Bay 41st Street, including Nellie Bly amusement park (now called Adventures), and a nature trail near the site, which are intended to show the public's access to parklands, including Dreier-Offerman Park, close to the project site. However, as DSNY points out, the land uses shown in the photographs were fully disclosed in the FEIS, and are not in dispute. DSNY says that the land uses emphasized by Baykeeper were the same when its site was operated as an incinerator, and subsequently, when the now-closed marine transfer station was receiving waste.

Impacts on neighborhood character are an appropriate consideration during environmental review under SEQRA. However, as both DSNY and DEC Staff emphasize, that review has been completed. Even if the subject could be considered here, the actual character of the neighborhood, including its attributes, is not in dispute; if anything, there is a dispute about the size of the study area, which DSNY limited to properties west of Shore Parkway, and which Baykeeper would expand to encompass the primary residential areas east of the parkway. That dispute is not adjudicable here, given DEC's inability in this proceeding to adjudicate issues based solely on SEQRA compliance.

- - Site Contamination. [Petition, pages 14 - 20; Supplement to Petition, pages 2 - 6.] Baykeeper says that the transfer station would be built on a site heavily contaminated by toxic substances stemming from what it describes as unsafe and improper operations of the Southwest Brooklyn incinerator between 1957 and 1991. According to Baykeeper, demolition, construction and dredging associated with project development will stir up contaminants -- including dioxins, furans, and heavy metals such as lead and arsenic - - making them available for human exposure at potentially damaging levels.

As noted in the FEIS, DSNY investigated the presence of hazardous materials in soil, groundwater and building components and equipment at the site and neighboring properties within a 1,000-foot radius. (See discussion at FEIS pages 5-43 to 5-46.) The assessment, performed in April 1999 and updated in February 2003, included a historical land use review, regulatory agency database review, reconnaissance of the study area and surroundings, and evaluation of surface and subsurface drainage. A field program to investigate the potential impacts to the soil and groundwater from the historic use of the property as an incinerator and marine transfer station was completed in November 2003, in accordance with a DEC-approved work plan. The field investigation determined that there was low-level soil and groundwater contamination at the incinerator and existing marine transfer station locations, but the FEIS concluded that such contamination would not prevent development of the site. According to the FEIS, if the project went forward, "any residual contaminated soil discovered would require appropriate disposal according to current regulatory guidelines in a manner that is consistent with the level of contamination found during the demolition/construction phase. The necessary and appropriate health and safety measures would have to be used to mitigate and minimize any exposure risk to workers or the general public." (FEIS, page 5-47.)

As explained in DSNY's brief dated May 30, 2008, soil testing conducted at the project site in 2003 revealed the presence of contaminants typical of urban fill (including metals, VOCs and pesticides slightly above DEC's recommended soil clean-up objectives), but no incinerator ash or ash residue. DSNY performed an investigation of the incinerator building itself prior to its demolition in 2004, which confirmed the presence of significant quantities of contaminated incinerator ash. However, this material was subsequently removed from the site, and no ash or ash residue remains. (See discussion at pages 22 to 24 of DSNY's brief of May 30, 2008.)

DSNY says that any soil contaminants remaining at the site are no danger to the Bensonhurst community or the users of Gravesend Bay. According to the Part 360 permit application, no significant excavation activities are required at the site. Upland excavation would be limited to utility trenching or to allow for the construction of pile caps; however, excavated soils would be backfilled later, and those areas that are backfilled with contaminated soils would be covered with an impervious surface. If excavated soils are deemed characteristic of hazardous waste, those soils would be disposed offsite in accordance with applicable regulations. (See Part 360 permit application, page 7.)

According to special condition No. 26 of DEC's draft permit, the reuse of any excavated soils, including the use of contaminated soils for backfilling, would require DEC approval. Special condition No. 23-C requires DSNY to retain an independent environmental monitor to be present during excavation and handling of soils, and to ensure implementation of a DEC-approved soil management plan, including dust suppression and particulate monitoring, as well as sediment and erosion controls. Also, special condition No. 23-B requires that disturbed soil be stabilized by an impermeable layer, such as asphalt pavement, or by coverage of two feet of clean fill with self-sustaining vegetation that is adequate to prevent erosion and sedimentation. Finally, special condition No. 24 requires regular inspection of the integrity of the site bulkhead from the surface down to the mudline, and the completion of any structural repairs as soon as practicable, to ensure that upland soils are not discharged into Gravesend Bay.

According to Baykeeper, dredging would resuspend contaminated sediments, spreading toxins to the bay's fish and to the people who eat those fish. However, as noted in the FEIS (page 5-54), dredging is not expected to result in any significant adverse long-term impacts, and measures such as the

use of closed clamshell buckets and silt curtains would be implemented during dredging to minimize or eliminate any short-term impacts to water quality, including an increase in water turbidity.

In the supplement to its petition, Baykeeper reiterates claims that the project site is contaminated and that existing testing is insufficient to demonstrate the extent of that contamination. The supplement references the petition (Exhibit No. 11) filed with EPA in January 2008 requesting an assessment of the site for the release of hazardous contaminants. As noted above, based on the assessment performed for EPA in April 2008, EPA determined that no further remedial action under the federal Superfund program is warranted.

- - Flooding Concerns. [Petition, page 21.] Baykeeper says that the transfer station would be built in a waterfront area prone to severe flooding from extratropical storms and subject to rising seas associated with global warming. Baykeeper says that flooding would curtail site activities and spread contaminants into Gravesend Bay. However, DSNY responds that the project will be pile-supported and thus resistant to flooding. As acknowledged in the Part 360 permit application, the project site is situated entirely within the 100-year flood plain boundary, according to Federal Emergency Management Agency ("FEMA") maps. However, the pier level, which is the lowest level of the facility, is designed to be six inches above the 100-year flood plain elevation, and no loose trash or garbage would be stored at that level. (See Part 360 application, page 8.)

- - Noise Impacts. [Petition, pages 21 - 23.] Baykeeper says that operation of the transfer station would have significant adverse noise impacts, particularly on children, who Baykeeper says are especially vulnerable to noise-induced hearing loss. Baykeeper argues that sensitive receptors including schools, playgrounds, nursing homes, and housing complexes for the elderly stand in the immediate vicinity of the project site.

As DSNY points out, a detailed noise analysis was performed to determine the impact of the transfer station on off-site receptors. That analysis, discussed at pages 5-182 to 5-184 of the FEIS, found that the facility would cause no increase in noise levels exceeding City Environmental Quality Review ("CEQR") thresholds of significance, taking into consideration impacts at the nearest noise-sensitive receptors, including the rehabilitation center, a residence across from the street from the center, a public school and a baseball field, all on Bay 44th Street west of Shore Parkway. Baykeeper's petition does not

address this analysis, except to say that the CEQR thresholds are insufficient to protect public health.

According to 6 NYCRR 360-1.14(p), noise levels resulting from equipment or operations at a solid waste management facility in an urban community 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 dBA between the hours of 7 a.m. and 10 p.m., and 57 dBA between the hours of 10 p.m. and 7 a.m. The CEQR analysis indicates that these thresholds would not be exceeded at the nearest residence (see Table 5.17-6(a) at page 5-187 of the FEIS), and Baykeeper does not suggest otherwise; in fact, its petition does not reference Section 360-1.14(p).

For DEC's purposes, Section 360-1.14(p) governs what level of noise is acceptable from a solid waste management facility. As discussed above, further consideration of noise under SEQRA is precluded. Also, Baykeeper's contention that CEQR noise thresholds do not sufficiently protect the public health is not reviewable by DEC.

- - Air Pollution. [Petition, pages 23 - 31.] Baykeeper says that operation of the transfer station would have significant air pollution impacts. Baykeeper is especially concerned about particulates generated from the diesel exhaust of trucks carrying waste to the facility. According to Baykeeper, air pollution in the Gravesend Bay area is already exceptionally high, and the additional diesel truck traffic would increase such pollution to an unacceptable degree, posing a serious health threat to residents.

As DSNY points out, the FEIS (at pages 5-151 to 5-169) contains an analysis of air quality impacts associated with collection vehicle traffic, including an analysis of particulate and other pollution at key intersections, which found that such impacts would not be significant (FEIS, page 5-159). DSNY predicted emissions of particulate matter from collection trucks and other diesel engines at the facility, concluding that the project would not cause any exceedances of EPA's health-based National Ambient Air Quality Standards ("NAAQS") for particulate emissions and that operations of the marine transfer station would not contribute significantly to existing fine particulate matter concentrations in the area.

Baykeeper does not challenge DSNY's analysis directly except to claim that the hazards of air pollutants, particularly those in diesel exhaust, have been understated. Baykeeper's proposed

witness, Dr. David Carpenter, would testify about various health risks associated with particulate air pollution. DSNY does not deny these risks; it acknowledges them, and, to mitigate impacts, has agreed to various permit conditions.

For example, the draft permit requires that DSNY collection trucks using the facility use low-sulfur diesel fuel and that the trucks be retrofitted with control technology to reduce particulate matter emissions by at least 90 percent. (Special condition No. 45-B.) The draft permit also prohibits the queuing of trucks on public streets (Special condition No. 36), and the facility has been designed with sufficient ramp capacity to accommodate 16 trucks in queue at any one time. (See Part 360 application, page 25.)

Baykeeper says that the FEIS grossly understates the health risks of particulate pollution, and does not accurately assess the health impacts of diesel exhaust on the surrounding community. However, as discussed above, this hearing is not intended to address alleged flaws in the FEIS, but to determine whether the project meets DEC's standards for permit issuance. The facility requires a solid waste management facility permit, but the Part 360 standards for issuance of such permits do not regulate emissions from collection trucks accessing the facility. Nor are truck emissions regulated under the air pollution control permit requested by DSNY; that permit addresses stationary onsite sources, not mobile sources traveling to and from the facility. (See East 91st Street issues rulings, page 62.)

- - Traffic Impacts. [Petition, pages 30 - 35.] Baykeeper contends that the traffic study in the FEIS is deficient, misleading and incomplete. For example, it says that several important, high-risk intersections were not included in the traffic study, and that the study failed to account for summer and Saturday traffic, which is influenced by the proximity of recreational resources.

Traffic impacts, largely associated with an increase in collection vehicles, were considered as part of an analysis documented at pages 5-78 to 5-150 of the FEIS. Key intersections were identified for analysis, traffic counts were conducted for periods of typical activity, and intersections were identified for mitigation efforts, including adjustments to traffic signals. According to the FEIS, an analysis of Saturday traffic was not performed on the understanding that a peak weekday analysis would represent worst-case conditions. Also, according to DSNY, a summer traffic analysis was not required based on information that traffic varies little between seasons, and that the area

closest to the site is not recreational, but a mixture of residences and industrial and commercial uses.

As DSNY argues, Baykeeper's claims, which relate to traffic studies presented in the FEIS, cannot be adjudicated in the absence of some connection to a DEC permitting standard.

- - Pesticide Pollution. [Petition, pages 35 - 41, Supplement to Petition, page 10.] Baykeeper says that pesticides employed at the transfer station would pose a health threat to the marine life of Gravesend Bay, to waterfowl, and to people working at the facility and living downwind from it. According to Baykeeper, no information about the particular pesticides to be used at the site, and how they would be applied, has been provided either by DSNY as part of its permit application, or by DEC Staff as part of its draft permit. Baykeeper maintains that the site is too close to natural terrestrial and marine resources to use rodenticides, and too close to water for pesticides intended to control flies, cockroaches and mosquitoes.

Part 360 includes an operational requirement (6 NYCRR 360-1.14(1)) that solid waste management facilities be maintained so as to prevent or control on-site populations of vectors using techniques appropriate for protection of human health and the environment. According to the Part 360 permit application, DSNY would have two in-house, licensed exterminators service the marine transfer station every 45 days, or sooner if necessary. Standing water in unused barges would be treated with larvicide and pesticide spray when necessary, and spray would be applied and traps placed throughout the refuse handling area, the tipping floor, the lunch and locker rooms and the administrative areas. (Part 360 application, page 71.)

As DSNY points out, DEC has regulations (at 6 NYCRR Part 325) governing the application of pesticides, and these regulations address concerns raised in Baykeeper's petition. Among other things, the regulations require that pesticides be used in such a manner and under such wind and other conditions as to prevent contamination of people, pets, fish, wildlife, crops, property, structures, lands, pasturage or waters adjacent to the area of use (6 NYCRR 325.2(a)), and that they be used only in accordance with label and labeling directions or as modified or expanded and approved by DEC (6 NYCRR 325.2(b)).

Baykeeper would like more specificity about DSNY's pesticide control measures, but has not demonstrated that this additional information is reasonably necessary to determine compliance with standards governing issuance of any of the requested permits.

[See 6 NYCRR 621.14(b), which provides authority for DEC to request additional information from a permit applicant.] Baykeeper wants to emphasize the risks pesticides pose to the natural environment, but those risks are acknowledged in DEC's pesticide regulations, and are not denied by DEC Staff or DSNY. Furthermore, the regulations are adequately protective of the public, and are enforceable by DEC against DSNY as they would be against any pesticide applicator, as was noted in my issues rulings for DSNY's East 91st Street marine transfer station (at page 63). Finally, DSNY counsel confirmed at the issues conference that DSNY would use pesticides in accordance with all applicable state and federal law, and that pesticides would be applied by licensed, fully trained applicators. (Transcript, page 175.) If rodenticides are used at all, it would be inside the transfer station, where they would not pose a threat to birds or other aspects of the natural environment.

- - Fish Consumption Hazard. [Petition, page 41.] Baykeeper says that operation of the marine transfer station will spread pesticides and other contaminants among the fish in Gravesend Bay, and to residents who consume the fish. (Transcript, page 177.) According to Baykeeper, the fish in the area are already contaminated by sludge from the Owls Head wastewater treatment plant (which the petition says is in Staten Island, though it is actually in Brooklyn), and New York City has posted a public health advisory in Bay Ridge, stating people should not consume the fish, though many do anyway.

Baykeeper would offer evidence demonstrating that people do fish in Gravesend Bay, though no party disputes that fact. As DSNY argues, whether the fish have been affected by outflow from the sewage treatment plant is not relevant to the review of its project. If, as Baykeeper says, there are signs warning people against eating fish from the bay, that adequately protects the public health, as people who eat the fish, knowing it to be a health hazard, do so at their own risk. For these reasons, no issue exists to adjudicate.

- - Environmental Justice. [Petition, pages 41 to 48.] Baykeeper says that operation of the marine transfer station would have disproportionate and discriminatory adverse environmental health impacts on a low-income community within a one-mile radius of the project site, which has already been unduly burdened by operations of the former Southwest Brooklyn incinerator. These impacts, Baykeeper contends, would be especially onerous for children and the elderly, creating environmental justice considerations that, in Baykeeper's view, have not been adequately addressed.

DSNY responds that, as lead agency, it implemented an environmental justice program to provide opportunities for citizens to be informed about and involved in the review of its SWMP, and that the program included enhanced public outreach, information dissemination and community meetings accessible to each environmental justice project area. (FEIS, pages 1-40 and 1-41.) DSNY reports that it identified Bensonhurst as an environmental justice community and followed DEC guidance in conducting outreach, including an informational meeting on this project which was held on April 16, 2007, at the Shore Parkway Jewish Center. (That meeting and the outreach efforts preceding it are described in a report on public participation plan completion, dated October 2007, which is attached as Exhibit "T" to DSNY's May 30, 2008, brief.)

In the context of permitting, environmental justice means providing meaningful opportunities for the public to comment on project proposals, as well as ensuring that no one group of people bears a disproportionate share of the negative environmental consequences of a permitted action. However, by itself, environmental justice does not form a separate basis for examining a project's possible impacts on public health. Nothing suggests that the efforts of DSNY and DEC have been inadequate to engage the community in the review of this project. What burdens the community suffered because of the incinerator are not relevant to whether the marine transfer station meets permitting standards. As noted above, development of the new facility, including soil excavation and dredging, has been conditioned to ensure that it does not allow for the spread of residual contaminants stemming from the incinerator's past operations.

Conclusion. Baykeeper's petition includes offers of proof as well as statements from prospective witnesses, all intended to demonstrate that the project is not compatible with public health, safety and welfare. DSNY's brief of May 30, 2008, argues that Baykeeper's proposed evidence is largely speculative and conclusory in nature, and therefore insufficient to raise an adjudicable issue. An exhaustive treatment of Baykeeper's offers is not necessary because, as noted above, Baykeeper's claims rely on a misunderstanding of the permitting criteria applicable to this project. Also, as DSNY argues, Baykeeper cannot use this hearing to challenge DEC's reliance on DSNY's SEQRA review, which culminated in the FEIS.

Issue Two: Failure to Meet Mandatory Requirements of Part 360

- - Transfer and Disposal of Waste [Petition, pages 49 - 50]

Baykeeper contends that the application does not specify where the waste processed at the Southwest Brooklyn marine transfer station will be disposed of or the transfer route that will be followed. In the absence of such information, Baykeeper 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 [Plan], by the DEC Engineer, is required, prior to operation of the facility."

Baykeeper 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. According to Baykeeper, 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 Southwest Brooklyn 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 plan.

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, 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, as well as 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 marine transfer stations - - two, including this one, 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 DSNY'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. (See FEIS, page 40-415.) Also, it determined that there were about 37,000 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.

According to the FEIS, DSNY is negotiating with proposers with the objective of entering into 20-year transport and disposal contracts with one or more of them. (See FEIS, page 40-401.) As DSNY explains, 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 says that it is satisfied with the interim plan provided as part of the FEIS, and agrees with DSNY that there is sufficient 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 administrative law judge 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 demonstrations DEC must make in relation to that plan. Baykeeper 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 the Part 360 permit. The costs of transfer and disposal of the waste are of legitimate concern to the City and its residents, who bear those costs, but not DEC. Baykeeper 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.

Neighbors of the Southwest Brooklyn marine transfer station have an environmental interest in ensuring that waste entering the facility be containerized and removed in a timely manner. However, this is already addressed 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. He did so because 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 those circumstances, 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.

Granted, that 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 -- to conclude that suitable arrangements for disposal will be made.

In its brief of July 25, 2008, Baykeeper requests that the final transfer, transport, and disposal plan be made available to DEC 120 days prior to the commencement of operations, 30 days more than the draft permit requires, and that it be made available to the public at the same time it is provided to DEC. Baykeeper says that this would provide transparency and extended notice so that the public can alert DEC of its concerns and participate in decisions about the final destination of waste and the contractors chosen to handle and transport the waste. However, as noted above, DEC would not decide where the waste is disposed of or who takes it to the disposal point. DEC's only legitimate interest is to ensure that, before operations start, a plan is in place for the transfer, transport and disposal of

waste, and that those involved in such activities (who would be selected by DSNY) are authorized to do so.

Because operations cannot begin until DEC provides written approval of DSNY's transfer, transport, and disposal plan, and given DEC's limited role in reviewing the plan, requiring that DSNY provide the plan earlier than 90 days before its intended start date is unnecessary. Furthermore, it is unnecessary that DEC subject the plan to public comment since there would be a public hearing under the City's procurement laws before DSNY enters any contracts, and the public could express its concerns at that time, as Robert Orlin, DSNY's general counsel, explained at the issues conference. (Transcript, pages 211 - 212.)

Finally, DSNY does not need a DEC variance in order to get its final transfer plan approved, contrary to an assertion in Baykeeper's July 25, 2008, submittal.

My rulings that there are no issues to adjudicate in relation to DSNY's transfer, transport and disposal plans, and that the draft permit adequately addresses concerns that such plans have not yet been finalized, are essentially the same as those rulings I made on identical claims made by petitioners in the permitting proceeding for DSNY's East 91st Street marine transfer station. (This particular issue is addressed on pages 28 - 32 of those rulings.)

- - Compliance with Local Laws [Petition, pages 50 - 52]

Baykeeper says that the proposed facility does not meet a Part 360 requirement that permits issued under that part assure, to the extent practicable, that the permitted activity will comply with applicable laws and regulations. More particularly, Baykeeper says that the facility would not meet the requirements of the New York City Zoning Resolution, which allows a waste transfer station in an M3 zoning district only if it complies with specific performance standards relating to, among other things, noise. According to Baykeeper, DSNY has not proposed any mitigation for a potential exceedance of the noise performance standards, which set maximum permitted decibel levels at and beyond any lot line.

RULING: No issue exists for adjudication. Initially, as both DSNY and DEC Staff point out, issues of compliance with local law are not properly adjudicable in this proceeding. It is true, as Baykeeper argues, that 6 NYCRR 360-1.11(a)(1) requires that the provisions of each solid waste management facility permit must assure, to the extent practicable, that the permitted

activity complies not only with applicable Part 360 requirements, but also with "other applicable laws and regulations." However, in this case, that mandate is covered by general condition No. 5 of the permit, which confirms that the permittee "must comply with all applicable local, State, and federal regulatory requirements." Whether local requirements are complied with is determined by the locality (in this case, the City), not DEC.

Even if DEC had the jurisdiction to enforce local requirements, Baykeeper alleges only a potential exceedance of the noise performance standard, with no evidence that an exceedance can actually be anticipated. At the issues conference, Mr. Kupferman acknowledged that Baykeeper's concern about a potential exceedance of the noise performance standard is not based on a noise analysis of the facility's operation, and that he had no noise expert to speak on this point, only "the community's experience with the sounds of the garbage trucks for the last 20 or 30 years in their neighborhood." (Transcript, pages 213 - 214.)

As DSNY argues, Baykeeper offers only conjecture about the potential for excessive noise, whereas DSNY studied the issue as part of the project's environmental review. As noted in the FEIS, overall noise at the facility boundary has been projected in relation to the New York City zoning code performance standards for manufacturing districts, and no exceedances of the performance standards are anticipated. (See FEIS at 5-184 and 5-185, and Table 5.17-7 at 5-188.) Also, the FEIS analyzed the facility's compliance with the then-existing City noise code and found no exceedance. (See FEIS at page 5-185, and Table 5.17-8 at page 5-189.) Finally, the data collected for the FEIS could be used to determine that the facility would comply with the noise code enacted in 2005, which prohibits sound increases above ambient background levels of 7 dB(A) at night or 10 dB(A) during the day along a public right-of-way (NYC Admin. Code Section 24-218(b)). (See Table 5.17-6(a) at page 5-187 of the FEIS.)

As DSNY argues in its submittal of May 30, 2008, because the FEIS demonstrates compliance with the City's own noise performance standards, no additional mitigation of noise impacts is required.

Issue Three: Project Need [Petition, pages 52 - 53; Supplement to Petition, pages 10 - 11]

According to Baykeeper, DSNY has not met its burden of proving that the Southwest Brooklyn marine transfer station is necessary, considering what Baykeeper says are "reasonable

alternatives that are more economically and environmentally sound" (Petition, page 52). Such alternatives were not identified in Baykeeper's petition, an omission I brought up at the issues conference. In response, Assembly Member Colton said it should not be a petitioner's burden to propose a specific alternative, but an applicant's burden to show that it looked at alternatives, particularly in relation to dredging. (Transcript, page 219.) Also, Mr. Kupferman argued that DSNY has not provided a proper analysis of alternatives, and that the alternatives analysis in DSNY's FEIS is inadequate. (Transcript, page 216.)

At the issues conference, Assembly Member Colton and Mr. Kupferman identified an Army terminal as an alternative site, saying that dredging there would not be required. (Transcript, pages 218 and 221.) Based on the street address they gave, this was an apparent reference to the Brooklyn Army Terminal between 53rd and 66th Streets in Sunset Park, which, according to on-line information, is a complex of piers, docks and warehouses that the City leases out for manufacturing, warehousing and commercial activity.

Also, Assembly Member Colton said that reducing, reusing and recycling waste, as proposed in the City's SWMP, should be considered as an alternative to the project in its entirety.

Baykeeper's petition states that, at a hearing on project need, Assembly Member Colton would testify about the social and economic impacts that would occur with placement of the marine transfer station at the intended location in Bensonhurst. In the supplement to its petition, Baykeeper says that DSNY shirked its responsibility to investigate site alternatives by limiting itself only to sites that it already owned. Also, it says that if the City adopted more aggressive recycling targets, the number of marine transfer station sites in its current SWMP could be reduced. Baykeeper claims that a city-wide strategy of intensive recycling could better reduce carbon emissions than extensive transport of waste out of the city, and that such a strategy would be much more economical.

RULING: No issue exists for adjudication.

Among the permits needed to build the Southwest Brooklyn 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, which includes assessing 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 application is for development of a new facility that would be constructed over 9 to 12 months within the upland area of a DSNY-owned lot, east of the existing marine transfer station. The design of the facility would incorporate: (1) an enclosed processing building, which would include a tipping floor and a loading floor and a container loadout and lidding area; (2) a pier level equipped with a gantry crane system; (3) an elevated access ramp; and (4) a new fendering system and king pile wall. A significant portion of the new facility would be located within the footprint of the former incinerator, and no significant new structures, beyond the replacement of the fendering system and the new king pile wall, would be developed within Gravesend Bay. (See Joint Application, Section 4.5, page 2.)

The new processing building would be about 200 feet wide and 200 feet long, and the height of the facility would be 98 feet from the pier level to the highest point on the roof, with the tipping floor 12 feet above the loading floor, and the loading floor 16 feet above the pier level. (See Joint Application, Section 4.5, page 3.)

To accommodate barge operations, the waterway adjacent to the building would be dredged, and tidal wetlands (consisting of

shallow water littoral zone) would be disturbed for bulkhead rehabilitation, replacement of an existing stormwater outfall, construction of the king pile wall and placement of armor stone.

According to the permit application, construction of the marine transfer station is anticipated to take about 9 to 12 months to complete, and dredging would likely occur prior to the commencement of major construction activities. (See Joint Application, Section 4.5, pages 2 and 5.) However, according to DSNY counsel, dredging may be deferred until the last six months of construction, depending on the construction proposals/bids that DSNY receives during the contract procurement process. (See e-mail of DSNY counsel Christopher King, dated March 3, 2009, responding to my e-mail of February 25, 2009, both included in the correspondence file for this hearing.)

DSNY says that dredging is required to improve existing water depths to allow for unimpeded operation of barges and the tugboats that would transport the barges to and from the facility, once it begins operations. Material would be dredged to achieve a minimum depth of 20.5 feet below mean low water, and the area along the western side of the king pile wall would be dredged to a depth of 22.5 feet in order to allow for the placement of stone for toe protection of the king pile wall. (See Joint Application, Section 4.5, pages 5 and 6.)

The existing bulkhead is composed of sheet pile, which would remain in place, and a fendering system that would be reconstructed in order to absorb the energy from potential barge impacts. A new 18-inch concrete outfall would be constructed within the bulkhead to drain stormwater from the facility into Gravesend Bay. The king pile wall - - 300 feet long, and consisting of steel king piles, sheet pile and rubber bumpers - - would be placed perpendicular to the bulkhead's southeastern corner both to allow for dredging and to protect an adjacent marina from facility operations. Finally, the armor stone would be placed at the southern end and eastern side of the sheet pile for additional support. (See Joint Application, Section 4.5, pages 4 to 6.)

According to DSNY, development of the Southwest Brooklyn marine transfer station is necessary to provide the city with an efficient way to collect, process and transport DSNY-managed waste to out-of-city facilities, while meeting the City's goals as set forth in the SWMP.

Historically, DSNY used a marine-based system which involved the use of eight marine transfer stations where collection

vehicles would transfer municipal solid waste to barges for deliveries to the Fresh Kills Landfill in Staten Island. Following that landfill's closure in 2001, those marine transfer stations could no longer function as they were originally designed, and the City implemented an interim export program that is truck-based and involves the transport of DSNY-collected waste to private transfer stations or disposal facilities within and outside of the city.

According to DSNY, the existing Southwest Brooklyn marine transfer station is physically limited and cannot meet the current waste management goals proposed by DSNY. Under the SWMP, DSNY would maintain it for potential future use, while developing the new facility so that waste can be containerized prior to export. DSNY contends that the new marine transfer station would increase the efficiency of the City's waste management system by providing a variety of transport alternatives, including transport by rail and ocean-going vessel, thereby reducing DSNY's reliance on the interim truck-based system, which contributes to traffic congestion and air pollution. Also, DSNY says it would allow the City to access more distant disposal facilities, and lead to more options and presumably more competitive costs for waste disposal. (See Joint Application, Section 4.5, pages 7 and 8.)

As part of its application for permits under Parts 608 and 661, DSNY provided a discussion of alternatives, including alternative facility designs and locations, as well as a no-action alternative involving reactivation of the existing facility whereby loose, non-compacted and non-containerized waste would be transferred from collection trucks to barges for removal to out-of-city disposal facilities. (See Joint Application, Section 4.5, pages 12 to 32.) According to DSNY, with the closure of the Fresh Kills landfill, very few, if any, facilities are available for the offloading of loose waste from barges, one of the reasons that the no-action alternative was deemed unacceptable. Also, as DSNY notes, under this alternative, periodic maintenance dredging would still be necessary to remove accumulated sediments in order to provide adequate draft for barges and tugboats and to allow for unimpeded operations at the facility.

If a marine transfer station - - either the existing one, or the new one proposed in this application - - is to operate at the site of the former Southwest Brooklyn incinerator, dredging to maintain access for barges and tugboats must be performed. Baykeeper does not contest this, nor does it challenge the reasonableness or necessity of the other activities proposed to

occur in and adjacent to Gravesend Bay as part of site development. DSNY considered alternative designs for its king pile wall and the possibility of building the new facility entirely over the water, which would require even more dredging and in-water construction over Gravesend Bay, before settling on a land-based design that limits waterfront construction. Baykeeper has not challenged this analysis; rather than advocate an alternative design, it argues for no transfer station at all, at least none at this location.

In its petition, Baykeeper indicates that there are "reasonable and feasible" alternatives to the Southwest Brooklyn marine transfer station "that are more economically and environmentally sound," without indicating what they are. Baykeeper contends that it should not have the burden of proposing specific alternatives; however, with no alternatives on the table, there is no basis for comparison to what DSNY has proposed. At the issues conference, the Brooklyn Army Terminal was offered as a preferable alternative location, ostensibly because it does not require dredging. No additional information was provided about the Brooklyn Army Terminal in Baykeeper's supplemental petition, though on-line information indicates that it has a working waterfront with piers and docks, which suggests that water depths are adequate for the transfer of material onto boats.

In its alternatives discussion, for purposes of the Part 608 and Part 661 permit, DSNY said that alternative locations were considered and deemed unacceptable for the proposed Southwest Brooklyn marine transfer station. For another site to be a reasonable alternative, DSNY said that it would have to be located in close proximity to the service area to facilitate the efficient and economic management of DSNY-managed waste, and would have to be of adequate size and configuration to realize the project's purpose. Finally, to comply with local zoning, a new transfer station would have to be sited in one of the City's industrial zones (manufacturing districts M1, M2 and M3). (See Joint Application, Section 4.5, page 14.)

According to DSNY, the lack of available industrially-zoned waterfront space of sufficient size in the vicinity of the existing marine transfer station limited the possibility of alternative locations, so that alternative locations were not considered viable options for the proposed action. (See Joint Application, Section 4.5, page 15.)

Baykeeper says that DSNY failed to investigate alternative sites; however, in the absence of an offer showing that the

Brooklyn Army Terminal could accommodate, and would be appropriate for, a new marine transfer station, there is no basis to consider it further. Baykeeper's only offer on the issue of need involves proposed testimony from Assembly Member Colton, who would speak to so-called "social and economic impacts" of locating the facility at the site of the former incinerator. This testimony, again about the character of the surrounding neighborhood, is not relevant to whether the marine transfer station is reasonable or necessary, or, for that matter, to the impacts of dredging and project-related construction on the marine environment of Gravesend Bay.

At the issues conference, Assembly Member Colton said that increased efforts to reduce, reuse and recycle solid waste should also be considered among the alternatives to the Southwest Brooklyn marine transfer station. Though such efforts could reduce the amount of waste subject to disposal, DSNY does not see them as an alternative to the development of the four marine transfer stations anticipated in its SWMP. In fact, the SWMP also proposes improving DSNY's curbside recycling program and developing new facilities to accept and process recyclables. Assembly Member Colton did not deny these elements of the SWMP, but said that they had not yet been implemented.

Overall, the issues of need and alternatives, as described by Baykeeper, are tied to revisiting determinations that DSNY made as part of its SWMP. The SWMP includes a continuation of programs designed to curb waste generation. However, as a key initiative, it also anticipates development of state-of-the-art marine transfer stations at four of DSNY's existing marine transfer station sites. As DSNY argues, there is no legal basis to expand the review of the permit application to encompass the alternatives proposed by Baykeeper, when DEC has already approved the SWMP - - including its reliance on marine-based waste transport - - and where DSNY has shown that the project depends on water access and will have substantial social, economic and environmental benefits city-wide.

Particularly in the absence of any evidence that this project is not needed, DEC should defer to DSNY about the necessity of maintaining a marine transfer station at the location of the former incinerator. 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 a similar issue about need, in that case for a proposed landfill, which arose in part under DEC's freshwater wetland permitting standards. This was done by

citing, among other things, "the appropriateness to give deference to the decision of the Authority, as a government entity, that such a project is necessary to fulfill an essential government function."

Finally, Baykeeper has proposed need as an issue under 6 NYCRR 231-2.4(a)(2)(ii), which states that, as part of a permit application for a proposed source project or proposed major facility subject to Subpart 231-2, an applicant must submit "an analysis of alternative sites, sizes, production processes, and environmental control techniques which demonstrates that the benefits of the proposed source project or proposed major facility significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification within New York State." As DSNY points out, such an analysis is not required in this case because the new source review analysis set forth in Part 231 only applies to "major facilities" or "non-major" facilities which have the potential to emit non-attainment pollutants "equal to or greater than the corresponding major facility size threshold in section 231-2.12 or 231-2.13." (See 6 NYCRR 231-2.2(a), addressing the applicability of Subpart 231-2 to emissions increases in non-attainment areas.)

As DSNY argues, while the marine transfer station may cause an increase in certain pollutants, such as nitrogen oxide, for which New York City has been designated a non-attainment area, the combined emissions of these pollutants would be well below the applicable source thresholds for "major facilities." In fact, at the issues conference, DEC Staff confirmed that its air pollution control (air state facility) permit, developed pursuant to Part 201, controls only "minor" stationary source emissions from the facility, and does not govern mobile source emissions, including those associated with truck traffic. (Transcript, pages 37 and 38.)

Issue Four: Dredging Impacts on Gravesend Bay [Petition, pages 53 - 58]

According to Baykeeper, DSNY has not met its burden of proving that the Southwest Brooklyn marine transfer station will not have an adverse impact on Gravesend Bay, 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)). Baykeeper contends that such an assessment is lacking in this case, and that the permit application relies instead on incomplete or misrepresented field studies. As a result, says Baykeeper, any conclusions regarding the level of potential impacts to wetlands or proposed mitigation plans are baseless.

Impacts to Gravesend Bay are proposed as an issue in relation to both the tidal wetlands 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 wetlands permit are met, and DEC may 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)).

Baykeeper is especially concerned about the harm it says would be caused by project-related dredging in Gravesend Bay adjacent to the marine transfer station. DSNY contends that the area subject to dredging is small, but Baykeeper responds that, to ensure safe passage for the barges and the continued integrity of the king pile wall, dredging will need to be repeated regularly over the facility's life.

DSNY also points out that, in terms of the amount of material to be removed, its dredging project is miniscule in comparison to other recent and ongoing dredging projects in New York Harbor, and comparable to ones that have been permitted for nearby locations along Gravesend Bay, such as the Bayside Fuel Depot (northwest of the project site) and the Excelsior Yacht Club (immediately southeast of the project site). On the other hand, Baykeeper says that this is a special case, because the sediments DSNY would dredge are especially contaminated, particularly with toxic ash. According to Baykeeper's offer of proof, fly ash and bottom ash from the former incinerator were moved along uncovered conveyor belts to barges along the water's

edge, and when the water was choppy a barge sometimes came out of position, so that the ash fell from the belt into the bay, at least until someone noticed and corrected the situation. Baykeeper says that the spilled ash contaminated the bay bottom with metals, dioxins, polycyclic aromatic hydrocarbons ("PAHs") and PCBs, which now lie buried under presumably cleaner sediments that have been deposited more recently, since the incinerator stopped operating.

According to Baykeeper, there is no method of dredging that would not cause resuspension and spillage of sediments, and even the newest dredges, while they minimize impacts, do not eliminate them. Baykeeper says that whenever any type of dredging takes place, some sediment is exposed to the water column and eventually settles out again. This process, Baykeeper says, exposes organisms in the dredged ecosystem to increased levels of contaminants, which, once resuspended, can be expected to disperse throughout Gravesend Bay, and to settle especially in shallows where water flow is curbed and they are trapped by submerged grasses.

Baykeeper says that shallow, grassy areas are habitat for larval and juvenile fish and invertebrates, which will be harmed directly by the contaminants, and that impacts will spread to fish, aquatic birds, and marine and terrestrial mammals that depend on fish and shellfish for food. According to Baykeeper, fish eggs, larvae and juveniles are typically the life stages most sensitive to toxins, dioxin in particular. Baykeeper says that once aquatic animals and fish-eating birds and mammals take up dioxin from the contaminated sediments, females will pass the dioxin to their offspring, with the potential for significant adverse effects on survival, growth, development and reproduction. Likewise, people will be exposed to dioxin -- and at increased risk of cancer, reproductive and developmental problems, immune dysfunctions and liver disorders -- by eating fish from Gravesend Bay, Baykeeper submits.

In relation to dredging impacts, Baykeeper offers to call two witnesses: Dr. David Carpenter, an environmental health sciences professor at the State University of New York at Albany, and Dr. Peter L. deFur, a biologist, environmental consultant and part-time faculty member at Virginia Commonwealth University. According to Baykeeper's petition, Dr. Carpenter would testify how dredging, by mobilizing contaminants in the water column, would elevate contaminant levels in fish and other marine life, while Dr. deFur would testify about the richness of the marine life in the waters near the project site, including data

supporting the conclusion that Gravesend Bay is essential fish habitat deserving of special protection.

DSNY contends that Baykeeper's offer fails to raise an adjudicable issue, as it ignores the extensive data analysis in the FEIS and joint application for Part 608 and Part 661 permits, which concluded that there would be no significant adverse impacts to Gravesend Bay, and fails to explain why the special conditions now included in the draft permit are inadequate to address its concerns.

Like DSNY, DEC Staff argue that the proposed activities will not have an undue adverse impact on tidal wetland and aquatic resources. According to DEC Staff, water-borne transportation of municipal solid waste is a practical and conventional undertaking, and a reasonable proposal. Staff contends that based on materials provided by DSNY and the experience of DEC's own marine resources staff with conditions at this site and elsewhere in Gravesend Bay, impacts would not be excessive in scale or scope. Staff contends that the habitat quality and functions provided at the site are expected to persist, with only minimal diminution attributable to the proposed facility. Also, Staff notes that the draft permit requires DSNY to perform appropriate compensatory mitigation for the remaining unavoidable impacts, which would provide for the creation and restoration of tidal wetlands within New York Harbor.

According to the FEIS, dredging is expected to involve only 4,200 cubic yards of material. In an e-mail dated March 3, 2009, DSNY counsel said that while actual dredging activity is expected to take no more than 20 days, that work may extend over a three to four month period, depending on weather conditions.

RULING: No issue exists for adjudication. By its nature, dredging will resuspend some sediments in the water column, which will have an adverse environmental impact. However, as both DSNY and DEC Staff point out, it will be conducted in a manner intended to limit that impact, as discussed below. Also, as noted above, dredging is necessary to open and maintain access to the marine transfer station by tugboats and barges, meaning that if dredging is prohibited, the overall project cannot proceed.

Dredging impacts have been proposed as an issue for both the tidal wetlands and use and protection of waters permits. First, in relation to the tidal wetlands permit, dredging impacts cannot be considered "undue" in light of the social and economic benefits that the City would derive from the new marine transfer station. As DSNY, DEC Staff, and EDF all contend, the current,

truck-based system of waste transport aggravates air pollution and congestion of the city's streets, while the incorporation of barge transport would ameliorate these problems and potentially create new waste disposal options, at more competitive costs. These advantages of the new marine transfer station are not disputed or even acknowledged in Baykeeper's petition. Nor does Baykeeper credit the permit conditions designed to ensure, in relation to the protection of waters permit, that dredging does not cause natural resource damage that is "unreasonable, uncontrolled or unnecessary."

Dredging is addressed in special conditions No. 47 to 56 of the draft permit. Various measures are incorporated to mitigate environmental impacts, including:

- - Mandated use of an "environmental bucket," meaning a bucket constructed with seals or flaps to minimize the loss of material during transport through the water column (special condition No. 49);
- - Limitation of bucket hoist speed to about 2 feet per second (special condition No. 50);
- - Requirements that the bucket be lifted in a continuous motion through the water column and into the barge, and that the bucket be lowered to the level of the barge gunwales prior to release of its load (special condition No. 50);
- - A requirement that excavated sediments be placed directly into the conveyance vehicle in a manner that prevents them from re-entering the waterway, including a prohibition on side casting (double dipping) or temporary storage of dredge material (special condition No. 53);
- - A prohibition on dredging between November 15 and July 15, when particularly sensitive organisms may be in the project area, including, for the period between November 15 and April 15, striped bass and winter flounder, during their spawning and early growth (special condition No. 56A); and
- - Mandated use of silt curtains configured according to tide directions to minimize dispersal of resuspended sediments, and inspected daily to ensure proper alignment and function (special condition No. 56B).

DEC Staff acknowledges that dredging would have adverse impacts on the tidal wetland and aquatic resources, but concludes that following the initial disturbance, the benthic community would quickly recover and thrive. Staff also says that the dredging-related impacts would not be undue in light of the dredging's purpose. Finally, Staff says that based on the materials provided by DSNY and the experience of DEC's own marine resource specialists with conditions at this site and elsewhere

in Gravesend Bay, the anticipated impacts would not be excessive in scale or scope.

Overall, Staff maintains, the habitat quality and functions provided at the site are expected to persist, with only minimal diminution attributable to development of the marine transfer station. For the diminution that occurs, both because of this project and DSNY's other new marine transfer stations proposed as part of the SWMP, DSNY is to create and restore, or fund projects to create and restore, additional tidal wetland areas at locations within New York Harbor, pursuant to special condition No. 57 of the draft permit.

As discussed above, special condition No. 47 of the draft permit requires DSNY to provide additional information prior to the proposed start of dredging, including a bathymetric survey and additional sediment sampling, including testing for dioxin, contamination from which is of particular concern to Baykeeper. DSNY has committed to provide this information to the petitioners at the same time it is provided to DEC Staff, so that they may have an opportunity to comment before dredging begins. According to the permit condition, dredging cannot proceed until the additional data and a more detailed dredging description are provided to and approved by DEC Staff.

Rather than defer permitting decisions and reopen the issues conference when this information is provided, permits may be issued now on the basis of findings that the dredging is necessary to project development, that adverse impacts would not be undue when weighed against the project benefits, and that damage to natural resources would be limited, controlled, and mitigated by various measures embodied in the draft permit. Should the additional information provided pursuant to special condition No. 47 warrant an adjustment of permit conditions, DEC may modify the permits authorizing dredging pursuant to 6 NYCRR 621.13(a)(4), on the basis of "newly discovered material information or a material change in environmental conditions." Pursuant to 6 NYCRR 621.13(a)(4), DEC may also modify the permits on the basis of "a material change in relevant technology," depending on improvements in dredging methods.

Providing the petitioners with the new information that DSNY produces, and allowing for their comments prior to approval of a final plan, allows them an opportunity to address their concerns with DEC Staff. Should Staff then decide to modify the permit, DSNY can request a hearing on any changes it opposes. However, on the existing record, the current draft permit may be issued, particularly in light of DEC Staff's analysis of dredging

impacts, and the impact mitigation anticipated by the permit conditions. (See Matter of Waste Management of New York, Decision of the Commissioner, October 20, 2006, page 5, affirming that "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 DEC Staff, or the record of the issues conference, among other relevant materials and submissions.")

As DSNY argues, the dredging controls included in the draft permit more than satisfy DEC guidance governing Class B sediments (in other words, sediments exhibiting moderate contamination, and chronically toxic to aquatic life), which DSNY says its testing (from 1996 and 2003) indicates are the type of sediments present in the site vicinity. (See DEC Technical & Operational Guidance Series (TOGS) 5.1.9, page 23, Table 3, and the sediment classifications at page 20 of that document from November 2004, titled "In-Water and Riparian Management of Sediment and Dredged Material.") Baykeeper maintains that on the basis of DSNY's testing for PAHs, PCBs and dioxins, some of the sediments could qualify as Class C (exhibiting high contamination, and acutely toxic to aquatic life). However, even for Class C sediments, the draft permit meets the requirements of the TOGS. In particular, special condition No. 49 requires use of a closed bucket, which is only suggested for Class B sediments but ordinarily required for Class C sediments. Also, special condition No. 50 prohibits barge overflow, a restriction mandated for Class C sediments, though barge overflow may be allowed on a site-specific basis for Class B sediments. (See Table 3 at page 23 of the TOGS document.)

Special condition No. 49 requires that seals or flaps designed or installed at the jaws and vent openings of the dredging bucket tightly cover those openings while the bucket is lifted through the water column and into the barge, and prohibit the excessive loss of water, sediment or both from the time the bucket breaks the water's surface to the time it crosses the barge gunwale. Should excessive loss of water, sediment or both be observed, DSNY is required to halt dredging operations and inspect the bucket for defects, and to make necessary repairs or replacements before such operations resume.

According to Baykeeper, the use of seals or flaps on the bucket is likely to have minimal efficiency to the extent there are substantial amounts of debris in the sediments to be dredged. Baykeeper suggests that, in the past, trash was placed on uncovered barges, from which it blew and fell into the water, and that the presence of this debris will increase the chance that

the bucket will not be able to close completely. Baykeeper further proposes that the sediments in and around the area to be dredged must be thoroughly analyzed for debris, though it does not suggest how this could be accomplished short of the large-scale disturbance of the sediments which it is trying to prevent.

Overall, I find Baykeeper's concerns about debris to be speculative, and unsubstantiated by an offer of proof. It is not apparent how any debris light enough to blow off a barge would present an obstacle to closure of the environmental bucket. On the other hand, DSNY should be alert for the location of large, heavy objects at the bay bottom which could present a physical impediment to the dredging operation. The only such object for which a concrete offer of proof exists is a possible shipwreck identified on a navigational chart, discussed below as Baykeeper Issue Ten.

Finally, Baykeeper questions the use of silt curtains at the project site, based on DSNY's statement at page 5-40 of its FEIS that silt curtains "would not be feasible" in light of swift currents in the area to be dredged. DEC Staff dismisses this statement as largely unfounded and says that, barring some detailed analysis showing otherwise, silt curtains should be effective, and at any event should not cause any environmental harm. DSNY has accepted the permit condition requiring use of silt curtains, though Baykeeper says whether silt curtains can be used at all is still a question of fact requiring adjudication. I disagree with Baykeeper. If there was ever any dispute about the use of silt curtains, it was between DEC Staff and DSNY, and it has been resolved by DSNY's acceptance of the permit condition. Baykeeper has no offer of its own concerning the silt curtains; for that matter, it has offered no expert who would testify about the efficacy or appropriateness of any of the measures proposed to limit dredging's environmental impacts.

Issue Five: Project Compatibility with Tidal Wetlands
[Petition, pages 53 and 54]

As a separate point concerning the tidal wetlands permit, Baykeeper argues that construction of the marine transfer station is not compatible with the littoral zone adjacent to the project site. This issue is proposed in reference to applicable use guidelines (at 6 NYCRR 661.5(b)(47) and (48)) which indicate that construction of a commercial or industrial use facility, even one requiring water access, in a littoral zone is presumptively incompatible with that zone. As DSNY emphasizes, such a designation does not necessarily mean that a proposed action

cannot be permitted, since the presumption may be overcome by a demonstration that the "proposed activity will 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)).

RULING: No issue exists for adjudication.

Considered separately from the project-related dredging, the construction of the marine transfer station may be deemed compatible with the littoral zone of Gravesend Bay because its development as an upland facility will minimize impacts to the tidal wetland.

As argued by DSNY, the project's impacts on tidal wetlands are primarily associated with construction of the king pile wall, which is necessary to protect the adjacent marina. (See Joint Application for Part 608 and 661 permits, Section 4.5, page 29.) The design is for an open king pile wall resembling a "picket fence" in profile, which would protect the adjacent jetty structure while allowing water to flow freely in and out of the space behind the wall. The king piles would extend above mean high water to prevent tugs and barges from getting close to the adjacent jetty. Also, armor stone would be installed on top of the existing sediment or at the existing mudline grade from the king pile wall to the toe of the jetty wall, thereby protecting the sediment from erosion due to prop wash. (Joint Application, Section 4.5, page 18.) As DSNY points out, the open king pile wall would maintain existing flushing behind the wall, and would not permanently impact the littoral zone as existing water depths could be maintained. (Joint Application, Section 4.5, page 26.)

Issue Six: Stormwater Impacts [Petition, pages 59 - 60]

According to Baykeeper, the potential exists for a substantial increase in coliform-contaminated runoff not only from the marine transfer station itself, but from roadways near the site, particularly during heavy rain events. Baykeeper attributes this to sanitation trucks which may carry items heavily contaminated with human and animal fecal material, and the leakage of fecal-contaminated water as trucks leave the facility. Baykeeper says that the FEIS includes no determination of the coliform concentrations one may expect from the facility, and no consideration of what Baykeeper describes as a likelihood that such concentrations will result in the closings of public swimming beaches in Brooklyn. Finally, Baykeeper says the FEIS does not address the use of low-impact (or "green") development at the site to minimize stormwater pollution. According to

Baykeeper, low-impact development uses devices like green roofs, rain gardens, disconnected rain gutter downspouts, and porous pavement to maintain and enhance the pre-development hydrologic regime of urban watersheds, capturing water near the sources of runoff. To the extent such features are not part of the project design, Baykeeper says they should be included as permit requirements, to mitigate stormwater pollution.

RULING: No issue exists for adjudication.

As described in the Part 360 permit application, the new marine transfer station will be equipped with a stormwater drainage system that will collect runoff from all paved areas of the site except the pier deck, and from the facility's roof, and process that runoff through two vortex units prior to discharge into Gravesend Bay. Processing areas inside the facility will be cleaned daily by wash-down and other appropriate methods. Drainage from the tipping floor, the loading floor and the pier deck will be collected by floor trench drains and discharged into the city sewer system after passing through an oil/water separator, and directed to the Owls Head wastewater treatment plant, which operates under a State Pollutant Discharge Elimination System ("SPDES") permit.

As DSNY points out, Baykeeper fails to credit these engineering controls, nor does it acknowledge that the transfer station will operate within a fully enclosed building, unaffected by runoff from the roof and outside property. Baykeeper claims that the FEIS is deficient, but any such deficiencies should have been pursued in a court challenge to DSNY's SEQRA review, which was completed years ago. This hearing is to determine compliance with DEC's permitting standards, none of which require the measures proposed by Baykeeper to control stormwater pollution. According to 6 NYCRR 360-11.2(a)(3)(iv), a transfer station permit applicant must submit an engineering report describing the facility's drainage system, which DSNY has done. Also, according to 6 NYCRR 360-11.4(f), a transfer station must operate so that drainage from cleaning areas is discharged to sanitary sewers, authorized sanitary waste treatment facilities, or a corrosion-resistant holding tank (which DSNY has addressed by connection to the city sewer system).

While Baykeeper says there would be "ample opportunity" for the leakage of fecal-contaminated water from trucks as they leave the facility, it failed to demonstrate how this would lead to a substantial increase in coliform pollution, or pollution to such a degree that it would trigger beach closings. Baykeeper's

claims in this regard are merely speculative, as no expert testimony was proposed, and no other offer of proof was made.

Issue Seven: Mitigation of Natural Resource Impacts
[Petition, pages 60 and 61]

According to Baykeeper, DEC must require a mitigation plan addressing anticipated impacts to the natural resources of Gravesend Bay before any permit is granted for this project.

RULING: No issue exists for adjudication, though the permit must be amended to ensure that mitigation occurs in a timely manner.

Mitigation of natural resource impacts is addressed in special conditions No. 57, 58 and 59 of DEC Staff's draft permit.

Special condition No. 57 provides that within 60 days of permit issuance, DSNY shall provide a proposed conceptual mitigation plan for review and approval, such plan to include the following:

- - Sites where appropriate wetland restoration activities could occur;
- - An initial estimate of the potential types and amounts of habitat restoration at the site(s);
- - Mechanisms for delivering projects at the site(s); and
- - An estimate of when the project(s) may be ready to proceed.

It also states that the mitigation for wetland habitat losses at the site of the Southwest Brooklyn marine transfer station, as well as any such losses at the sites of DSNY's three other proposed converted marine transfer stations, will be the creation and restoration of, or funding of projects to create and restore, additional tidal wetland areas at locations within New York Harbor.

According to special condition No. 58, within 60 days of DEC's approval of the conceptual mitigation plan, DSNY and its agent will meet with DEC Region 2 Staff to develop a plan of action and time line for the plan's implementation.

Also, according to special condition No. 59, no later than 120 days after DEC's approval of the conceptual mitigation plan, DSNY shall submit a formal plan for DEC review and acceptance, such plan to include details of the mitigation project(s) as well as a monitoring plan developed and based upon the New York State Salt Marsh Restoration and Monitoring Guidelines.

Baykeeper says that unless the mitigation plan is provided before any permit is issued, DSNY cannot know whether all impacts are capable of being mitigated, the full extent of so-called cumulative impacts (which Baykeeper says would depend on DSNY's mitigation capabilities), the increased project costs due to mitigation projects, and potential "maintenance and enforcement" issues, which are not specified in Baykeeper's petition. However, there is no question that whatever unavoidable impacts DSNY's new marine transfer stations may have on tidal wetlands, DSNY can ensure they are offset at wetlands elsewhere in New York Harbor. DSNY itself does not object to the permit conditions, which have also been included in DEC's draft permit for DSNY's East 91st Street marine transfer station. As a City agency, DSNY has access to sites where wetlands can be created and restored, experts who can design suitable projects, and funding to implement those projects. The actual costs of the projects cannot be established at this time, but DSNY, by accepting the permit conditions, obliges itself to pay for whatever work DEC Staff determines is necessary to offset impacts created by development of the four new marine transfer stations.

As DSNY points out, wetland mitigation plans like the one proposed here are regularly employed by DEC in the permitting context. However, to be effective, the plans need to be implemented in a timely manner. For instance, in the recent matter involving Sullivan County's expansion of its existing landfill, DEC Staff's draft permit required that mandated mitigation of impacts caused by the filling of part of a state-regulated freshwater wetland and its adjacent area -- through the restoration or creation of additional wetland -- be completed no later than the first disposal of waste in the first landfill cell to be completed, or by the expiration date of the permit, whichever occurs first. By contrast, the draft permit in this matter sets no time for completion of the mitigation that is proposed, the only deadlines being for submittal of a proposed conceptual mitigation plan (special condition No. 57), and, following that plan's approval, the submittal of a formal plan (special condition No. 59). There is another deadline for a meeting between DSNY and DEC Staff to develop a time line for implementation of the mitigation plan, but the permit does not specify how it would be established if DSNY and DEC Staff do not agree.

Fixing a time frame similar to that set in the Sullivan County draft permit, I direct that the permit for the Southwest Brooklyn marine transfer station be amended to require that completion of tidal wetland restoration or creation deemed suitable by DEC Staff as mitigation for this project's impacts to

wetland habitat be completed prior to the first receipt of waste at the new facility. This leaves it to DEC Staff to determine what work is adequate, but ensures that the work is completed in a timely manner, something that the current permit language does not. It also gives DSNY an incentive to develop a plan that Staff can accept.

Issue Eight: Access to the Waterfront/The Public Trust Doctrine [Petition, pages 61 - 63]

According to Baykeeper, the permit should be denied under the public trust doctrine, thereby ensuring that the public maintains access to the waterfront and the coastal resources of New York Harbor. Baykeeper's petition outlines the history of the public trust doctrine from ancient Rome to medieval England to contemporary America. Included are references to other states' case law recognizing public interests in preserving tidelands in their natural state - - interests also recognized in New York's tidal wetlands permitting standards - - and maintaining feasible access routes over municipally owned land so that the public can swim in the ocean and use its foreshore. According to Baykeeper, case law indicates that the public trust doctrine can be invoked by any member of the public, whether or not that person would otherwise have standing to sue, because the doctrine involves rights to which any member of the public is entitled.

RULING: No issue exists for adjudication.

As DSNY points out, it considered the marine transfer station's consistency with the City's waterfront revitalization program, including the policy to provide public access to and along the City's coastal waters. (See pages 16 to 18 of the attachment to the "New York City Waterfront Revitalization Program Consistency Assessment Form," included in Section 4.5 of the Joint Application for Part 608/661 permits.) As a stand-alone, water-dependent industrial facility, the marine transfer station would be consistent with existing land uses in the vicinity of the site and with the City's "Plan for the Brooklyn Waterfront," which recommends the continued industrial use of the area. (See Consistency Assessment Form Attachment, page 4.)

DSNY is correct that public access would not be compatible with development of the new marine transfer station, but that such development would not preclude any future development of public access at other locations along the Gravesend Bay waterfront. (See Consistency Assessment Form Attachment, page 17.) DSNY also is correct that the new marine transfer station would not have any impact on surrounding open space and

recreational areas, including Dreier-Offerman Park, which is of special concern to Baykeeper. Waterfront activities associated with the new facility would be centralized in the vicinity of the marine transfer station and, as such, would not result in adverse impacts to parklands or open space areas. (See Consistency Assessment Form Attachment, pages 17 and 18; and FEIS, page 5-19.) The New York State Department of State reviewed DSNY's consistency assessment form and also determined that the marine transfer station proposal meets its general consistency concurrency criteria. (See General Concurrence letter, September 25, 2005, included in the consistency assessment at page 20.)

In short, development of the marine transfer station would not add to or subtract from the opportunities of the general public to access the waterfront and coastal resources of Gravesend Bay. For safety reasons, access to the project site has been restricted in the past, and would properly be restricted in the future should the project go forward.

Issue Nine: Live Munitions in Gravesend Bay [Supplement to Petition, pages 11 and 12]

According to Baykeeper, project-related dredging could result in the detonation of live munitions in Gravesend Bay. Baykeeper notes that a military barge, the USS Bennington, overturned in Gravesend Bay in March 1954, spilling its munitions into the water. Also, it says that Gravesend Bay has been a longtime pathway for munitions barges between Fort Lafayette (formerly known as Fort Diamond) and a munitions storage depot in New Jersey. Baykeeper raises the possibility that there may have been other mishaps besides the one involving the USS Bennington, and argues that the public health, welfare and safety would be imperiled if, during the course of dredging, live munitions were encountered, triggering an explosion.

Former Congressman Vito Fossella raised the possibility of munitions in the waters of Gravesend Bay in a letter of January 18, 2008, to the U.S. Secretary of Defense. This triggered an investigation by the Department of the Navy, which assembled a team consisting of a Naval historian, explosive ordnance experts, and Army Corps of Engineers dredging experts to provide information in response to Congressman Fossella's concerns. Also, at the issues conference, Assembly Member Colton questioned whether dredging could detonate live shells buried in the harbor silt, even 54 years after the spillage from the USS Bennington.

RULING: No issue exists for adjudication.

Concerns about live munitions in Gravesend Bay have been addressed by the Department of the Navy, which issued its response to former Congressman Fossella in letter of February 29, 2008 (attached as Exhibit "V" to DSNY's response to Baykeeper's petition, and as Exhibit "B" to DEC Staff's response to the petition).

According to the Navy's response:

"Historical records indicate there were several explosives anchorages located in New York harbor. These explosive anchorages were used by both military and non-military entities. The Gravesend Bay Explosives Anchorage, established in the 19th century, was utilized by various vessels carrying explosives and dangerous cargoes. No records were found indicating that ammunition was accidentally dropped overboard or lost by [the] Navy in Gravesend Bay, except for the event of March 1954.

"Several records were found regarding the March 1954 incident where the barge used to off load the munitions from the USS Bennington was capsized in a sudden storm. These records indicate that a total of 14,470 munitions items were on board the barge when it capsized. Salvage Divers from the US Navy Salvage School, Bayonne, New Jersey recovered all but 10 of these munitions items. The final 10 items could not be located.

"Although the Navy did not find any records of other lost munitions in Gravesend Bay, it can not be concluded that such losses did not occur."

According to the Navy letter, the Army Corps of Engineers, whose dredging experts were part of the investigatory team, will issue a permit to support the dredging. The letter says that the Army Corps of Engineers has extensive knowledge of dredging technologies, which can be applied to accomplish this work in a safe manner. The letter adds that one of the most protective dredging technologies employs screens, which prevent the munitions from being brought to the surface. According to the letter, close coordination with the Army Corps of Engineers will ensure that the most appropriate requirements for safe execution of this project are included in the dredging permit.

The Navy letter instructs that should a munitions item be brought to the surface, the item should not be further moved or touched, and that instead the dredge operator should contact local law enforcement who will arrange for the Navy's Explosive Ordnance Disposal ("EOD") support to address the situation.

No issue exists for adjudication in light of the Navy's investigation of the claims raised in the supplement to Baykeeper's petition and in former Congressman Fossella's letter. There is no evidence that more than 10 munitions items remain uncovered from the capsizing of the USS Bennington, and Baykeeper offers only speculation as to other incidents involving munitions losses. The possibility that munitions are buried in the sediments in the small area to be dredged adjacent to the project site, rather than elsewhere in the vast expanse of Gravesend Bay, is extremely remote. Also, there is no explanation how munitions lost in the bay more than a half-century ago would still be "live" and capable of exploding were they encountered during dredging operations.

Issue Ten: Shipwreck in Gravesend Bay [Supplement to Petition, page 12]

According to Baykeeper, project-related dredging would likely encounter a shipwreck in the Marine Basin boat marina due south of the project site, close to DSNY's proposed king pile wall. The location of the alleged shipwreck is identified in a navigational chart (attached to Baykeeper's petition supplement as Exhibit 8) which Baykeeper admits "is a couple of years old," though it adds that the wreck is likely still there. Baykeeper says the wreck might be historically significant, and, if it is, other state agencies, such as the New York State Office of Parks, Recreation and Historic Preservation ("OPRHP"), would have to be involved, and DSNY could be required to provide OPRHP a plan to preserve and protect the wreck during dredging. Even if the wreck is not historically significant, Baykeeper says that DSNY would have to determine whether it would impede the dredging process and how contaminated silt would be contained during the wreck's removal or movement.

RULING: No issue exists for adjudication.

The existence of a shipwreck in the area to be dredged is not a barrier to permit issuance, though if any shipwreck is encountered - - either in the additional work required under special permit condition No. 47, or in the subsequent dredging itself - - the permit must require that DSNY bring it to the attention of DEC Staff, which can then coordinate its response with other agencies that may have jurisdiction or possible concerns, including the Army Corps of Engineers and OPRHP. As DEC Staff points out, Baykeeper's claim of a shipwreck is sketchy, consisting only of a notation on a navigational chart whose exact age is unknown. The shipwreck, if it exists, would be in shallow water, so the lack of a statement by someone with

knowledge of it suggests that it may not be not there or, if it ever was there, that it has been removed. At any rate, the possible existence of a wreck should not preclude dredging. At most, it suggests a possible complication that can be dealt with if a wreck is actually encountered.

Issue Eleven: Worker Health and Safety [Supplement to Petition, page 13]

According to Baykeeper, the health and safety of workers would be at risk from factors discussed elsewhere in its petition: prior contamination of the project site, future pesticide applications, and operations that could exceed local noise limits. Baykeeper adds that because operations would occur within an enclosed building under negative air pressure, there is an intensified risk to workers and truck drivers within the building, whose health and safety is essential to ensure that the facility works in an environmentally sound manner. Baykeeper adds that the health and safety of DEC's on-site environmental monitors would be at risk, and that DEC has a heightened and direct responsibility to its own employees.

RULING: No issue exists for adjudication.

As an environmental agency, DEC's concerns are for the health and safety of people in the community surrounding the project site, and DEC has no jurisdiction with regard to the health and safety of workers at the site or within the building where waste would be handled. As DEC Staff argues, worker safety is regulated by the federal Occupational Health and Safety Administration ("OSHA") and the New York State Department of Labor. At the issues conference, DSNY argued that OSHA has regulations that set permissible exposure limits for various indoor air contaminants, and that the City has its own Office of Occupational Safety and Health, which also deals with such issues.

DSNY also points out that an extensive training plan setting out worker safety precautions is included in its Part 360 application, and both DSNY and DEC Staff note that the draft permit includes a special condition (No. 25) requiring that a certified industrial hygienist be present throughout project construction and witness all proposed excavation work. According to the condition, the hygienist must be capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and have authorization to take prompt corrective measures to eliminate such hazards and conditions.

Baykeeper's concerns about existing site contamination, pesticides and noise, to the extent they were raised separately in its initial petition, are addressed elsewhere in these rulings.

Issue Twelve: Soil Vapor Intrusion [Baykeeper Reply Brief, pages 32 to 37]

According to Baykeeper, subsurficial contaminant testing must be performed within the footprint of the former incinerator building to ensure that future site development goes forward in a manner that protects construction workers, DSNY employees, adjacent residents and occupants of adjacent non-residential buildings. Such testing is necessary, Baykeeper says, because of the risk of soil vapor intrusion, a process by which volatile chemicals migrate from a subsurface source into a building's indoor air.

Baykeeper is concerned that construction of the new marine transfer station will release volatile chemical vapors from the subsurface beneath the old incinerator. To address this concern, Baykeeper requests an order directing DSNY to perform borings within the incinerator footprint, and to test the soil media and groundwater as potential pathways for vapor contamination. Should the test results indicate a need for major remediation, Baykeeper says such remediation should be done before any permits are issued, any excavation is begun and any contracts are let.

According to Baykeeper, the risk of soil vapor intrusion is heightened at this site by a number of factors including the relative permeability of subsurface soils, which would facilitate vapor flow, and the installation of below ground infrastructure as part of the transfer station's development.

RULING: No issue exists for adjudication, nor is additional site testing required to make determinations on the pending permit applications.

At any time during the review of an application for a new permit, DEC may request in writing any additional information which is reasonably necessary to make any findings or determinations required by law (6 NYCRR 621.14(b)). Baykeeper says that subsurficial testing must be done within the footprint of the former incinerator building not to ensure compliance with a regulatory permitting standard, but instead to comply with DEC's own policies, in particular DEC's program policy DER-13, "Strategy for Evaluating Soil Vapor Intrusion at Remedial Sites

in New York," dated October 18, 2006 (attached as Exhibit "M" to Baykeeper's reply brief).

According to DER-13, DEC's policy is that the soil vapor intrusion pathway will be evaluated at all contaminated sites in New York, both sites where remedial decisions have not yet been made and sites where remedial decisions were made in the past. These sites "include all Resource Conservation and Recovery Act (RCRA) Corrective Action sites, inactive hazardous waste disposal sites (State Superfund), Voluntary Cleanup Program sites, Brownfield Cleanup Program sites, and Environmental Restoration Program sites." (See DER-13, page 1.) As DEC Staff points out, the project site does not fall into any of these categories, which means the policy does not apply to it. DEC Staff also says it is not aware that hazardous waste has or may have been disposed of at the site, and that if it were made aware that such disposal had or was likely to have occurred, it would conduct a preliminary site assessment, which is akin to the preliminary assessment that resulted in the April 2008 report, which led EPA to conclude that no further site remediation is warranted.

As the administrative law judge assigned to this matter, I could order further testing if the information resulting from that testing would be relevant to determining compliance with a statutory or regulatory permitting standard. However, no such standard is cited by Baykeeper, and for that reason I have no basis to direct the testing it requests, or to identify an issue requiring adjudication.

Issue Thirteen: Traffic Impacts Associated with Coney Island's Renovation [Baykeeper Reply Brief, pages 38 to 42]

According to Baykeeper, a portion of the project site, or land adjacent to it, at or near the Nellie Bly children's amusement park, has been identified by the City planning department as a potential site for a new parking garage associated with the proposed redevelopment of Coney Island. Baykeeper says the location of a new parking facility close to the proposed marine transfer station would increase traffic congestion, delaying trucks traveling to and from the station while increasing stop-and-go traffic, idling times, air pollution, noise and risk to pedestrians. Accordingly, Baykeeper requests that DSNY be required to perform a new multi-season traffic analysis that factors in any changes recommended by the planning department. Also, Baykeeper requests that any DEC permit be conditioned to prohibit use of any part of the project site for parking that is unrelated to the operation of the marine transfer station.

RULING: No issue exists for adjudication.

As DSNY and DEC Staff both argue, traffic impact issues arise solely under SEQRA and have no connection to a relevant DEC permitting standard. The FEIS for the transfer station considered the impacts it would have on local traffic, but that FEIS was developed by DSNY, and DEC, not being the lead agency, has no authority to direct that any portion of it be redone or supplemented.

As DSNY confirmed in papers dated September 26, 2008, the Nellie Bly site, adjacent to its own, is being considered as a possible parking area in the context of a City rezoning project for Coney Island. This is apparently a recent development, one that postdates the FEIS for the marine transfer station project. Even so, both projects are unrelated, and the rezoning project, which concerns a plan for Coney Island's redevelopment, is subject to a separate environmental review. Until there is a definite proposal for new parking at the Nellie Bly location, any consideration of its impacts would be speculative and premature. Because no new parking is being proposed for the site of the marine transfer station, Baykeeper's proposed permit condition is unnecessary.

Issue Fourteen: Applicant Fitness [Reply Brief, pages 58 to 61]

Baykeeper maintains that DSNY and, more generally, the City are unfit to receive the permits requested in this matter due to a history of non-compliance with environmental laws. That history, Baykeeper says, includes the long-time operation of the Southwest Brooklyn incinerator without a permit from DEC, a circumstance conceded by DEC Staff counsel at the issues conference (Transcript, page 129), and alleged air pollution violations tied to the incinerator's operation, which were addressed through a series of orders on consent.

Baykeeper says that DSNY should be considered a "bad actor" and, on that basis, the permits should be denied or, at the least, they should be modified to include such things as heightened scrutiny of facility operations, greater transparency and disclosure, and penalty provisions to address potential violations of their provisions.

RULING: DSNY's fitness shall not be adjudicated as a hearing issue.

Permit denial is not warranted given the distinctions between operations of an incinerator and a marine transfer station. While Baykeeper has provided information suggesting a poor operating record for the former incinerator, the alleged violations highlighted by Baykeeper -- which concern emissions from its smokestack -- are long past (because the incinerator stopped operating in 1991) and would not recur at a facility where waste is merely containerized, not burned.

Construction and operation of a marine transfer station presents its own set of environmental concerns, but those activities would be monitored by DEC. Also, DSNY, pursuant to special condition No. 46, would be required to make payments to support the cost of that monitoring. Pursuant to special condition No. 23-C, DSNY would have to retain, subject to DEC's approval, an independent environmental monitor to inspect the excavation and handling of on-site soils, which is of special concern to Baykeeper. Finally, as discussed below in relation to the permit conditions, there are various requirements for DSNY's disclosure of operating information to DEC, the CAG, and, through DSNY's website, the general public. Overall, the terms of the draft permit ensure adequate oversight of DSNY's activities.

Issue Fifteen: Historic Burden on Surrounding Community
[Reply Brief, pages 61 to 63]

Baykeeper says that neighbors of the project site have "suffered enough" from the long-term operation of the former incinerator, which they associate with a high rate of cancer in their community as well other longstanding insults to their quality of life. According to Baykeeper, easily performed tests could indicate the presence of dioxin in the blood of people living near the project site; however, DSNY has not performed such tests, nor has it made other attempts to evaluate the incinerator's impact on public health. As a matter of fairness and environmental justice, Baykeeper argues, any new marine transfer station should be relocated, and this site should be remediated more thoroughly.

RULING: No issue exists for adjudication. This hearing concerns the proposal for the new marine transfer station and whether it complies with DEC's permitting criteria. While there are legitimate concerns about the impacts the incinerator may have had on public health, such impacts are not relevant to the decisions to be made in this permitting matter.

Issue Sixteen: Adequacy of Permit Conditions [Petition, pages 63 to 67]

As noted above, before referring this matter to hearing, DEC Staff prepared a draft permit (Exhibit No. 6) that it determined could be issued to DSNY. Baykeeper addressed the terms of this permit in its petition for party status, arguing that particular conditions should be clarified and strengthened, and that additional significant conditions should be imposed. DEC Staff presented modified draft permits with its briefs dated May 30 and September 26, 2008. Baykeeper's objections to the draft permit as initially presented, and as modified, are discussed below.

- - Truck Queuing [Petition, pages 63 and 64; Reply Brief, page 50]

DEC Staff's initial draft permit included a special condition (No. 36) prohibiting truck queuing on a public street in association with the operation of the marine transfer station. However, it did not explain how the condition would be enforced and what penalties would be assessed for non-compliance. Baykeeper said there should be conditions specifying how DSNY will prevent queuing on public streets. Baykeeper proposed that there be language requiring DSNY to have a staff member stationed at the foot of the facility access ramp, and providing penalties for truck queuing, including cessation of operations if queuing occurs too frequently.

DEC Staff responded to Baykeeper's concern by adding special condition No. 40-D to its draft permit. That condition requires DSNY to install video cameras in locations that allow for views of the ramp, on-site queuing areas, and the public street that provides access to the facility. It also grants DEC unrestricted access to those cameras and their electronic records. DEC Staff earlier imposed a similar condition in the draft permit for DSNY's East 91st Street marine transfer station, after petitioners in that matter also raised concerns about trucks queuing on public streets.

In the East 91st Street matter, DEC Staff also added a condition requiring that DSNY station a staff person at the foot of the facility's access ramp to monitor and control truck traffic when waste deliveries occur. Here, however, both DSNY and DEC Staff say that such a condition is not necessary. DSNY points out that the Southwest Brooklyn marine transfer station would be part of a larger garage complex for its vehicles, whereas the East 91st Street marine transfer station is along

busy York Avenue in Manhattan, immediately adjacent to Asphalt Green, which provides outdoor recreation areas for children.

RULING: No further permit amendments are necessary.

Video camera surveillance of the public street that provides access to the marine transfer station, coupled with real-time, unrestricted access to the video record by DEC Staff, would be effective to confirm compliance with the no-queuing requirement. The situation at DSNY's Southwest Brooklyn marine transfer station is not comparable to that at its East 91st Street marine transfer station, in that York Avenue, in front of the East 91st Street facility, has heavy vehicle and pedestrian traffic, with large numbers of people crossing in front of the foot of the access ramp, which justifies stationing a staff person there not only to prevent trucks from queuing, but to ensure pedestrian safety. Video camera surveillance at the Southwest Brooklyn facility would be sufficient by itself to detect on-site queuing, and DEC's access to the surveillance information would provide relevant evidence to support 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. Potential penalties are set by statute and need not be fixed or referenced in the permit. Also, the penalty that would be assessed in any particular case depends on a number of factors, so fixing penalties in advance of a violation would not be appropriate. According to 6 NYCRR 621.13(a), a permit may be revoked due to a permittee's failure to comply with any of its terms or conditions. Therefore, the permit need not specify that a violation of its conditions could result in a facility shutdown.

In its reply brief, Baykeeper says that special condition No. 36 is vague, though I agree with DEC Staff and DSNY that it is clear enough to impose an enforceable obligation.

- - Health and Safety Plan [Petition, page 64]

According to Baykeeper, special permit condition No. 16, which references the application documents to which construction must conform, does not take into account so-called "toxic conditions" at the site. Baykeeper requests that a "health and safety plan" for site construction be provided for review prior to permit approval.

RULING: No health and safety plan is required.

Special condition No. 16 requires that the marine transfer station be constructed in accordance with an engineering report that is part of DSNY's permit application, except where that report conflicts with any permit provision, in which case the permit provision must prevail. Special condition No. 25, as amended, requires that during any proposed construction, and any proposed excavation in particular, all appropriate health and safety measures must be deployed and maintained, in addition to dust suppression techniques set out in special condition No. 23-A. Furthermore, special condition No. 25 requires that construction proceed under the instructions of a certified industrial hygienist who would be present throughout the construction and witness all proposed excavation. As explained in that condition, the hygienist would be responsible for identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and would be authorized to take prompt corrective measures to eliminate such hazards and conditions. In other words, the hygienist would be there to ensure protection of the public health and safety, thereby addressing Baykeeper's concern.

Baykeeper claims that a health and safety plan must be furnished prior to permit approval, but cites no regulation requiring such a plan as part of the permit application. Nor does Baykeeper specify what the plan it wants would encompass. For these reasons, and given the function of the industrial hygienist, Baykeeper's request is denied.

In its reply brief, Baykeeper also claims that more complete characterization of soils, particularly those beneath the footprint of the former incinerator, should take place before construction so that the industrial hygienist can recognize and predict hazards posed by the soils' residual contamination. I disagree. As DEC Staff points out, the area of the incinerator is now a vacant lot covered with concrete and asphalt, and the incinerator's subsurface receiving pit was backfilled with clean refractory brick pursuant to a DEC Beneficial Use Determination ("BUD") issued in 2003, and then paved over.

- - Transfer, Transport and Disposal Plan [Petition, page 64]

According to Baykeeper, deferring DSNY's submittal of a final transfer, transport and disposal plan until 90 days prior to commencement of operations, as contemplated by special

condition No. 20, leaves DEC without authority to deem the Part 360 application complete and issue a permit allowing construction of the marine transfer station. Baykeeper objects to this condition and says the plan must be provided now.

RULING: The lack of a final transfer, transport and disposal plan does not render the application incomplete, as DSNY's interim plan provides sufficient information to support permit issuance. Provision of a final plan can be deferred until just prior to commencement of operations, consistent with special condition No. 20, as noted above in my ruling on Baykeeper Issue Two.

- - Extension of Disposal Facility Permits, and Identification of Back-Up Disposal Facilities [Petition, page 65; Reply Brief, page 42]

Special condition No. 42 states that prior to the expiration of any state permit required to operate a disposal facility to which waste from the marine transfer station would be sent, DSNY must provide DEC with a complete copy of the renewal or extension of the permit. Furthermore, it provides that if DSNY fails to do so, or if any such disposal facility loses any government authorization required for its operation, DSNY must immediately cease sending waste to that facility, and must notify DEC of such cessation and the reason(s) for same.

According to Baykeeper, the public should be notified of each permit extension. Also, Baykeeper says that DSNY should be required to identify back-up facilities at least 90 days prior to the expiration of any state permit required to operate a disposal facility to which its waste is sent, to avoid potential emergencies and the overloading of other facilities. In effect, it requests a contingency plan that would be subject to DEC approval.

RULING: No permit amendment is required.

DSNY has demonstrated that there is more than enough disposal capacity for the waste that would be generated by this marine transfer station and the other three it has proposed, and that this disposal capacity is enhanced by the movement of waste in shipping containers by rail or ship. As noted above, DEC has an interest in ensuring that waste goes to permitted disposal sites, but that is satisfied by the existing language of special condition No. 42. Requiring that back-up facilities be identified prior to the expiration of each disposal site permit

on the chance, however slim, that the permit will not be renewed or extended would put an undue burden on DSNY, particularly if, as it appears, there will be ample disposal capacity for DSNY's waste. Furthermore, a contingency plan, as described by Baykeeper, is not required under Part 360.

Finally, the information DSNY provides under this condition would be available from DEC under the state's Freedom of Information Law (FOIL). Public notice of each permit extension is unnecessary to ensure that waste is disposed of properly; DSNY's notice to DEC suffices for that purpose.

- - Containerization and Removal of Waste [Petition, page 64]

Special conditions No. 33 and 34 of the draft permit say 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). Baykeeper maintained that these conditions should impose reporting obligations if the conditions are violated, and penalties for non-compliance. DEC responded first by adding language to both conditions requiring that the permittee maintain a record of any exceedance of these time periods. Subsequently, DEC added other language requiring that such records be provided to DEC and the Community Advisory Group ("CAG"), and posted on DSNY's website, within a week of the exceedance.

RULING: No further permit amendment is warranted.

DEC Staff's permit revisions answer Baykeeper's requests for documentation and reporting. The permit need not specify penalties for exceedances, as decisions in that regard are subject to DEC's enforcement discretion, and penalties could vary depending on the circumstances of any particular violation.

- - Notice of Public Emergencies [Petition, page 64]

Special condition No. 17-A limits acceptance of municipal solid waste to 2,106 tons per day except in defined upset or emergency conditions. According to the condition, there is an upset condition limit of 4,290 tons per day and an emergency condition limit of 5,280 tons per day.

In its petition, Baykeeper said that DSNY should be required to give notice of public emergency events both to the New York State Department of Health ("DOH") and to the community. Subsequently, DEC added special condition No. 17-B, which

requires that DSNY notify DEC's regional solid waste engineer and the chairperson of the CAG "as soon as practicable, but in no case later than 3 hours, via telephone and e-mail . . . after the onset of any upset or emergency condition."

RULING: No further permit amendment is necessary.

Notification of the CAG chairperson suffices in terms of community notification that a public emergency exists. Because the marine transfer station is regulated by DEC, not DOH, notification of DEC's regional solid waste engineer suffices as a notification of state authorities.

According to special condition No. 17-B, DSNY's notification of the onset of any upset or emergency condition must specify the date and time of the condition, whether it is an upset or emergency, the reason for the need for the condition, the detailed underlying cause for the occurrence (if then known), measures taken to address the condition, the expected end date and time of the occurrence, the name of the person who authorized the condition, and the expected number of daily truck trips during the condition. If the expected end date of the condition is delayed, then DSNY must notify DEC and the CAG of the reasons for the delay and the modified end date within 24 hours of learning of the expected delay. Finally, at the end of the upset or emergency, DEC and the CAG chairperson must be alerted within two business days of the date and time when the condition ended, the tons of solid waste received per day during the upset or emergency, the number of trucks per hour passing over the scale, and any unexpected or unusual occurrences during the condition. All this information about upset and emergency conditions must also be posted to DSNY's website within seven days of any required submittals to DEC and the CAG.

In its reply brief, Baykeeper proposed that the information also be provided through DEC's website. I disagree; putting the responsibility on DSNY, as the entity generating the information, makes better sense. Baykeeper also proposed that information be broadcast over the radio, but I find that unnecessary in light of the other avenues by which information can be retrieved.

Finally, Baykeeper proposed that DSNY release information not only about the measures taken to address any upset or emergency that occurs, but also about any measures that are in place to prevent such conditions from happening again. This is not a practical proposal, as events that would give rise to an emergency or upset condition -- terrorist acts, explosions, power outages, and severe or extreme weather conditions such as

hurricanes, snow and ice storms, and flooding -- are by their nature unpredictable in terms of when, where and how they might occur, and the impacts they would have on DSNY's solid waste management system. DSNY cannot reasonably be expected to anticipate each contingency, but must react to events as they unfold, with protection of public health, safety and the environment all in mind, as the draft permit already requires.

- - Facility Storage Limit [Baykeeper Reply Brief, page 43]

As special condition No. 18, DEC Staff's draft permit sets a facility storage limit of no more than 634 tons (2,818 cubic yards) on the loading floor and 48 full containers of waste on each of two barges moored at the facility, plus 48 containers stacked on the facility's pier, for a total of 3,802 tons. In its reply brief, Baykeeper requested that in case of any exceedance of that limit, other than in the event of upset and emergency conditions, "state and public notices be provided, including, without limitation, immediate posting on DSNY's website."

RULING: The permit shall be amended to require that DSNY maintain records of any exceedance of the storage limit (other than those triggered by upset and emergency conditions), and provide such records to DEC and the CAG, and post them on DSNY's website, within a week of each exceedance. This will ensure that such exceedances are treated like exceedances of the time limits for waste containerization and removal, as established in special conditions No. 33 and 34. Requiring that DSNY self-report these exceedances promptly will provide DEC an opportunity to investigate the reasons behind them, in an effort to prevent their recurrence. Also, the public's interest in knowing that the storage limit is being maintained is at least as strong as its interest in knowing that waste is being containerized and removed in a timely manner.

- - Notices of Intent to Construct and Operate [Baykeeper Reply Brief, page 44]

Special condition No. 21 requires that no less than five days prior to the dates when DSNY proposes to commence both the construction and operation authorized by the permit, DSNY must deliver written notice to DEC. Baykeeper requests that public notice be provided simultaneously, including posting at the site itself.

RULING: No additional notice is required, as the apparent intent of the condition is to alert DEC, as permit overseer, to

DSNY's activities. Nonetheless, DEC Staff has now modified the condition to require that an additional copy of DSNY's notice be mailed to the CAG and posted on DSNY's website within seven days of the mailing.

- - Contract Penalties for Part 360 Violations [Petition, pages 64 and 65]

Special condition No. 19 requires that all work, construction and operation associated with the project and authorized by the permit comply with all applicable provisions of Part 360. Baykeeper says that this condition should be strengthened with penalty clauses in any contract that is let.

RULING: No permit amendment is warranted.

As DEC Staff points out, it can hold any contractor who violates Part 360 liable for its violation, just as it can hold DSNY liable. Also, DSNY notes that it has existing mechanisms for enforcing its contracts. DEC's responsibility is to enforce the regulations and the terms of its permits, and has no legitimate role in setting the terms of DSNY's contracts. DEC Staff retains discretion with regard to the penalties it seeks for violations of Part 360 and the permits issued pursuant to that part.

- - Disposal of Toxic Consumer Products [Petition, page 65; Reply brief, page 49]

Special condition No. 32 states that, in accordance with ECL Article 27, Title 21, the transfer station shall not knowingly or intentionally accept any mercury-added consumer products. ECL 27-2101(7) defines such products as devices and materials into which elemental mercury or mercury compounds were intentionally added during formulation or manufacture, and in which the continued presence of mercury is required to provide a specific characteristic, appearance or quality, or to perform a specific function. Examples of such products include any of the following which contain mercury: thermostats, thermometers, switches, medical or scientific instruments, electric relays and other electric devices, lamps, and batteries sold to consumers, not including button batteries.

According to Baykeeper, the list of toxin-added consumer products addressed by this special condition should be expanded to include cadmium and lead. Furthermore, Baykeeper says it is unclear who would be responsible for oversight, inspection and

monitoring of what is accepted at the marine transfer station and where rejected materials would go. Finally, Baykeeper says the standard of "knowingly or intentionally" is "knowingly and intentionally left vague."

RULING: No permit amendment is warranted.

According to DEC Staff, the language of special condition No. 32, which addresses only mercury-added consumer products, is added to all similar solid waste management facility permits, on account of ECL Article 27, Title 21, which restricts such products' disposal due to mercury's dangerous and non-biodegradable nature. In particular, ECL 27-2105(3) says that no solid waste management facility shall "knowingly or intentionally" store, recycle or dispose of any mercury-added consumer products except in accordance with regulations promulgated pursuant to this article. Staff's condition merely confirms DSNY's statutory responsibility, which is clear enough and does not require further clarification.

As a practical matter, it may not be possible for DSNY to screen all mercury-added consumer products from its waste stream, which is why ECL 27-2103 requires the labeling of such products to clearly and conspicuously inform the consumer that mercury is present in them and that they shall not be disposed of or placed in a waste stream destined for disposal in mixed municipal solid waste until the mercury is removed and reused, recycled or otherwise managed to ensure that the mercury does not become part of solid waste or contaminate groundwater. Furthermore, ECL 27-2105(1) says that no person shall knowingly or intentionally dispose of a mercury-added product in solid waste or otherwise dispose of such a product except by separated delivery thereof to a solid or hazardous waste management facility that is duly permitted or authorized to accept it.

As DSNY points out, no similar state law exists with regard to other substances, nor did Baykeeper explain why the permit should treat cadmium and lead in the same manner as mercury.

- - 24-Hour Hotline [Petition, page 65]

Baykeeper requests a new permit condition requiring that a 24-hour hotline be established and maintained for the public to report nuisance conditions or violations of permit conditions to DSNY. Baykeeper says the condition should require that complaints be responded to within a certain period of time, and that signs alerting the public to the hotline number be posted.

RULING: No such condition is warranted. As DEC Staff and DSNY both argue, the City's 311 system provides a mechanism to report these types of matters, and DEC has enforcement authority to ensure that nuisance conditions are abated. A separate hotline for this facility would be redundant. A similar request for a new hotline for DSNY's East 91st Street marine transfer station was denied at page 57 of my issues rulings in that matter.

- - Citizens Committee [Petition, page 65]

Baykeeper says there should be a new condition establishing a citizens committee providing community oversight of the marine transfer station. As proposed by Baykeeper, that committee would communicate its concerns to DSNY directly and on a periodic basis, having timely and meaningful input into all plans for the facility.

RULING: No such condition is warranted. As DSNY argues, the community is already served by the CAG established under the SWMP to advise the mayor and other elected officials on issues concerning construction and operation of the transfer station. DEC Staff also pledges its availability to any individual or group that wants to communicate its concerns. A similar request that a new citizens committee be created for DSNY's East 91st Street marine transfer station was denied at page 57 of my issues rulings in that matter.

- - Fuel and Emissions Controls [Petition, page 66]

Baykeeper says there should be a new condition requiring that all diesel fuel-powered trucks accessing the facility be required to 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-B, which tracks the code requirements.

Both DSNY and DEC Staff agree that DEC lacks authority to impose similar requirements concerning commercial trucks under the facility's air permit. According to them, 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. They add that while DEC may regulate emissions from stationary

sources under the air facility permit regulations, there is no legal basis for DEC to impose conditions related to mobile sources that may travel to and from the facility, absent a voluntary agreement.

RULING: A new condition governing all diesel fuel-powered trucks accessing the facility - - not just DSNY's own collection trucks - - is not 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 Baykeeper 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 emission 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.

This ruling repeats one I made in my issues rulings in the matter involving DSNY's East 91st Street marine transfer station. There too DSNY and EDF negotiated the same condition regarding DSNY's own collection vehicles, and petitioners sought to expand the condition to cover all diesel fuel powered trucks, just as Baykeeper proposes now. A full discussion of the issue as presented in that case, which applies likewise here, is found at pages 58 to 62 of my issues rulings.

- - Anti-Idling Controls [Petition, page 66]

Baykeeper says that state and city laws that prohibit heavy trucks from idling more than five consecutive minutes will not be sufficient to mitigate air quality impacts, and that extra precautions must be taken, such as extending environmental monitoring and enforcement beyond the facility. Baykeeper says that DSNY should be required to fund the expanded monitoring, which DEC would provide.

RULING: Compliance with existing state and local laws, which prohibit excessive idling, is already required by the permit. DEC may monitor compliance with anti-idling laws beyond the immediate vicinity of the facility, but has no authority to compel DSNY to pay for such funding, particularly under the terms of the transfer station permit.

- - Pesticide Management Plan [Petition, page 66; Reply Brief, pages 51 to 53]

To the extent that DSNY intends to use pesticides and rodenticides, Baykeeper says a condition should be added requiring that DSNY formulate a detailed pest control plan for prior EPA, DEC and community review and approval. Baykeeper says it is essential that every precaution be taken in the plan to minimize the environmental and public health effects from the use of pesticides and rodenticides.

RULING: No new condition is necessary in this regard.

Baykeeper's claim here is basically a restatement of a claim raised as part of its Issue One, concerning project impacts on public health, safety and welfare, and addressed in these rulings as part of that issue. A pest control plan, as described by Baykeeper, is not a required element of an application for a solid waste management facility or transfer station. The operational requirements for all solid waste management facilities require that they be maintained so as to prevent or control on-site populations of vectors using techniques "appropriate for protection of human health and the environment" [6 NYCRR 360-1.14(1)]. Also, the operational requirements particular to transfer stations require that insects and other nuisances be controlled, and that the transfer station and transfer vehicles be cleaned to prevent vectors [6 NYCRR 360-11.4(e)]. DEC's Part 325 regulations govern the application of pesticides, and address Baykeeper's environmental and health concerns. Through its environmental monitoring, DEC is in a position to assure compliance with these regulations, but there is no legal basis to insist that plans for pesticide application be subject to community review and approval before those plans are implemented.

In its reply brief, Baykeeper argues that without approval of a comprehensive plan for the application of pesticides at and around the project site, DSNY avoids accountability in this area. However, even in the absence of a plan, DSNY would be accountable to DEC under the Part 325 regulations to ensure that pesticides

are applied safely, and under Part 360 to ensure that insects and vectors are controlled.

- - Mitigation Plan [Petition, page 66]

Baykeeper says that DSNY must have a "mitigation plan" to avoid, minimize, rectify and compensate for impacts.

RULING: A new permit condition requiring such a plan is not necessary. Though the petition does not explain whether its proposed plan would encompass all or some project impacts, there is already a requirement (under special condition No. 57) that DSNY submit a mitigation plan to address the natural resource impacts of activities, including dredging, that occur in Gravesend Bay. (See discussion, above, regarding Baykeeper Issue Seven.) DSNY and DEC Staff acknowledge that these activities would have impacts on tidal wetlands, and that to compensate for those impacts at this and the other three marine transfer stations proposed by DSNY, other wetlands within New York Harbor should be created and restored.

The permit applications and FEIS already address projected impacts of the project as a whole in a comprehensive fashion. The costs associated with mitigation measures are of direct concern to DSNY, but DEC is concerned only with the adequacy of those measures from an environmental protection standpoint.

- - Stormwater Management Plan [Petition, pages 66 and 67]

Baykeeper requests a permit condition requiring that DSNY incorporate low-impact development in its site plans for the proposed transfer station, to offset stormwater pollution problems.

RULING: No such condition is warranted. As discussed above in relation to Baykeeper Issue Six, the facility is already designed to collect and process stormwater runoff before it enters Gravesend Bay. Low-impact development features are not required under the applicable permitting regulations.

- - Automatic Penalties for Non-compliance [Petition, page 67]

Claiming DSNY is a "bad actor" in terms of its compliance with environmental laws at this site and others throughout the city, Baykeeper says substantial per-day penalties should be set for violations of the permit, and that 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 responds that the conditions contained in its draft permit provide reporting requirements and mechanisms for DEC oversight greater than those required by Part 360. Combined with DEC's enforcement authority under ECL and Part 360, Staff contends that it has sufficient enforcement tools.

DSNY agrees that DEC's enforcement authority over the terms of all permits it issues need not be set out as a separate permit condition, and that the requirement of an environmental monitor will ensure adequate oversight and enforcement.

RULING: No new condition is warranted. DEC Staff shall retain discretion as to whether to undertake enforcement action for any permit 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 itself does not allow for consideration of the full range of relevant circumstances that are present when a violation occurs. This repeats what I said at page 64 of my issues rulings in the permitting hearing for the East 91st Street marine transfer station, where a similar request was made by petitioners there.

- - Soil Management [Reply Brief, pages 45 to 47]

After the issues conference, DEC Staff modified its draft permit to add conditions placing environmental controls on dust, erosion and sedimentation, and requiring monitoring for these things during construction of the facility. In its reply brief, Baykeeper took issue with special condition No. 23 as revised, which addresses these topics.

Special condition No. 23-A requires DSNY to develop and implement a soil management plan covering areas of the site where soils will be disturbed by construction. According to Baykeeper, this plan, for the suppression of fugitive dust and the monitoring of particulate matter, should be presented to and approved by DEC before any permit is granted. Also, Baykeeper says that the plan should require a chemical analysis of the dust to determine its toxicity, and a chemist should be employed to oversee both monitoring and control measures.

Special condition No. 23-B requires DSNY to maintain erosion and sedimentation controls until disturbed soil is stabilized by either an impermeable layer, such as asphalt pavement, or by

coverage of two feet of clean fill. Baykeeper objects to any capping with an impervious layer, arguing that it would trap any toxic substances and allow them to migrate to other areas and eventually into Gravesend Bay. Also, Baykeeper says that capping with soils would allow vapors to escape into the air or intrude into the newly constructed facility.

Finally, special condition No. 23-C requires DSNY to retain an independent environmental monitor to be present at all times during excavation and handling of soils on-site, and to conduct regular inspections during all construction activities. According to Baykeeper, the monitor should be present at all times during the construction and operation of the facility, and report not only to DEC, but to the surrounding community. Baykeeper says DSNY should not be able to request approval to modify the monitor's duties without an evidentiary showing of good cause, and that the work histories of engineers retained as monitors should be closely scrutinized in light of recent events involving the failure of construction cranes and so-called "irregularities" by City inspectors.

According to special condition No. 23-C, if DSNY's control measures are either non-operational or ineffective in controlling dust, erosion or sedimentation, the monitor shall direct DSNY to cease all construction activities resulting in these problems, allowing DSNY an avenue to appeal the monitor's directives to a DEC engineer, who shall have ultimate authority in the matter. The permit provides that if DEC's engineer does not resolve the appeal and communicate a decision to DSNY within 24 hours of DSNY's written appeal, any construction activities suspended or halted may resume during the appeal's pendency. Baykeeper objects to this, and says work must be stopped until hazardous conditions are resolved to DEC's satisfaction, whenever that is.

RULING: Submittal of a soil management plan at this time is not necessary. As DEC Staff argues, submittal of the plan no later than 90 days after the effective date of the Part 360 permit and prior to the commencement of construction of the facility, as required by the draft permit, provides adequate time for Staff's review of the plan. Special condition No. 23-A requires that DSNY employ "reasonable" fugitive dust suppression techniques during all site activities which may generate fugitive dust. While particular techniques are not specified in the condition, Baykeeper has not proposed any for inclusion.

Dust control during the facility's operation is addressed in the Part 360 application, where it states that dust suspended in the air, caused by the tracking of mobile equipment and

collection vehicles and by tipping waste, would be controlled by a system involving pressurized nozzles creating a fine mist over the tipping and loading floors. (See engineering report, page 70, in Volume 1 of the application.) Also, Part 360 includes operating requirements that dust be effectively controlled "so that it does not constitute a nuisance or hazard to health, safety or property," and that all measures as required by DEC be undertaken "to maintain and control dust at and emanating from the facility" (6 NYCRR 360-1.14(k)).

Chemical analysis of fugitive dust generated during facility construction is not required because there is no evidence that the soils at the site are highly toxic; in fact, the record indicates that they have low levels of contamination typical of urban fill, and that there is no incinerator ash or ash residue remaining at the site. Also, as DEC Staff points out, its permit requirements for particulate monitoring are the same as those embodied in DEC's recommendations for monitoring during construction activities which may generate fugitive dust from contaminated soil at hazardous waste sites. (See DER-10, "Technical Guidance for Site Investigation and Remediation," March 2008, Appendix 1B, attached as Exhibit "F" to DEC Staff's reply brief of September 26, 2008.) These recommendations involve the use of real-time monitoring equipment capable of measuring particulate matter less than 10 micrometers in size (PM-10) and capable of integrating over a period of 15 minutes (or less) for comparison to the airborne particulate action level, but do not involve chemical analysis of the particulate matter.

Baykeeper says that without knowing the make-up of the materials to be excavated or the dust that will be generated, effective control measures cannot be designed, but does not explain why this is so. However, it quotes a statement I made in a March 7, 2001, ruling in Matter of the Application of Waste Management of New York, LLC, a permitting case involving a proposed landfill in Albion, New York. In that ruling, addressing an issue concerning the ability to monitor the surroundings for a possible release of leachate through the bottom liner, I said, "The ability to monitor and remediate depends upon a proper understanding of the subsurface environment in which the landfill is located, working from the legal presumption that a release may occur, because if no release were possible, there would be no reason for the monitorability requirement in the first place."

The statement referred to a regulatory requirement at 6 NYCRR 360-2.12(c)(5), which states that "new landfills must not

be located in areas where environmental monitoring and site remediation cannot be conducted." This requirement is peculiar to landfills, and does not apply to transfer stations. The reference to "subsurface environment" was to the patterns of groundwater flow, knowledge of which is important to fixing monitoring well locations and tracing a release back to its source. The references to monitoring and remediation concerned impacts from the movement of leachate through the groundwater, not the movement of toxic dust through the air. Baykeeper argues that only a thorough chemical analysis of the dust that is generated during construction of the transfer station will dictate appropriate remediation and precautions. But to support this contention, it has taken a ruling I made in another case and quoted it entirely out of context.

Turning to special condition No. 23-B, the purpose of capping disturbed areas after construction is to prevent sedimentation and erosion, as DEC Staff points out. While Baykeeper is critical of capping with either pavement or clean fill, it offers no alternatives, nor does it explain how capping would facilitate the migration of toxins in the soil. Baykeeper's claims in this regard are not supported by an expert offer of proof.

Finally, there is no need for the independent environmental monitor, retained by DSNY under special condition No. 23-C, to remain onsite to oversee operations, as there is a separate provision (special condition No. 46) requiring DSNY to fund DEC's own monitoring of both construction and operation of the marine transfer station. The monitor need only report to DEC (and not to the public generally) because the job of the monitor, as stated in special condition No. 23-C, is to ensure that the DEC-approved soil management plan, including dust suppression and particulate monitoring, as well as all sediment and erosion controls, are in effect, and to alert DEC if any element of the plan is non-operational or ineffective. According to the special condition, all information kept by the monitor -- including, but not limited to, inspection reports, field notes, monitoring data, graphics, databases, and minutes of meetings -- will be accessible to DEC and subject to release under the state's Freedom of Information Law, thus protecting the public's right to know. DSNY may request DEC's approval to modify the monitor's duties, but, as DEC points out, the monitor's scope of work must include ensuring the implementation of the soil management plan as well as the sediment and erosion controls. The monitor's particular duties will depend on the activities the monitor oversees, but any change in those duties shall require the

approval of DEC Staff, and Staff shall determine for itself whether any requested change is warranted.

As indicated in the permit, DEC Staff shall also retain approval authority with regard to the monitor's retention, discharge and replacement. The permit states that the monitor, if an individual, must be a professional engineer licensed by New York State or, if an engineering firm, must provide an employee who meets that requirement. The permit states that a monitor candidate shall not be rejected by DEC solely because that person has other business with a City agency, but adds that a candidate having business with DSNY shall be automatically excluded from consideration, presumably because that business could compromise the candidate's independence. Needless to say, it is important that monitors demonstrate competence and integrity, but DEC Staff can ensure this by evaluating the credentials and work histories of any candidates who are proposed.

Baykeeper objects to the 24-hour time frame for DEC's engineer to address DSNY's appeal of any monitor directive that construction activities cease, noting that once that time frame passes, the permit language allows such activities to resume while the appeal remains pending. Baykeeper is concerned that this may lead to the resumption of hazardous activities if DEC, for whatever reason, does not respond to appeals in a timely manner. This is a legitimate concern; however, DEC Staff established the time frame itself, and presumably concludes that it affords sufficient time to review the situation and communicate its decision to DSNY. I shall defer to Staff's judgment in this regard, also noting DSNY's interest in avoiding unnecessary construction delays.

- - Reuse of Concrete, Brick and Rock [Reply Brief, pages 48 and 49]

Special permit condition No. 26, addressing construction of the facility, allows for the reuse of uncontaminated and recognizable concrete, brick and rock. As Baykeeper points out, there is no language requiring a chemical analysis to determine whether or not these materials are contaminated. According to Baykeeper, contamination cannot be determined on the basis of visual inspection alone; some form of testing is required, and the plans and protocols for that testing must be provided before any materials are excavated.

RULING: No permit amendment is necessary. As DSNY points out, Baykeeper has provided no support for its assertion that these materials would be contaminated in the first instance, or

that they would contain any contamination that would not be apparent in the absence of some unspecified testing.

- - Use of Existing Marine Transfer Station [Reply Brief, page 49]

Special condition No. 28 sets out a procedure by which DSNY may seek DEC's authorization for minor project alterations, such as the reconfiguration of the facility's physical plant without the addition of any waste processing equipment. Baykeeper says that the term "physical plant" should be limited to the newly built structure, so that the permit is not read to allow use of the former waste transfer station that still exists at the site.

RULING: No further definition of the term "physical plant" is necessary. It is clear enough from the face of the permit that the "facility" in question is the new marine transfer station that is the subject of DSNY's application, not the existing facility, at the western edge of the project site, which had been used to move uncontainerized waste to the now-closed Fresh Kills landfill.

Timeliness of Issues Proposed by Baykeeper

As noted above, DSNY claims that many of Baykeeper's proposed issues were not raised in a timely manner, and therefore should be excluded from consideration. I have reviewed Baykeeper's claims on their merits, to ensure they are factored into the permitting decision. On the other hand, I agree with DSNY that many of the claims were not timely presented, and could be excluded on that basis.

According to DEC's permit hearing procedures, a prospective party should identify in its petition for full party status the issues it proposes to adjudicate, as well as its offer of proof on those issues (6 NYCRR 624.5(b)(2)). Where the administrative law judge finds that a prospective party did not have adequate time to prepare its petition for party status, the ALJ shall provide an opportunity for supplementation of the petition (6 NYCRR 624.5(b)(5)). Also, the ALJ shall grant late-filed petitions of prospective parties who demonstrate that there is good cause for the late filing, that their participation will not significantly delay the proceeding or unreasonably prejudice the other parties, and that their participation will materially assist in the determination of the issues raised in the proceeding (6 NYCRR 624.5(c)(2)).

At the issues conference on January 23, 2008, I questioned Mr. Kupferman whether certain claims he made there were part of the petition he had filed on behalf of Baykeeper. By e-mail of January 31, 2008, Mr. Kupferman indicated his intent to supplement the petition, and, in a memorandum of February 1, 2008, I told him he should provide the supplemental information along with an explanation as to why there is good cause for the late filing, including any explanation why the information could not have been provided sooner (in other words, by the petition filing deadline announced in the notice of hearing). I also said that, once the new information was provided, the other conference participants would have an opportunity to respond to it and to the timeliness of its production. Mr. Kupferman provided his supplement dated February 7, 2008, and DEC Staff and DSNY responded to it in their papers dated May 30, 2008.

As DSNY correctly points out, claims about live munitions and a shipwreck in Gravesend Bay (Issues Nine and Ten) were not raised in the original petition and are therefore untimely as presented in the supplement. Baykeeper has not demonstrated good cause for raising these claims after the petition deadline, and does not assert that the deadline prevented it from raising the claims in a timely manner. The claim about live munitions was raised for the first time at the legislative hearing, after the petition filing deadline, and again at the issues conference, and the claim about the shipwreck was raised for the first time in the supplement to the petition. However, the documents that underlie these claims were publicly available long before this hearing, as Baykeeper itself acknowledges. Though the claims were raised late, DSNY and DEC Staff had an opportunity to respond on their merits as part of this record, so they have not been unreasonably prejudiced by Baykeeper's tardiness. Also, the supplement was provided not long after the issues conference, early in a long period during which DSNY and DEC Staff were negotiating with the petitioners, so the filing of the supplement did not delay the proceeding. These factors, and the interest in having a full record for decisionmaking, warrant consideration of these claims on their merits.

Baykeeper's claims about worker health and safety (Issue Eleven) are also, for the most part, new material not raised in the original petition. At any rate, they concern issues that are beyond DEC's jurisdiction as an environmental agency.

Baykeeper's claims about soil vapor intrusion (Issue Twelve) are based on a DEC policy and State Department of Health guidance, both from 2006, as well as information from soil testing done in 2003. Therefore, they could have been part of

the original petition, and there is no good cause for their introduction in Baykeeper's reply brief.

Plans to develop a new parking garage next to the project site in association with Coney Island's redevelopment (Issue Thirteen) could qualify as new information warranting a supplement to Baykeeper's petition, but for the fact such plans are so tentative and have no connection to the transfer station project. As DSNY points out, the parking garage is merely a proposal that may be included in a rezoning project for which the City's environmental review is just now beginning. Because the rezoning is unrelated to the marine transfer station, any impacts it may have on local traffic are not relevant to this hearing.

Baykeeper's so-called "equitable" claims about DSNY's fitness as permit applicant (Issue Fourteen) and the historic burden on the surrounding community (Issue Fifteen) are highlighted as distinct points in its reply brief, though they relate to issues proposed earlier in the hearing, and are worthy of separate rulings.

Petitions of SIBRO Civic Association, Stephen A. Harrison, and American Heritage Democratic Organization

Stephen A. Harrison prepared two petitions, one on behalf of himself and the SIBRO Civic Association (Exhibit No. 8), and the other on behalf of the American Heritage Democratic Organization (Exhibit No. 9). As Mr. Harrison acknowledged at the issues conference (transcript, page 263), the petitions are essentially identical; they make the same claims about the project, and propose the same issues, which have some overlap with the issues proposed by Baykeeper.

Issue One: Dredging Impacts

Mr. Harrison claims that project-related dredging has the potential to release toxins from the bottom of Gravesend Bay, and that these toxins may wash up on beaches on Staten Island, including ones used for recreational bathing. According to Mr. Harrison, Staten Island residents have invested heavily in the past several years to clean beaches which had been plagued by medical waste and other visible debris. Mr. Harrison says that, even unseen, toxins released from the bay bottom present a more insidious form of pollution, particularly for the elderly and youth populations that use the beaches.

RULING: No issue exists to adjudicate.

As with the other issues in his petitions, Mr. Harrison has not provided an offer of expert proof, saying only that "witnesses have not yet been identified" and that he expects to require discovery, the nature of which has not been explained. The only documentation provided with the petition is a New York Times article that includes claims by EPA and New Jersey officials that hospital waste which washed up on the New Jersey shore during the summer of 1987 may have originated at the existing Southwest Brooklyn marine transfer station, perhaps from barge spillage.

According to the article, from September 16, 1987, New Jersey had provided notice of its intent to sue the City for failing to keep its waste out of coastal waters, and the U.S. Attorney for New Jersey was beginning a Federal grand jury investigation of the incident. However, the petition does not indicate whether any lawsuits were filed or, if they were, how they were resolved. The article also includes suggestions by New Jersey officials that existing wind and tide conditions could have carried the waste out of the lower bay into the ocean, and that floating timbers that were part of the trash stream probably collected the waste and acted like a sail in pushing it back to shore. Such movement of debris across the surface of the bay cannot reasonably be compared to the transport of resuspended toxins below the surface, within the water column. In the absence of proposed expert testimony, the claim that toxins could travel as far as Staten Island, and in such quantities that they would threaten public health, must be dismissed as speculative.

Issue Two: Impacts on Recreational Fishing

Mr. Harrison says that the marine transfer station may have a serious economic impact on the recreational and sport fishing industry as fishermen shun Gravesend Bay for fear of angling fish laced with heavy metals or other toxins. According to Mr. Harrison, people fish from alongside a recreational bike path in Brooklyn, and also from boats, many of which come from Staten Island.

RULING: No issue exists to adjudicate. The economic benefits which may be derived from the project may be considered in relation to issuance of the tidal wetlands permit. (See 6 NYCRR 661.9(b)(1)(i).) Also, the project's potential environmental impacts may be considered in relation to both the tidal wetlands and use and protection of waters permits. (See 6 NYCRR 661.9(b)(1)(i) and 6 NYCRR 608.8(c).) However, possible adverse economic impacts -- particularly those that are based merely on fears of contamination -- are not relevant to

consideration of either permit. (See pages 43 to 47 of my issues rulings dated June 19, 1998, in Matter of Al Turi Landfill, rejecting consideration of so-called "psycho-social" impacts stemming from public fears about alleged health and environmental hazards associated with a landfill expansion.)

Furthermore, Mr. Harrison offered no proof to suggest that the small amount of dredging involved in this project would spread toxins widely in the bay. Finally, Baykeeper's petition indicates that people fish in the bay now despite its compromised water quality, which apparently has led to warnings not to eat the fish that are caught.

Issue Three: Impacts Associated with Construction at Dreier-Offerman Park

According to Mr. Harrison, the application for the marine transfer station does not account for impacts associated with construction tied to the renovation of Dreier-Offerman Park, which he says is "geographically related" to this project due to the park's close proximity. He says that the use of heavy earth-moving equipment as part of park construction, and the introduction of new materials such as artificial turf when the park is completed, will produce runoff into Gravesend Bay. Also, he says that, once renovated, the park will be used on a much larger scale, which has the potential to increase traffic and traffic-related pollutants and to bring more people - - particularly children and seniors - - to the area near the transfer station.

According to Mr. Harrison, the newly renovated park is expected to provide access to Gravesend Bay for kayakers, canoeists, windsurfers, kite surfers and a myriad of other recreational water users, who would share the water with the transfer station and its potential run-off, including such items as rat poisons and dredged pollutants.

RULING: No issue exists to adjudicate. According to SEQRA, proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action should be evaluated as one whole action. However, the construction of the marine transfer station and the renovation of Dreier-Offerman Park are in no way related to each other; they are part of no common plan and serve no common purpose. Though the transfer station would be close to the park, the two facilities would not be accessed from the same street. Trucks would enter and leave the transfer station along 25th Avenue, while the park borders Bay 44th Street, a few blocks away. As noted above, the project

and Staff's draft permit incorporate various measures to minimize the risks of water pollution associated with runoff and dredging. Also, the use of rat poisons is controlled by DEC's pesticide regulations, which require that they be used in such a manner and under such conditions as to prevent contamination of people and waters adjacent to the area of use. (See 6 NYCRR 325.2(a), requirements for the use of pesticides; and 6 NYCRR 325.1(aw), which includes in the definition of "pesticide" those substances used to destroy or repel rodents.)

Issue Four: Possible Storm-Related Facility Collapse

According to Mr. Harrison, because the facility would be built on fill, its bulkhead and pier only slightly above sea level, it is vulnerable to collapsing into Gravesend Bay during a severe storm.

RULING: No issue exists to adjudicate.

By its nature, the marine transfer station must be along the water. However, though it would be built within the 100-year flood plain, its pier level, which is the lowest level of the facility, is designed to be six inches above the 100-year flood plain elevation, and no loose trash or garbage would be stored at that level. Also, as DSNY points out, the facility would be built on piles driven down to the bedrock, eliminating the risk of it collapsing during a storm. Mr. Harrison offered no proposed expert who would testify otherwise.

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.

According to 6 NYCRR 624.5(d)(2), to secure amicus status, a prospective intervenor must:

- (1) file an acceptable petition pursuant to 6 NYCRR 624.5(b)(1) and (3);
- (2) identify a legal or policy issue which needs to be resolved by the hearing; and
- (3) demonstrate that it has a sufficient interest in the resolution of such issue and may contribute materially to the

record of such issue through expertise, special knowledge or unique perspective.

- - Baykeeper

Baykeeper's petition (Exhibit No. 7) meets the requirements of 6 NYCRR 624.5(b)(1) and (2), and those named as petitioners each have adequate environmental interest in the project. As noted in the petition, NY/NJ Baykeeper, Inc. is an environmental group whose mission includes the protection and preservation of the productivity and ecological integrity of Gravesend Bay, and whose membership -- which includes commercial and recreational fishermen, divers, swimmers and boaters -- is concentrated near the coastal areas of the New York bight, including Brooklyn. The Natural Resources Protective Association also is a conservation organization with an interest in preserving habitat and water cleanliness in Gravesend Bay. Wake Up and Smell the Garbage is a loose association of individuals formed for the sole purpose of opposing this project, and most of its members live in housing clusters close to the project site. The Urban Divers Estuary Conservancy is an environmental organization that performs dive missions throughout New York Harbor as well as clean-up, monitoring and investigation activities in Gravesend Bay and Coney Island Creek, which enters the bay at Dreier-Offerman Park. The No Spray Coalition works to limit pesticide use as a means of protecting people, wildlife and the environment. Assembly Member Colton is a long-time opponent of the former Southwest Brooklyn incinerator who likewise opposes the marine transfer station as an elected representative of people who live near the project site.

DSNY and DEC Staff did not challenge the environmental interests of the above petitioners, nor did they challenge the adequacy of their petition, except to say that the issues proposed therein are not substantive and significant, and, for that reason, no adjudicatory hearing is required. I agree that there are no issues that warrant adjudication, and therefore deny Baykeeper's petition for party status.

- - SIBRO Civic Association, Stephen A. Harrison, and American Heritage Democratic Organization, Inc.

The petitions prepared by Mr. Harrison, on behalf of himself and the SIBRO Civic Association (Exhibit No. 8) and on behalf of the American Heritage Democratic Organization (Exhibit No. 9) make essentially the same substantive claims, including some regarding the impacts of dredging, a topic addressed in Baykeeper's petition as well. They state that the petitioners have read Baykeeper's petition and adopt the legal issues and arguments set forth therein as well as the four issues they

identify as their own. During the issues conference, Mr. Harrison agreed that he and his petitioners should be consolidated with those named in Baykeeper's petition, and the Baykeeper petitioners, through Mr. Kupferman, accepted this arrangement.

As noted in their petitions, the SIBRO Civic Association is an unincorporated association formed to address issues common to both sides of the Narrows in Staten Island and southwest Brooklyn (hence the name, formed by the combination of SI and BRO). The American Heritage Democratic Organization is a 70-member political club associated with the 60th Assembly District which spans Brooklyn and Staten Island. Mr. Harrison is a founder of SIBRO Civic Association, president of the American Heritage Democratic Organization, a former chair of New York City Community Board 10, a life-long resident of Bay Ridge in Brooklyn, and a marathon runner who trains on the bike trail along Gravesend Bay.

DSNY and DEC Staff did not challenge the environmental interests of Mr. Harrison or the groups with whom he is associated. They did, however, challenge the petitions Mr. Harrison submitted. At the issues conference, DSNY argued that, as petitions for full party status, they did not present offers of proof specifying the witnesses, the nature of the evidence to be presented, and the grounds upon which particular assertions were made, all as required by 6 NYCRR 624.5(b)(2). Also, DEC Staff said the issues proposed in the petitions had not been related to standards for issuance of the permits requested by DSNY.

I agree with DSNY and DEC Staff that Mr. Harrison's petitions do not adequately meet the requirements of one for full party status. No permitting standards or legal requirements were cited in relation to the four issues specified in the petition, and no proposed witnesses were identified on these issues.

Mr. Harrison's petitions also do not meet the requirements for amicus status, which he sought in the alternative, if full party status were denied. The petitions identify no legal or policy issue relevant to DEC's permitting decision, and there is nothing to indicate that Mr. Harrison or the groups with whom he is affiliated are in a special position to brief any such issue that might arise from Baykeeper's petition.

For these reasons, the petitions are denied.

- - Environmental Defense Fund

Environmental Defense Fund's petition for full party status (Exhibit No. 10) was filed to secure particular changes to the

draft permit, because, unlike the other petitioners, EDF supports the project and its siting at the location proposed by DSNY. As noted above, EDF is satisfied that the permit, as now amended, adequately addresses its concerns.

Neither DSNY nor DEC Staff challenged EDF's environmental interest in this project, and such interest is well-established in EDF's petition. As the petition points out, EDF, a national organization with headquarters in New York City, has issued reports examining strategies for transferring and transporting the City's solid waste, concluding that a SWMP that minimizes use of and dependence on land-based, truck-dependent transfer facilities and maximizes use of marine- and rail-based transfer facilities will have substantial benefits in terms of reduced truck vehicular miles traveled and improved air quality. More generally, EDF has a long-standing interest in reducing diesel emissions from heavy-duty trucks, including City and commercial trash collection trucks, and from construction equipment. Also, it has a long-standing interest in the proper management of sediments in New York Harbor, having worked over the last 15 years with federal and state entities as well as environmental organizations to devise a program that minimizes impacts of dredging of contaminated sediments.

Because no hearing is required on the issues proposed by the other petitioners, EDF's petition is denied. However, should my rulings be reversed and a hearing be directed on any issue, EDF should have a full opportunity to participate at that hearing, given its potential to make a meaningful contribution to the record and its stated interest in ensuring that project impacts are adequately mitigated. Having played an important role in developing the current draft permit, EDF should also have a role in any discussions about further permit amendments.

SUMMARY OF RULINGS ON ISSUES AND PARTY STATUS

No substantive and significant issues exist for adjudication in this matter. Because no adjudicatory hearing is warranted, the petitions for party status are denied.

ADDENDUM - - CONCERNED CITIZENS OF BENSONHURST

On April 29, 2009, Adeline Michaels, chairperson and executive director of Concerned Citizens of Bensonhurst, left a telephone message at my office indicating her group "was in the process of getting core samples" and requesting that I allow a time frame for completion of this work, which she said was intended to prove the toxic nature of the sediments to be

dredged. I hereby deny this request because the record of the issues conference has long been closed, and because further delay in the issuance of these rulings would be prejudicial to DSNY. At the ALJ's discretion, the issues conference may be reconvened at any time to consider issues based on new information upon a showing that such information was not reasonably available at the time of the issues conference. (See 6 NYCRR 624.4(b)(1).) However, no new information has been presented, only a representation that work is underway from which information may yet be developed. Also, pursuant to special condition No. 47 of the revised draft permit, DSNY itself is required to provide DEC Staff with additional sediment sampling prior to the commencement of dredging, including testing of the samples for VOCs, semi-volatile organics, PCBs and aroclors, pesticides, metals, and dioxins and furans and their congeners. This sampling would presumably provide the same types of information as the work apparently being done on behalf of Concerned Citizens of Bensonhurst. Concerned Citizens of Bensonhurst has never filed a petition for party status, so it is unclear how it would participate at an adjudicatory hearing if one were held on any issue arising from its work. However, I urge it to provide whatever sample results it has obtained to DEC Staff, which will be reviewing the details of DSNY's plan before dredging actually begins.

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 to the Commissioner on an expedited basis [6 NYCRR 624.8(d)(2)]. Ordinarily, such appeals must be filed in writing within five days of the disputed ruling [6 NYCRR 624.6(e)(1)]. Allowing extra time due to the length of these rulings, any appeals of these rulings -- including any appeal by Concerned Citizens of Bensonhurst in relation to my ruling on its telephone request -- must be received no later than 4 p.m. on August 26, 2009. Any responses to appeals must be received no later than 4 p.m. on September 23, 2009.

The original and three copies of each appeal and response thereto must be filed with Commissioner Alexander B. Grannis (attn: Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services), at the New York State Department of Environmental Conservation, 625 Broadway (14th Floor), Albany, New York 12233-1010. The copies received will be forwarded to me and Chief Administrative Law Judge James T. McClymonds. One copy of each submittal must be sent to all others on the service

list at the same time it is sent to the Commissioner. Service of papers by facsimile transmission (FAX) is not permitted, and any such service will not be accepted. Please note that the service list has been expanded to include Stephen Harrison, for himself and his client organizations, and Adeline Michaels as chairperson and executive director of Concerned Citizens of Bensonhurst.

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 the marked conference exhibits is attached to these rulings. The record also includes all correspondence between me and the parties, which I have retained in a separate folder.

ORDER OF DISPOSITION

Due to the absence of issues requiring adjudication, and subject to the Commissioner's determination of any appeals of these rulings, the adjudicatory phase of this hearing is canceled, the record is closed, and the application is remanded to DEC Staff for continued processing consistent with SEQRA and the relevant statutes and regulations.

The final permit that is issued to DSNY shall be consistent with the revised draft provided with DEC Staff's reply brief of September 26, 2008, except as modified by these rulings. In particular, the permit must be amended to require that completion of tidal wetland restoration or creation deemed suitable by DEC Staff as mitigation for this project's impacts to wetland habitat be completed prior to the first receipt of waste at the new facility. Also, the permit must be amended to require that DSNY alert DEC should any shipwreck be encountered during dredging. Finally, the permit must be amended to require that DSNY maintain records of any exceedance of the storage limit in special condition No. 18, other than an exceedance triggered by upset or emergency conditions, and provide such records to DEC and the CAG, and post them on DSNY's website within a week of each exceedance.

Albany, New York
July 22, 2009

/s/
Edward Buhrmaster
Administrative Law Judge

ISSUES CONFERENCE EXHIBIT LIST

**NEW YORK CITY DEPARTMENT OF SANITATION
SOUTHWEST BROOKLYN MARINE TRANSFER STATION**

Project Application No. 2-6101-00002/00022-0

1. Notice of Legislative Hearing and Issues Conference (11/27/07) (file copy)
2. Notice of Legislative Hearing and Issues Conference, as published in DEC's on-line Environmental Notice Bulletin (11/28/07)
3. Affidavit of publication of Notice of Legislative Hearing and Issues Conference in New York Post (11/30/07)
4. Cover letter for transmittal of Notice of Legislative Hearing and Issues Conference from ALJ Edward Buhrmaster to DSNY Assistant Commissioner Harry Szarpanski and DEC counsel John Nehila (11/27/07)
5. DEC Hearing Notice Distribution List (11/27/07)
6. DEC Draft Permit as forwarded with hearing referral to DEC's Office of Hearings and Mediation Services
7. Petition for party status filed by Joel Kupferman, Esq., on behalf of Raritan Baykeeper, Inc. (d/b/a NY/NJ Baykeeper), Natural Resources Protective Association, Wake Up and Smell the Garbage, Urban Divers Estuary Conservation, the No Spray Coalition, and Assembly Member William A. Colton (1/13/08)
8. Petition for party status filed by Stephen A. Harrison, Esq., on behalf of himself and SIBRO Civic Association (1/13/08)
9. Petition for party status filed by Stephen A. Harrison, Esq., on behalf of American Heritage Democratic Organization (1/13/08)
10. Petition for party status filed by James T.B. Tripp, Esq., and Ramon Cruz on behalf of the Environmental Defense Fund
11. Preliminary Assessment Petition filed by Joel Kupferman, Esq., with Alan J. Steinberg, Region 2 Administrator of the U.S. Environmental Protection Agency (1/22/08)