

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

In the Matter of  
the Application for Permits Pursuant to Articles 15, 19, 25 and  
27 of the Environmental Conservation Law of the State of New  
York to Construct and Operate a Marine Transfer Station at Bay  
41<sup>st</sup> Street, 25<sup>th</sup> Avenue, and Gravesend Bay in Brooklyn, New York,

- by -

**NEW YORK CITY DEPARTMENT OF SANITATION,**

Applicant.

DEC Application No. 2-6106-00002/00022-0

DECISION OF THE COMMISSIONER

May 21, 2012

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

The New York City Department of Sanitation (DSNY or applicant) proposes to construct and operate a marine transfer station (facility) on a lot it owns bounded by 25<sup>th</sup> Avenue to the north, Bay 41<sup>st</sup> Street to the south, and Gravesend Bay to the west. The facility is identified as part of the New York City Solid Waste Management Plan (SWMP) and DSNY's long-term waste export program. The proposed facility would be built over land at the location of DSNY's Southwest Brooklyn incinerator, which was demolished in 2005.

The proposed facility requires the following permits from the New York State Department of Environmental Conservation (DEC or Department):

(1) a solid waste management facility permit pursuant to Environmental Conservation Law (ECL) article 27, title 7, and part 360 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR);

(2) an air pollution control (air state facility) permit, pursuant to ECL article 19 and 6 NYCRR part 201;

(3) a tidal wetlands permit, pursuant to ECL article 25 and 6 NYCRR part 661; 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. 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) address construction and dredging activities in Gravesend Bay. The proposed facility would require a storm water general permit for construction activities.

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<sup>1</sup> By memorandum dated November 10, 2010, Acting Commissioner Peter M. Iwanowicz delegated decision making authority in this proceeding to the Assistant Commissioner for Hearings and Mediation Services. The delegation is hereby rescinded, and Commissioner Joseph J. Martens is serving as the decisionmaker on this matter.

The matter was referred to the Office of Hearings and Mediation Services and assigned to Administrative Law Judge (ALJ) Edward Buhrmaster. A legislative hearing and issues conference were subsequently held. Participating in the issues conference, in addition to Department staff and DSNY, were 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 Assemblyman William A. Colton, Esq. (collectively, petitioners), the Environmental Defense Fund (EDF), American Heritage Democratic Organization, and (jointly) SIBRO Civic Association (SIBRO) and Stephen A. Harrison (Harrison).<sup>2</sup>

In the Ruling on Issues and Party Status dated July 22, 2009 (issues ruling), Judge Buhrmaster determined that no issues were subject to adjudication and the permits should be issued to DSNY. Petitioners filed an appeal from the issues ruling (appeal). Replies to the appeal were received from Department staff (Department staff reply) and DSNY (DSNY reply), respectively.<sup>3</sup>

Petitioners, by their participation, have ensured a full discussion of matters of concern to the surrounding community. Nevertheless, upon consideration of the record before me, I conclude that petitioners have not demonstrated that the ALJ misapplied the standards for identifying adjudicable issues and have not otherwise rebutted the ALJ's analysis. The ALJ's

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<sup>2</sup> Petitioners filed a Joint Petition for Full Party Status and Adjudicatory Hearing dated January 13, 2008 (Issues Conference Exhibit 7) (Joint Petition). Petitions were also filed by SIBRO and Harrison (Issues Conference Exhibit 8) and American Heritage Democratic Organization (Issues Conference Exhibit 9), both dated January 13, 2008, and Environmental Defense Fund (Issues Conference Exhibit 10). Petitioners (joined by SIBRO and Harrison) filed a supplement dated February 7, 2008 to the Joint Petition. Replies dated May 30, 2008 in opposition to the petitions were filed by Department staff and by DSNY. Petitioners (joined by SIBRO and Harrison) and EDF each filed a reply (dated July 25, 2008) to Department staff's and DSNY's reply briefs. Sur-replies were filed by Department staff and DSNY on September 26, 2008, and by petitioners (joined by SIBRO and Harrison), on October 20, 2008. Other documents were submitted during the course of the proceeding (see, e.g., Issues Conference Exhibit List attached to the issues ruling).

<sup>3</sup> Attached to Department staff's reply to the appeal was a draft permit that included revisions, as noted in staff's papers, to address matters raised by the issues ruling (see Department staff reply, at 1). Previously, by memorandum dated October 31, 2008 (EDF memorandum), EDF had indicated that its concerns had been addressed, with the understanding that New York City would provide EDF "in a timely manner with copies of any additional reports, sampling results and analysis" referenced in the facility permit (see EDF memorandum, at 1).

evaluation of the issues was detailed, comprehensive and complete, and he properly considered and applied the relevant legal authority.

I hereby affirm the issues ruling, subject to my comments in this decision.

### **BACKGROUND**

According to DSNY, the proposed facility is an integral part of its solid waste plan (see, e.g., DSNY Joint Application for Permit dated February 2007 [Joint Application], at Section 2 [Program Overview], and Section 4.5 [Southwest Brooklyn Converted MTS]; see also DSNY reply, at 2-4). DSNY post-recycling waste would be containerized and exported from the City by barge or rail for disposal, utilizing four new converted marine transfer stations which would include this facility (see, e.g., Lead Agency Findings Statement for the New York City Comprehensive Solid Waste Management Plan dated February 2006 [Findings Statement], at 18-20).

As described in special condition 17A of the draft permit, the facility would be authorized to accept a weekly limit of 11,148 tons and a maximum peak daily limit of 2,106 tons of municipal solid waste (MSW), except in upset or emergency conditions. The draft permit establishes an upset condition limit of 4,290 tons of MSW per day, and an emergency condition limit of 5,280 tons of MSW per day (see draft permit special condition no. 17A for definitions of the upset condition limit and the emergency condition limit; see also DSNY reply, at 9).

As noted, the site for the facility previously contained the now-demolished Southwest Brooklyn municipal incinerator. The facility 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 fully enclosed building. The waterway adjacent to the building would be dredged to allow for barge operations.

DSNY conducted an environmental review for the SWMP, which included a detailed environmental evaluation of each of four proposed marine transfer stations, in accordance with the State Environmental Quality Review Act (SEQRA, ECL Article 8), SEQRA's implementing regulations (6 NYCRR Part 617), and the Rules and Procedures for (New York) City Environmental Quality Review

(CEQR). Following receipt of public comment, DSNY prepared and circulated the Final Environmental Impact Statement dated April 1, 2005 (FEIS) on the SWMP, and issued its findings statement on February 13, 2006. DEC, which was an involved agency in the SEQRA review of the SWMP, provided comments on the SWMP's draft environmental impact statement (see FEIS, at § 40.3.3.1). The DEC approved the SWMP by letter dated October 27, 2006.<sup>4</sup>

Department staff circulated a draft permit for the proposed facility. The draft permit in one omnibus document incorporates the following: a solid waste management facility permit (ECL article 27, title 7; 6 NYCRR part 360); an air state facility permit (ECL article 19); a water quality certification (6 NYCRR part 608); a tidal wetlands permit (ECL article 25); and a use and protection of waters permit (ECL article 15, title 5). The draft permit includes numerous general and special conditions that address construction and operational activities at the facility.

#### **APPLICABLE STANDARDS GOVERNING IDENTIFICATION OF ISSUES**

In this proceeding, Department staff expressed no objections to the project, stated that it had no issues to raise, and indicated that it had no requests for additional information (see Issues Conference Transcript [Tr], at 76). In addition, DSNY expressed no objection to the draft permit that Department staff had prepared (see Tr, at 74-76).

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

An issue is substantive "if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry" (6 NYCRR 624.4[c][2]). In determining whether an issue is substantive, the ALJ "must consider the

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<sup>4</sup> The proposed transfer stations include the North Shore marine transfer station in Queens, the East 91<sup>st</sup> Street marine transfer station in Manhattan, and the Hamilton Avenue marine transfer station in Brooklyn, in addition to the Southwest Brooklyn marine transfer station (see Joint Application, Section 1, at 1-1). The Southwest Brooklyn marine transfer station is specifically addressed at Section 4.5 of the Joint Application, and the specific environmental review of this site appears in Chapter 5 [Environmental Review: Southwest Brooklyn Converted MTS] of the FEIS.

proposed issue in light of the application and related documents, the draft permit, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments authorized by the ALJ" (id.).

An issue is significant "if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit" (6 NYCRR 624.4[c][3]).

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

A potential party's burden of persuasion at the issues conference is met with an appropriate offer of proof supporting its proposed issues. The offer of proof must specify "the witness(es), the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect to that issue" (see 6 NYCRR 624.5[b][2][ii]). Judgments about the strength of the offer of proof must be made, among other things, in the context of the analysis of Department staff (see Matter of Mirant Bowline, LLC, Interim Decision of the Commissioner, June 20, 2001, at 3).

The submission of a petition for party status is not a pro forma exercise. Conducting an adjudicatory hearing "where 'offers of proof, at best, raise potential uncertainties' or where such a hearing 'would dissolve into an academic debate' is not the intent of the Department's hearing process" (Matter of Adirondack Fish Culture Station, Interim Decision of the Commissioner, August 19, 1999, at 8 [quoting Matter of AKZO Nobel Salt Inc., Interim Decision of the Commissioner, January 31, 1996, at 12]).

In areas of Department staff's expertise, its evaluation of the application and supporting documentation is an important consideration in determining whether an issue is adjudicable (see Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, December 29, 2006, at 6; Matter of Halfmoon Water Improvement Area No. 1, Decision of the Commissioner, April 2, 1982, at 2; Matter of Mirant Bowline, LLC, Interim

Decision of the Commissioner, June 20, 2001, at 3 (judgments about the strength of an offer of proof by a potential party must be made in the context, among other things, of Department staff's analysis); Matter of Bonded Concrete, Inc., Interim Decision of the Commissioner, June 4, 1990, at 2).

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

#### **DISCUSSION**

Petitioners, in their appeal, challenge the ALJ's rulings not to adjudicate their issues, including their SEQRA issues relating to the FEIS (see Appeal, at 24-25).

With respect to SEQRA issues, petitioners contend that the ALJ misapplied or misapprehended requirements relating to SEQRA (see, e.g., Appeal, at 14-15 [neighborhood character impacts], 20-21 [SEQRA determinations regarding traffic impacts], and 21-22 [marine life]). However, DSNY (and not DEC) served as lead agency and prepared the environmental impact statement on the SWMP. In this circumstance, "no issue based solely on compliance with SEQRA and not otherwise subject to the department's jurisdiction will be considered for adjudication unless . . . the department notified the lead agency during the comment period on the [draft environmental impact statement] that [it] was inadequate or deficient with respect to the proposed issue and the lead agency failed to adequately respond" (6 NYCRR 624.4[c][6][ii][b][1]). Department staff did not identify any inadequacies or deficiencies in DSNY's environmental impact statement (see, e.g., Tr, at 71; see also Issues Ruling at 26; Department staff reply, at 4), and, accordingly, those issues are not adjudicable.

Furthermore, legal proceedings and actions challenging the FEIS for the SWMP have been dismissed (see, e.g., Powell v City of New York, 85 AD3d 429, lv denied 17 NY3d 715 [2011]; Matter of Association for Community Reform Now ["ACORN"] v Bloomberg, 52 AD3d 426, lv denied 11 NY3d 707 [2008]). I concur with the ALJ's determination that, to the extent that petitioners' claims are not related to DEC's permitting standards and are based solely on SEQRA compliance, these claims should have been pursued in a court challenge to DSNY's SEQRA review of the SWMP, which has long been completed (see Issues Ruling, at 25).<sup>5</sup>

Based on the record before me, the ALJ properly held that petitioners' other issues did not raise any substantive and significant issues and would not be adjudicated.

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

Petitioners argue that the facility is incompatible with, and would have an adverse impact on, the public health, safety and welfare (see Appeal, at 12). They also emphasize that an incinerator had been located at the site "for over thirty years" (see Appeal, at 10).

Petitioners cite several regulatory and statutory provisions in support of their contention that the facility is not compatible with the public health, safety and welfare. These include statutory citations to ECL 1-0101 (describing the policy of the State with respect to the environment), ECL 1-0303 (defining pollution), ECL 27-0101 (legislative purpose to encourage the development of economical projects for the collection, treatment and management of solid waste consistent with the protection of the public health), as well as a number of regulatory provisions (see Appeal, at 11-12).

Based on the aforementioned provisions, petitioners claim that Department staff disregarded public health, safety and welfare considerations. That argument is unsupported. As the ALJ noted, and as the record of this proceeding demonstrates, Department staff carefully considered potential facility impacts in its involvement in the SEQRA process, in its evaluation of

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<sup>5</sup> Litigation has also been commenced with respect to the permit that the Department issued to DSNY for the East 91<sup>st</sup> Street marine transfer station (see Matter of Gracie Point Community Council v New York State Dept of Env'tl Conservation, 92 AD3d 123, 128-129 [3d Dept 2011] [affirming Supreme Court decision dismissing petition in opposition to granting of permits for the East 91<sup>st</sup> Street marine transfer station], mot for lv pending).

applicable permitting criteria relevant to DSNY's permit applications, and in its development of special conditions in the proposed facility permit.

Specifically, petitioners contend that the ALJ "too narrowly" interpreted the Department's authority pursuant to 6 NYCRR 360-1.11(a), which states that the provisions of each solid waste management facility permit must assure "to the extent practicable" that the permitted activity "will pose no significant adverse impact on public health, safety or welfare."

As set forth in 6 NYCRR 360-1.11(a), the Department may impose conditions on a permit, which was accomplished here. The draft permit contains numerous special conditions including stringent construction and operational requirements. These conditions, which have been drafted to address and ensure compatibility with the public health, safety and welfare, are reasonable, appropriate and well-considered.

The ALJ concluded that the narrative statement in 6 NYCRR 360-1.11(a) does not provide an independent basis to deny a solid waste management facility permit, noting that the permit issuance criteria are in 6 NYCRR 360-1.10 (see Issues Ruling, at 25), and I agree (see Matter of New York City Department of Sanitation [East 91<sup>st</sup> Street Marine Transfer Station], Decision of the Assistant Commissioner, July 27, 2009, at 6-7).<sup>6</sup> The ALJ's and Department's interpretation of 6 NYCRR 360-1.11(a) have been upheld by judicial decision (see Matter of Gracie Point Community Council v New York State Dept of Env'tl Conservation, 92 AD3d 123, 128-129 [3d Dept 2011], not for lv pending [DEC's interpretation of 6 NYCRR 360-11.1{a} was rational]).

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<sup>6</sup> Even assuming, for purposes of argument, that 6 NYCRR 360-1.11(a) constituted a specific public health, safety and welfare standard (which it does not), the conditions in the draft permit will assure, to the extent practicable, that the permitted activity will not result in a significant adverse impact on public health, safety and welfare.

Petitioners cite to Matter of Goldhirsch v Flacke, 114 AD2d 998 (1985), lv denied 67 NY2d 604 (1986). In Goldhirsch, the court stated that, even if a lead agency determines that a proposed project will have no significant effect on the quality of the human environment under SEQRA, the Commissioner has the authority to deny a permit (which, in that case, was a freshwater wetlands permit) if it does not comply with permit issuance standards. However, as the record demonstrates in the matter pending before me, DSNY's proposed project has satisfied the applicable permitting standards and, accordingly, the requested applications should be granted.

Petitioners, in raising this issue, also contend that the ALJ failed to take into consideration or improperly analyzed sub-issues relating to neighborhood character, site contamination, noise impacts, air pollution, adverse traffic impacts, fish consumption hazards, and environmental justice. With respect to these sub-issues, as discussed below, the ALJ fully addressed these matters in the issues ruling.

- Neighborhood Character. The ALJ properly noted that neighborhood character was addressed in the context of the SEQRA review and would not be subject to adjudication pursuant to 6 NYCRR part 624 (see Issues Ruling, at 28-29), and I concur. The SEQRA documents demonstrate that DSNY evaluated neighborhood character in the context of its SEQRA review (see, e.g., FEIS Chapter 5, [Environmental Review: Southwest Brooklyn Converted MTS], § 5.8, at 5-32 to 5-34; Findings Statement, at 59-60).

- Site Contamination. Petitioners raise concerns regarding existing contamination at the site, in light of the prior presence and operation of an incinerator at this location.

The record before me effectively rebuts petitioners' claims that soil contamination at the site would preclude its development as a marine transfer station. Based on investigations that were conducted of the site, DSNY determined that the low level of soil and groundwater contamination that was detected would not prevent the development of a marine transfer station at this location (see, e.g., FEIS Chapter 5, [Environmental Review: Southwest Brooklyn Converted MTS], § 5.10, at 5-43 to 5-47 [noting hazardous materials assessment performed in April 1999 and updated in February 2003]; Exhibits E [Draft Initial Soil and Groundwater Sampling Program Summary Report dated April 2004], F [Report on Geotechnical Investigation Southwest Brooklyn Marine Transfer Station Conversions dated April 2005], and G [Final Site Investigation Report Southwest Brooklyn Incinerator dated December 2001] to the New York City Department of Sanitation's Brief in Opposition to the Requests for Party Status dated May 30, 2008 [2008 DSNY Brief]; see also 2008 DSNY Brief, at 22-23 [noting findings that the presence of soil contamination at the site was typical of urban fill and that materials associated with demolition of incinerator were tested and, as appropriate, removed from the site for disposal]; Issues Ruling, at 30).

Petitioners identify three witnesses with respect to this issue. Their concerns regarding the draft permit, the extent and adequacy of testing, the relationship of prior operation of

the incinerator to the proposed marine transfer station, and public health considerations, among others, fail to account for the extensive data that are presented in the FEIS and the Joint Application or the protective conditions in the draft permit (see, e.g., 2008 DSNY Brief, at 27-29).

Furthermore, applicable special conditions in the draft permit for the facility ensure proper procedures relating to soil management (see, e.g., special permit condition nos. 23A, 23B, 23C, 24, 25 and 26 [addressing, among other things, sediment-related management plan, control measures and inspections, and dust suppression requirements]; see also Issues Ruling, at 29-31).<sup>7</sup> These permit conditions would provide for strict monitoring and control of dust during excavation periods. Before erosion and sedimentation controls are removed, DSNY must remove and properly dispose of all sediment that has accumulated in those areas. In addition, the controls must be maintained until the disturbed soil is stabilized "by either an impermeable layer, such as asphalt pavement, or by coverage of two feet of clean fill approved by [a Department engineer]" (see special condition no. 23B(ii) of the draft permit).

Petitioners cite to the lack of a certification of closure for the former incinerator as casting doubt "on DSNY's claims that the site is appropriate for redevelopment without major remediation and public input" (emphasis deleted) (Appeal, at 16). Although DSNY did not provide a certification of closure, the environmental studies of the site that are contained in this record do not support petitioners' contentions that major site remediation is required.<sup>8</sup>

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<sup>7</sup> The ALJ further referenced a site assessment performed for the U.S. Environmental Protection Agency in 2008 (Preliminary Assessment Report Former Southwest Brooklyn Incinerator, prepared by Region 2 Site Assessment Team 2 for the United States Environmental Protection Agency, April 2008 [2008 EPA Report]). Reference 3 to the 2008 EPA Report contains a Phase II Site Investigation Report prepared for DSNY by EEA, Inc., dated December 2004 (EEA Report). The EEA Report noted that "[m]inimum amounts of contamination exist in the soils" in the area surrounding the former incinerator and that these "could be attributed to the fill materials used during the construction at this site, also typically seen in urban fill areas" (EEA Report, at Section 6.0). The EEA Report noted that "[n]o additional testing is deemed necessary at this time" (see *id.*).

<sup>8</sup> As to petitioners' reference to public input, DSNY has obtained public input through its implementation of a public participation plan with respect to the proposed Southwest Brooklyn marine transfer station, including environmental justice area outreach (see, e.g., DSNY's Report on Public Plan Completion dated October 2007) and also through its SEQRA/CEQR process.

Petitioners also contend, in part, that the ALJ too narrowly interpreted 6 NYCRR 360-1.11(a) and that "further testing and special scrutiny" of the site are required (see Appeal, at 15). As discussed earlier in this decision, the ALJ properly interpreted the scope and intent of 6 NYCRR 360-1.11(a).

- Noise Impacts. Petitioners' SEQRA concerns relating to noise, as noted, are precluded from consideration in the context of this proceeding.<sup>9</sup> Petitioners expressed concerns about noise impacts arising from the facility but did not provide a sufficient offer of proof. They identified no expert witnesses for this issue, nor did they specify the nature of evidence that would be presented. No substantive and significant issue has been raised (see Issues Ruling, at 31-32).

Furthermore, as the ALJ noted, section 360-1.14(p) of 6 NYCRR governs the level of noise from a solid waste management facility that DEC has determined to be acceptable. The analysis supplied by DSNY in this proceeding indicates that the facility would not exceed the 360-1.14(p) thresholds at the nearest residence, and petitioners did not suggest otherwise. In fact, petitioners, in their petition for party status, did not challenge compliance with this standard. Department staff noted that DSNY is required to comply with Part 360 standards (see Tr, at 145; see also Issues Ruling, at 32).

- Air Impacts. The ALJ properly concluded that no adjudicable issue was raised with respect to air impacts (see Issues Ruling, at 32-33).

As part of their appeal, petitioners contend that all collection trucks that use the facility should use ultra-low sulfur diesel fuel. The draft permit provides that all collection trucks owned and operated by DSNY that use the facility must use ultra-low sulfur diesel fuel (see draft permit, special condition no. 45B). The Department does not have the authority to impose a limitation on collection trucks owned and operated by commercial carters. Moreover, petitioners provided nothing that would demonstrate that the Department has

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<sup>9</sup> As discussed and presented in the FEIS, a noise analysis was performed to determine the potential impact of the transfer station on off-site receptors, as well as other noise-related impacts (see FEIS Chapter 5, at 5-174 to 5-204). DSNY has committed to implementing measures that would "fully mitigate" the predicted impacts (see Lead Agency Findings Statement for the New York City Comprehensive Solid Waste Management Plan dated February 2006, at 74).

such authorization to regulate private mobile emission sources. No basis exists for the Department to impose such a condition on commercial collection trucks (see Matter of Gracie Point Community Council, 92 AD3d, at 130-131; see also Matter of New York City Department of Sanitation [East 91<sup>st</sup> Street Marine Transfer Station], Decision of the Assistant Commissioner, July 27, 2009, at 15; Department staff reply, at 4-5).

- Traffic Impacts. The ALJ properly noted that, under the circumstances of the proceeding, petitioners' claims regarding traffic impacts cannot be adjudicated "in the absence of some connection to a DEC permitting standard" (see Issues Ruling, at 34). I note that traffic impacts were extensively reviewed as part of the SEQRA process (see FEIS, Chapter 5 [Environmental Review: Southwest Brooklyn Converted MTS], at 5-78 to 5-150; see also Findings Statement, at 67 [deliveries of waste would not result in significant adverse traffic impacts]). Department staff did not identify any inadequacies or deficiencies relating to this analysis (see 6 NYCRR 624.4[c][6][ii][b]).

- Fish Consumption Hazard. Petitioners argue that operation of the facility will spread toxins and other contaminants that will be consumed by fish in Gravesend Bay and, as a result, will impact people who eat the fish. It is acknowledged that fishing occurs in Gravesend Bay, but that warnings exist directing people not to eat the fish from that area (see, e.g., Tr, at 177; see also Joint Petition, at 41 [noting existing warnings against fish consumption]). Petitioners' contentions that facility dredging may lead to higher levels of contamination in fish consumed are merely speculative, and their offer of proof in their petition for party status is inadequate.<sup>10</sup> No adjudicable issue is raised (see Issues Ruling, at 35).

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<sup>10</sup> Petitioners' offer consists of a chart displaying fishing locations in Gravesend Bay, a photograph of a fisherman in Gravesend Bay, and a reference to a website concerning the safety of eating fish from the area (see Joint Petition, at 41). On their appeal, petitioners note a July 2009 Daily News article reporting on fishing by lower income people and field notes relating to the sale of fish caught in these waters to local restaurants (see Appeal, at 21-22). Other than conjecture and generalized concerns, petitioners fail to demonstrate that these assorted references have any relation to the proposed facility. Furthermore, as set forth in the FEIS to the SWMP, only minimal impacts are expected as a result of the contemplated dredging (see FEIS Chapter 5 [Environmental Review: Southwest Brooklyn Converted MTS], at § 5.9.3.3).

- Environmental Justice. Petitioners argue that the ALJ erred in rejecting matters relating to environmental justice, and that the ALJ misapprehended and misapplied the DEC's environmental justice policy.

Petitioners express concern about the burdens that the local community suffered from an incinerator that was previously operated at the site for many years up until 1991. Issues relating to the operation of the incinerator, which was demolished in 2005, are not relevant to whether the current proposal for a marine transfer station satisfies permitting standards. Although petitioners selectively quote the ALJ, a review in full of his analysis demonstrates that the issues ruling correctly incorporates the intent of the Department's environmental justice considerations (see Issues Ruling, at 35-36; DEC Environmental Justice Policy CP-29 [March 19, 2003][CP-29]).

As the record demonstrates, DSNY implemented a public participation plan for the proposed facility (see Exhibit T to the 2008 DSNY Brief; see also Findings Statement, § 1.9.2, at 40-41). DSNY's public participation plan was designed "to achieve the goals of the [DEC] Environmental Justice Policy" with respect to the permit process (see Exhibit T, at 1). DSNY submitted the public participation plan in support of its permit applications and in fulfillment of the requirements of CP-29 to the DEC. DSNY's plan was approved by Department staff (see letter dated March 8, 2007 from Michelle Moore, DEC Environmental Analyst, to DSNY Assistant Commissioner Harry Szarpanski).

Applicant identified the local community in the vicinity of the proposed project as an environmental justice community and followed the Department's environmental justice policy in conducting appropriate outreach and providing meaningful opportunities for input (see, e.g., FEIS § 1.8, at 1-39 to 1-43). Department staff confirmed that consideration of this site was undertaken in compliance with the DEC's environmental justice policy (see Tr, at 181-184).

Petitioners also contend that DSNY failed to take into account the concept of "vulnerability" as defined by the United States Environmental Protection Agency in the context of environmental justice, and that additional consideration should be given to cumulative impacts of the proposed facility. Contrary to petitioners' contentions, DSNY undertook an extensive review of potential impacts relating to the proposed

facility (see, e.g., FEIS, Chapter 5 [Environmental Review: Southwest Brooklyn Converted MTS][addressing, among other things, local land use, socioeconomic conditions, community facilities, open space, cultural resources, neighborhood character, natural resources, hazardous materials, infrastructure, traffic, air quality, odor and noise]; Findings Statement, § 2.0, at 45-80 [addressing environmental impacts of the SWMP]; FEIS Responsiveness Summary, at 40-184 to 40-185 [Response to Comment 179 (addressing traffic impacts in the context of neighborhood issues)], at 40-285 [Response to Comment 17 (noting no potentially unmitigable significant adverse impacts associated with SWMP)]). DSNY has addressed, through the environmental impact statement on the SWMP, the project impacts both as to the City's overall proposed infrastructure utilizing marine transfer stations and specifically as to each of the proposed marine transfer stations.

I have reviewed the record before me and conclude that the procedures relating to environmental justice, as established by CP-29, were met, and that the potential impacts of this facility have been considered. As discussed in the FEIS and the Joint Application, as well as reflected in the procedures for the construction and operation of the facility and the special conditions in the draft permit, adverse environmental impacts have been avoided or otherwise mitigated. Accordingly, the arguments that petitioners raise are rejected.

## 2. Facility Compliance with the Requirements of Part 360 Governing the Transfer and Disposal of Waste

Petitioners contend that the failure of DSNY's application to state where the waste processed at the facility will be disposed, and the lack of a transport and disposal plan for the facility, mandate a denial of the application or adjudication of this issue (see Appeal, at 25-28). In support of their position, petitioners cite language in the Department's solid waste regulations that govern transfer stations. Specifically, that language provides that the engineering report for a transfer station must include "a description of the general operating plan for the proposed facility, including . . . where all waste will be disposed of . . . [and] a proposed transfer plan specifying the transfer route, the number and type of transfer vehicles to be used, and how often solid waste will be transferred to the disposal site" (see 6 NYCRR 360-11.2[a][3][i] & [iii]).

Petitioners' argument does not raise an adjudicable issue. The ALJ extensively addressed petitioners' concerns relating to waste transfer and disposal, and the transport and disposal plan (see Issues Ruling, at 37-41). The ALJ noted that special condition no. 20 of the draft permit provides conditions relating to submission of a Final Operations and Maintenance Plan (FOMP) for the Department's review and approval, ninety days prior to the commencement of operations at the facility. The FOMP is to include information on specific waste transport and disposal contractors and final disposal sites (inclusive of all necessary authorizations), among other information. The authorizations must include a certified copy of each permit or other authorization pertaining to the operation of the treatment or disposal facility to which the solid waste will be brought. Department staff is required to approve the FOMP prior to commencement of operations at the facility.

DSNY, as a supplement to its Part 360 permit application, has also provided a report serving as an interim transfer, transport and disposal plan (see DSNY Engineering Report dated January 2007, Vol 1, Appendix I [addressing system requirements, rail capacities, intermodal terminal and disposal facility components]; see FEIS, § 40.3.5, at 40-400 to 40-431). The interim plan shows the available capacity at intermodal terminals in the New York region, as well as the sufficiency of the capacity of rail or ocean barge transport that serves those facilities to transfer and transport containerized waste from the City's marine transfer stations.

The interim plan also describes the available disposal capacities in various states based on proposals that DSNY received in response to its "Request for Proposals ['RFP'] to Transport and Dispose of Containerized Waste from One or More Marine Transfer Stations" that was issued in December 2003 (see Issues Ruling, at 38). As set forth in the FEIS, DSNY is negotiating with the objective of entering into long term transport and disposal contracts. Once these contracts are finalized in accordance with the City's procurement process, the final transport and disposal plan will be developed and submitted to DEC in accordance with special condition no. 20 of the draft permit.

Department staff and the ALJ interpreted the permit application requirements to allow for conditioning the permit to provide for the pre-operational submission of this information. This interpretation is reasonable and an appropriate application of the regulation, and provides a basis to ensure that suitable

arrangements will be made (see Matter of Gracie Point Community Council, 92 AD3d, at 129-130 [determining that, with respect to the same requirement for the East 91<sup>st</sup> Marine Transfer Station, DEC acted "reasonably and practically" in allowing DSNY to delay providing a final plan until the City's competitive procurement process was completed]; see also Matter of the Islip Resource Recovery Agency, Decision of the Commissioner, November 26, 1984, at 2-3 [providing for the conditioning of the permit upon subsequent execution of a residue and bypass disposal agreement]).

In addition, the proposed permit contains other conditions that address the proper operation of the facility with respect to the transfer and containerization of waste (see, e.g., special condition nos. 33 [time periods for waste removal] and 34 [containerization requirements]; Department staff reply, at 6), which address concerns raised by petitioners.

### 3. Tidal Wetlands and Use and Protection of Waters

Petitioners state that the ALJ erred in interpreting two regulatory provisions (6 NYCRR 608.8[b][relating to use and protection of waters] and 6 NYCRR 661.9[b][relating to tidal wetlands]) "in failing to rule there is an adjudicable issue as to whether the proposed dredging and construction, without the further testing and special scrutiny required for the issue of a permit for the site of a longtime former incinerator[,] will cause adverse impacts on the public health, safety, and welfare" (Appeal, at 29).

Petitioners also contend that the ALJ erred in ruling that no adjudicable issue exists regarding "the long-term and lasting impacts the proposed dredging will have on the nearby tidal wetlands and the aquatic resources and wildlife as provided for in 6 NYCRR 661.9(a)" (Appeal, at 29). Petitioners state that repeated periods of re-suspension of sediment during the proposed dredging activities would negatively impact the benthic community, which would not see a quick recovery (see Appeal, 30).

Petitioners maintain that dredging is unpredictable and reference, in their appeal, an August 11, 2009 New York Times article reporting on Hudson River PCB dredging issues. Petitioners had previously submitted documents in this proceeding which stated that dredging may result in resuspension of sediments.

DSNY's application, Department staff's analysis and the conditions of the draft permit fully rebut petitioners' arguments. As set forth in DSNY's application, only a small area would be dredged, the total volume of dredging is anticipated to be 4,180 cubic yards, and activities associated with the dredging would be anticipated to last approximately three to four months (see Joint Application, Section 4.5, at 32, 34).<sup>11</sup> The ALJ analyzed in detail the submissions on this issue (see Issues Ruling, at 52-57), and I concur with his determination that no issue exists for adjudication.

By its nature, dredging will resuspend some sediments in the water column. Comparisons of metal concentration ranges in sediments for the facility site to those for other local projects indicate that these concentrations are generally similar (see, e.g., Exhibit S to the 2008 DSNY Brief).

As both Department staff and DSNY pointed out, the dredging, as proposed for this project, would be conducted in a manner that would limit environmental impacts. The dredging, which would be necessary, in part, to accommodate the deeper draft of the coastal barges, would result in a short-term impact on the benthic invertebrates in the area (see FEIS, Chapter 5 [Environmental Review: Southwest Brooklyn Converted MTS], at 5-41). However, the impact is expected to be minimal, and the recolonization of the area by benthic invertebrates "can be expected to occur within 6 to 12 months after cessation of dredging activities" (see id.). Department staff's independent evaluation of the potential impacts of dredging on the tidal wetland and aquatic resources, including the effect on the benthic community, determined that the impacts would be limited (see, e.g., Tr, at 228-229; see also Department staff reply, at 6 [no undue adverse impacts on tidal wetland and aquatic resources]).<sup>12</sup>

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<sup>11</sup> A comparison of the dredging project proposed for the facility to other dredging projects in the New York harbor demonstrates its smaller scale (see Exhibit R to the 2008 DSNY Brief); see also FEIS, Chapter 5 [Environmental Review: Southwest Brooklyn Converted MTS], at § 5.9.3.3 [noting occurrence of prior periodic dredging maintenance over a number of years]).

<sup>12</sup> Petitioners raise questions regarding the impact of the project on the "unique juxtaposition of habitat types in the immediate area," specifically citing the use of Dreier-Offerman Park by migratory birds (Appeal, at 31). Petitioners' claims of potential impacts are speculative and conclusory, and petitioners have not made any sufficient offer of proof.

Moreover, the draft permit contains numerous protective conditions to ensure that dredging will be completed in a manner limiting any adverse environmental impact on the marine environment in Gravesend Bay (see draft permit special condition nos. 49 [mandated use of an "environmental bucket" to minimize the loss of material during transport through the water column], 50 [requirements relating to use of the bucket], 53 [requirements relating to placement of excavated sediments on conveyance vehicle to prevent material from reentering waterway], 56A [seasonal restrictions on dredging activities], and 56B [mandated use of silt curtains]; see also Department staff reply, at 7). Additionally, at least 60 days before dredging begins, DSNY must submit to the Department a detailed description of the proposed dredging activities, which must be approved by the Department before dredging may commence (see draft permit special condition no. 47; see also Issues Ruling, at 53-54).

These special permit conditions will help ensure that the dredging activities "will not have an undue adverse impact on the present or potential value of the affected tidal wetland area or adjoining or nearby tidal wetland areas" (6 NYCRR 661.9[b][1][i]).

Petitioners do not present any credible offer of proof that the proposed dredging activities would cause natural resource damage that is "unreasonable, uncontrolled or unnecessary" (6 NYCRR 608.8[c]). In addition, petitioners have offered no expert to testify about the efficacy or appropriateness of any of the measures proposed to limit dredging's environmental impacts (see Issues Ruling, at 56), further underscoring the inadequacy of their offer of proof.

DSNY has also detailed other protective measures that it will undertake to protect water quality with respect to the facility (see, e.g., FEIS Chapter 5, [Environmental Review: Southwest Brooklyn Converted MTS], § 5.11.3, at 5-54; New York City Waterfront Revitalization Program Consistency Assessment Form [included at end of Section 4.5 of the Joint Application], §§ 5.1 to 5.4, at 10-13).

As provided in the draft permit, the mitigation for wetland losses at the site of the Southwest Brooklyn marine transfer station, as well as any such losses at the sites of the three other proposed converted marine transfer stations set forth in the SWMP, would be the creation and restoration of, or funding of projects to create and restore, additional tidal wetland

areas at locations within the New York Harbor (see special condition no. 57 of the draft permit). In the issues ruling, the ALJ directed that the permit for the facility be modified to require that completion of tidal wetland restoration or creation deemed suitable by Department staff as mitigation for the impacts of the Southwest Brooklyn marine transfer station to wetland habitat be completed prior to the first receipt of waste at the new facility (see Issues Ruling, at 60-61; see also Matter of New York City Department of Sanitation [East 91<sup>st</sup> Street Marine Transfer Station], Decision of the Assistant Commissioner, July 27, 2009, at 13). This modification to the draft permit has been made (see special permit condition no. 60 [noting that the tidal wetland restoration or creation deemed suitable by Department staff must be completed "prior to the first receipt of waste at this facility"])). All such mitigation, based on the projected impacts of this marine transfer station on wetland resources, must be completed to Department staff's satisfaction.

With respect to tidal wetlands, the regulations provide that tidal wetland permitting standards take into account the "social and economic benefits which may be derived from the proposed activity" (see 6 NYCRR 661.9[b][1][i]). Through its studies including the SWMP and FEIS, and its consideration of various alternatives, DSNY has demonstrated the purpose and need for its proposal to use marine transfer stations in the handling and disposal of municipal solid waste. Such use will allow the City to move away from the current truck-based system to one based on barge and rail transport. The new system, which requires water access and is water dependent, will help relieve communities that are significantly burdened with a concentration of private, truck-based waste transfer stations and will reduce environmental impacts associated with truck transport.

Petitioners also contend that project-related dredging could detonate live munitions that may be in the project area from an incident in March 1954 where munitions were accidentally dropped or lost by the U.S. Navy in Gravesend Bay, or from other potential mishaps (see Appeal, at 32).

I concur with the ALJ that this is not an adjudicable issue. As the ALJ explained, this issue was investigated by the U.S. Department of the Navy, which concluded that its records indicate that the US Navy Salvage School "recovered all but 10" of the munitions that spilled into Gravesend Bay in March 1954 (Issues Ruling, at 63). I note also that the Army Corps of Engineers has indicated that it will issue a permit to support

DSNY's proposed dredging with requirements relative to the safe execution of this project (see Exhibit V [letter dated February 29, 2008 from BJ Penn of the Department of the Navy to NYC Commissioner Harry Szarpanski] to 2008 DSNY Brief).

Petitioners' statements with respect to munitions in the bay are speculative and conclusory. In their appeal, petitioners refer to a 2005 report from London's Imperial College Consultants which states that munitions found under water may detonate and to a finding of an unexploded ordnance on Staten Island "several years ago" (see Appeal, at 34). These new references raise only general concerns that are insufficient for any offer of proof. Furthermore, this information is untimely. Appeals from an issues ruling are not an appropriate vehicle to attempt to supplement offers of proof or otherwise offer new information (see, e.g., Matter of Town of Brookhaven, Interim Decision of the Commissioner, July 27, 1995, at 5).

In sum, petitioners' arguments fail to raise sufficient doubt about DSNY's ability to meet applicable statutory or regulatory criteria relating to tidal wetlands and the use and protection of waters, such that a reasonable person would require further inquiry, or provide any basis for the denial of the requested permit, a major modification to the proposed project or imposition of significant permit conditions in addition to those proposed in the draft permit. Accordingly, no adjudicable issue has been raised.

#### 4. Necessity of Marine Transfer Station and Consideration of Alternative Sites

Before the Department may issue permits pursuant to the protection of waters and tidal wetlands regulations, DSNY has the burden of establishing that the proposed facility is reasonable and necessary, considering such factors as the existence of reasonable alternatives (see 6 NYCRR 608.8 and 6 NYCRR 661.9).

The application documents and the FEIS demonstrate that the project-related activities are "reasonable and necessary." DSNY, pursuant to the requirements of the State Solid Waste Management Act, prepared the SWMP (see ECL 27-0107 [setting forth the components to be addressed by local solid waste management plans]). Based on a comprehensive review of solid waste needs, the SWMP, which was approved by DEC, provides for a reliance on marine-based waste transport in place of a waste transfer system that is land-based and truck-based. The plan

that DSNY has developed would help reduce air pollution and traffic congestion by minimizing the dependence on trucks for the handling of solid waste. Issues relating to project need were thoroughly reviewed by the ALJ (see Issues Ruling, at 43-49), and support the determination that no adjudicable issue, relative to project need, was raised.

According to petitioners, there are reasonable and feasible alternatives to the proposed site. However, at the issues conference, petitioners only noted one alternative -- the Brooklyn Army Terminal (see Tr, at 218). Petitioners contend that DSNY did not adequately consider this alternative in its SWMP (see Appeal, at 35).

Contrary to petitioners' claims, the record demonstrates that DSNY undertook an extensive and thorough alternatives analysis in its environmental review of methods to manage solid waste generated within the City. With its selection of marine-based transport, DSNY evaluated potential locations for marine transfer stations, including the one at this location (see, e.g., Findings Statement, at Section 3.0 [Alternatives Considered]; FEIS, Chapter 1 [Proposed Action], at 1-1 to 1-34; Joint Application, Section 2).

I concur with the ALJ that petitioners' recommendation of the Brooklyn Army Terminal does not raise an adjudicable issue, in part due to the Department-approved SWMP that establishes the manner in which DSNY is proposing to locate its solid waste infrastructure. Petitioners' offer of an alternative to the facility, in effect, is a challenge to the SWMP and is untimely. Moreover, even if that challenge were timely, petitioners failed to make a sufficient offer of proof showing that their proposed alternative (the Brooklyn Army Terminal) could accommodate and would be appropriate for a new marine transfer station (see Issues Ruling, at 47-48).

The comprehensive analysis that DSNY undertook with respect to solid waste infrastructure siting in the development of the SWMP and the appropriateness of deferring to the DEC-approved SWMP have not been offset by petitioners' arguments. Although petitioners contend that the Brooklyn Army Terminal is a potentially suitable alternative (see Appeal, at 36-37), their claims as to the suitability of this new site are speculative and conclusory, and are insufficient to raise an adjudicable issue. Furthermore, any such alternative should have been advanced by petitioners during DSNY's consideration of the SWMP which identified the marine transfer stations to be established.

## 5. Fitness of Applicant (DSNY)

Petitioners state, in their appeal, that DSNY is unfit to operate the proposed facility because of a history of alleged repeated violations during the period when DSNY operated the Southwest Brooklyn incinerator without a permit at this location. Petitioners note that the facility was the subject of several consent orders for alleged air pollution violations tied to the incinerator's operation (Appeal, at 38).

The ALJ concluded that DSNY's fitness was not an adjudicable issue, and I agree. The ALJ stated that "[p]ermit denial is not warranted given the distinctions between operations of an incinerator and a marine transfer station" (Issues Ruling, at 69). Furthermore, the alleged violations that petitioners raise are long past, as the incinerator stopped operating in 1991, about two decades ago.<sup>13</sup>

The ALJ noted the protective conditions in the draft permit regarding waste handling at the facility. Moreover, the draft permit would establish specific monitoring and oversight obligations (see, e.g., special condition nos. 23C [requiring DSNY to retain, subject to the approval of DEC, an independent environmental monitor for the facility]). DSNY would also be required to disclose operating information to the Department and the general public (see, e.g., special condition no. 40C [providing for information through DSNY website]; see also Issues Ruling, at 69).<sup>14</sup>

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<sup>13</sup> As part of their argument, petitioners refer to Exhibit C of the Joint Petition for Full Party Status and Adjudicatory Hearing (January 13, 2008) (Issues Conference Exhibit 7) (see Appeal, at 38). Exhibit C includes nine photographs including, for example, photographs of storage activities, waste, and disposal trucks. The specific dates and locations when these photographs were taken are not noted. I have reviewed the photographs and conclude that they do not, by themselves, raise questions regarding DSNY's fitness and ability to operate a marine transfer station at this site.

<sup>14</sup> In its appeal brief, petitioners also raise questions regarding the silt curtain requirement in the draft permit (see Appeal, at 39-40; see also Tr, at 233). Petitioners contend that, notwithstanding this permit requirement (see special condition no. 56B), the FEIS found that silt curtains would not be feasible. Accordingly, petitioners say "[t]his raises the question whether the FEIS was a good faith assessment" (Appeal, at 40). As DSNY has not objected to Department staff's determination that silt curtains should be used during dredging operations, no adjudicable issue is raised (see 6 NYCRR 624.4[c][1][i]). Moreover, petitioners have no offer of proof of their own concerning silt curtains or their utilization (see Issues Ruling, at 56).

## 6. Pesticide Issues

Petitioners contend that the ALJ did not sufficiently consider No Spray Coalition's arguments regarding the effects of pesticides on humans, marine life and birds; the effect of wind currents on pesticide drift; the "illegality of washing of pesticides into [Gravesend Bay] and groundwater;" and the tracking of pesticides by vehicles through the surrounding neighborhoods (see Appeal, at 40). Additionally, petitioners argue that DSNY's application did not include a comprehensive plan for applying pesticides at and around the site or include the names of pesticides to be used, and that these omissions raise an adjudicable issue (see Appeal, at 47-49).<sup>15</sup>

The Department's regulations govern the application of pesticides, requiring, among other things, that pesticides must "be used in such a manner and under such wind and other conditions as to prevent contamination of people, . . . fish, . . . property, structures, lands, . . . or waters adjacent to the area of use" (6 NYCRR 325.2[a]). Further, pesticides must be used only in accordance with label and labeling directions (6 NYCRR 325.2[b]). DSNY stated that pesticides at the site will be used in accordance with all applicable state and federal law and applied by licensed, fully trained applicators (see, e.g., Tr, at 175).

Department regulations governing solid waste management facilities, in general, and transfer stations, specifically, require that vectors be controlled and the techniques used must be protective of human health and the environment (see 6 NYCRR 360-1.14[f][1] [facility must be maintained in accordance with the permit; see also 360-1.14[f][3][owner or operator must promptly remedy any problems "to ensure that no environmental or human health hazard develops"]; 360-1.14[1] ["[t]he facility must be maintained so as to prevent or control on-site populations of vectors using techniques appropriate for protection of human health and the environment and prevent the facility from being a vector breeding area"]; 360-11.4(e) [transfer station and transfer vehicles must be cleaned to prevent odors and vectors]; see also Tr, at 171).

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<sup>15</sup> Petitioners also contend that the FEIS on the SWMP did not provide sufficient detail about the pesticides that DSNY plans to use at the site, and that a pesticide management plan was not included (see Appeal, at 41). However, as noted, Department staff did not find any inadequacy or deficiency with DSNY's environmental impact statement that DSNY prepared for the SWMP. Petitioners' arguments relating to SEQRA are not adjudicable in this proceeding (see 6 NYCRR 624.4[c][6][ii][b]).

Petitioners' contentions relating to pesticide use and impacts at this facility, including assertions regarding the discharges of pesticides into Gravesend Bay and in the local neighborhood, are speculative and unsupported. Other of their contentions reflect generalized concerns or statements regarding pesticides for which no particular relationship to this facility has been shown. As the ALJ appropriately concluded, petitioners did not show that additional information is reasonably necessary to determine compliance with statutory and regulatory standards governing issuance of any of the requested permits, or that mandating a pesticide management plan is warranted (see Issues Ruling, at 34; see also 2008 DSNY Brief, at 36-38).<sup>16</sup>

In fact, DSNY's Part 360 application sets forth procedures that will be followed at the facility. These procedures include: timeframes for servicing the facility by in-house, licensed exterminators; maintenance of exterminating logs; evaluation of any potential vector problems; as well as response mechanisms to emergency complaints (see Engineering Report, Part 360 Permit Application, Vol 1, at 71; see also Appendix D to Vol 1 of the Engineering Report [Operation and Maintenance Plan], at D-33).

In that DSNY will be maintaining maintenance logs of pesticide applications, I conclude that it would be appropriate for the DSNY website to include information on how the public may obtain this information. Accordingly, I direct that Department staff include a special condition in the facility permit requiring DSNY to post information on the DSNY website regarding the procedures by which the public may obtain information on the use of pesticides at the facility, including dates of pesticide application, the locations where pesticides were applied, and pesticide products used (see special condition no. 40C of the draft permit).

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<sup>16</sup> Petitioners argue that, because birdwatchers in the Dreier-Offerman Park have photographed peregrine falcons and the presence of this raptor was not noted in the FEIS on the SWMP, the ALJ should have directed additional studies pursuant to draft permit condition 4, and "former" sections "624.7[a](4)" and "624.17(b)" of 6 NYCRR (see Appeal, at 52). Petitioners' claims were not based on any significant offer (e.g., affidavits or other proof from the birdwatchers) and any demonstration that this constituted significant new evidence with respect to the project's consideration. Accordingly, their claims do not support any demand for additional studies relating to this project.

As part of their appeal, petitioners propose that residents should have a mechanism to immediately alert the Department of any negative impacts from operations at the facility (see Appeal, at 49). The City of New York already has a 24-hour call-in number (311). That number is accessible to any member of the local community who may have a complaint regarding the facility's operation. Additionally, nothing precludes a resident from contacting the Department directly if he or she has a complaint regarding the facility's operation. With respect to complaints that the Department receives, I hereby direct Department staff to establish a procedure to ensure that such complaints will be forwarded to the Independent Environmental Monitor (see draft permit special condition no. 23C) and to a representative of the facility as designated by DSNY.

To the extent petitioners have raised other arguments relevant to pesticides and rodenticides, these arguments are lacking in merit or insufficient to raise an adjudicable issue.

#### 7. Soil Vapor Intrusion

Petitioners argue that the ALJ erred in failing to find an adjudicable issue "as to the need for further testing and scrutiny to ensure public safety in regard to the release of volatile chemical substances resulting in soil vapor intrusion," relative to the past operation of an incinerator at the site (Appeal, at 60). Petitioners further argue that "[n]o data is provided to confirm that soil vapor intrusion is not an issue" (id., at 61), and, accordingly, "potential impacts of soil vapors on site cannot be conclusively ruled out" (id.).

Petitioners offer no expert witnesses or other proof sufficient to support identifying soil vapor intrusion as an issue in this proceeding. Their speculative and conclusory contentions are not an adequate offer of proof.

Furthermore, as documented in this record, the site has undergone a number of soil and groundwater investigations (see, e.g., Exhibit E [Draft Initial Soil and Groundwater Sampling Program Summary Report] to 2008 DSNY Brief, §§ 3.2 & 4.4.2.3; Exhibit F [Report on Geotechnical Investigation Southwest Brooklyn Marine Transfer Station Conversions dated April 2005 to 2008 DSNY Brief]; Issues Ruling, at 29-30; see also, supra, fn 7 [site assessment performed for the U.S. Environmental Protection Agency in 2008]). None of the investigations has shown volatile organic compounds, including chlorinated volatile organic

compounds, to be at a level of concern with respect to potential soil vapor intrusion.<sup>17</sup>

Although petitioners have cited to DEC program policy DER-13 ("Strategy for Evaluating Soil Vapor Intrusion at Remedial Sites in New York") to support their argument for further investigation, the ALJ determined that the site does not fall within any of the categories addressed in the policy (see Issues Ruling, at 67; see also Department staff reply, at 9).

The ALJ reviewed the legal requirements that would support a request for additional information or testing at the site, and determined that no basis existed to direct the testing requested (see Issues Ruling, at 67). I agree with the ALJ's determination for the reasons set forth in the issues ruling.

#### 8. Access to the Waterfront/Public Trust Doctrine

Petitioners, in their appeal, invoke the public trust doctrine, citing an obligation to protect and preserve against pollution and ecological impacts. Accordingly, petitioners contend that the site should be tested for toxins that might drain or leach into Gravesend Bay, and that local sediments should also be tested (Appeal, at 62). Petitioners also reference the access of the public to the waterfront as a concern.

With respect to petitioners' demands for further testing, as discussed elsewhere in this decision and in the issues ruling, petitioners failed to provide any adequate offer of proof or identify any legal standard that would support such testing.

With respect to access, applicant considered the marine transfer station's consistency with New York City's waterfront revitalization program "including the policy to provide public access to and along the City's coastal waters" (Issues Ruling, at 61). The ALJ noted that development of the facility would not preclude any future development of public access at other locations along the Gravesend Bay waterfront, and it would "not add to or subtract from" the opportunities of the general public to access the waterfront and coastal resources of Gravesend Bay (id., at 62).

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<sup>17</sup> Although petitioners claim that there may be leaking underground storage tanks at the site, the record indicates that the single tank found on the site passed a tightness test prior to its closure (see Exhibit P to 2008 DSNY Brief).

The ALJ also noted that the New York State Department of State has reviewed DSNY's consistency assessment form and determined that the proposed facility meets its general consistency concurrence criteria (see Issues Ruling, at 62; see also letter dated September 29, 2005 from Jeff Zappier, Supervisor of Consistency Review and Analysis, Division of Coastal Resources, New York State Department of State, to Harry Szarpanski of DSNY [included at end of Section 4.5 of the Joint Application]; New York City Waterfront Revitalization Program Consistency Assessment Form [included at end of Joint Application, Section 4.5], §§ 8.1 to 8.4, at 16-17 [noting that the facility would not impact the local marina or other existing, public water-related recreational resources or access, would not preclude any future development of public access, and would not preclude visual access from other locations along the Gravesend Bay waterfront]; Department staff reply, at 10).

Petitioners cite to certain general propositions relating to government obligations pursuant to the public trust doctrine but fail to demonstrate how these support any issue in this proceeding.<sup>18</sup> Petitioners' contentions are conclusory and insufficient to raise a substantive and significant issue.

#### 9. Impacts of Contamination of Former Incinerator

Petitioners contend that further scrutiny and further testing of the site is needed prior to the issuance of any permit. This testing, according to petitioners, is to address the "[l]ong [t]erm and [l]asting [i]mpacts of [d]redging and [c]onstruction [a]ctivities" and the "[s]trong [p]robability of

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<sup>18</sup> Petitioners cite two cases in support of their argument that the permit should be denied or that the issue of the public trust doctrine should be adjudicated. Neither case supports petitioners' position. The first cited decision, People v Poveromo, 71 Misc2d 524 (Suffolk Cty Dist Ct 1972), rev'd, 79 Misc2d 42 (1973), which concerns the alleged illegal disposal of fill without a permit, enunciates certain general principles regarding the public trust doctrine and addresses whether a local town law may prohibit such activity. The second cited decision, Matter of Colonial Pipeline Co v State Board of Equalization and Assessment, 81 Misc2d 696 (Kings Cty Sup Ct 1975), aff'd, 51 AD2d 793 (1976), aff'd, 41 NY2d 1057 (1977), addresses the extension of an oil pipeline in the bed of the Arthur Kill and the terms of the consent granted by New York City. The court noted that the City "has an obligation . . . to protect and preserve the waters within its boundaries against any potential hazard of pollution and ecological destruction" (81 Misc2d, at 700). Any obligation of environmental protection has clearly been satisfied here as the result of DSNY's environmental review process on the SWMP, the manner of the proposed construction and operation of this facility, Department staff's review of the project, and the imposition of protective permit conditions for the facility.

[e]specially [s]evere [c]ontamination of [l]and and [s]ea" arising from the operation of the former incinerator on this site (Appeal, at 62-63).

Based on this record, no substantive and significant issue has been raised. Potential impacts relating to dredging and prior site activities that petitioners allege have been previously addressed in this decision and were extensively and carefully reviewed in the issues ruling (see Issues Ruling, at 29-31, 52-61). Moreover, the draft permit incorporates numerous protective special conditions relative to these matters (see, e.g., special condition nos. 23A [preparation of a soil management plan, including program to suppress fugitive dust and monitor particulate matter at the site], 23B [establishment of erosion and sediment controls, including sediment management], 24 [inspection and maintenance of the integrity of the bulkhead "from the surface down to the mudline," as well as inspection and maintenance of sand fill material], and 26 [requirements governing excavated soil disposal]).

Furthermore, special condition no. 47 of the draft permit provides that not less than sixty days prior to the proposed start date of dredging, DSNY must submit two copies of a detailed description of the proposed dredging (proposed dredging report) to DEC for DEC's review. The description is to include:

"(i) a bathymetric survey conducted within the previous 3 months; (ii) existing sediment sampling data, and a sediment sampling plan for DEC's approval providing for additional sediment sampling prior to the commencement of dredging, including sampling locations and methods; (iii) sampling results from the additional sampling in the form of (a) bulk sediment chemistry and grain size analysis and (b) including additional testing required for the dredge deposition or placement at an upland location. The specific analytes which must be tested for include VOCs, semi-volatile organics, PCBs and aroclors, pesticides, metals, and Dioxin and Furans and their congeners . . .; (iv) an estimate of amount of material to be dredged; (v) a site plan and cross-sectional diagram with axes, mud lines, dredge lines (historical and proposed), wetlands, and all other pertinent information clearly labeled; (vi) the name and address of dredged material placement location as well as a 'letter of acceptance' from the named facility . . .; and, (vii) a copy of the permit or other authorization authorizing the activity."

(special condition no. 47). In addition, dredging may not proceed without DEC's approval (see id.).<sup>19</sup>

The ALJ notes that DSNY has committed to provide this information to participants in this proceeding at the same time it is provided to Department staff "so that they may have an opportunity to comment before dredging begins" (Issues Ruling, at 54; see also DSNY's Sur-Reply Brief in Response to Petitioners' Replies and in Opposition to the Requests for Party Status dated September 26, 2008, at 5 fn 1). I conclude that it is appropriate for that commitment to be reflected in the language of special condition no. 47. Accordingly, I direct Department staff to add language providing that DSNY is to submit one copy of the proposed dredging report to each of the participants in the issues conference (that is, 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, Assemblymember William A. Colton, Esq., the Environmental Defense Fund, American Heritage Democratic Organization, SIBRO Civic Association, and Stephen A. Harrison) at the same time that it is submitted to Department staff.

The draft permit requires the submission of a number of other reports (see special condition nos. 20 [Final Operations and Maintenance Plan], 23A [draft and final soil management plan], 57 [conceptual natural resources mitigation plan], and 59 ["formal" natural resources mitigation plan]). The addition of language to the permit regarding the proposed dredging plan required by special condition no. 47 does not negate or otherwise modify any commitments that DSNY has made to the participants in this proceeding to provide them with copies of other reports and information in a timely fashion. To facilitate access of the public to these reports, Department staff is directed to add language to the permit that would require DSNY to include on the DSNY website the dates when the reports required pursuant to special condition nos. 20, 23A, 47, 57 and 59 are submitted to the DEC and the procedures by which the public may request copies of those reports from DSNY.

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<sup>19</sup> Petitioners, in their appeal, raise concerns about the presence of dioxin at the site arising from the operation of the former incinerator. Although dioxin has been detected in sediments (see 2008 DSNY Brief, at 26 n12 [samples with moderate contamination]), it is not of a level that would preclude construction and operation of this facility. As noted, special condition no. 47 will require testing for dioxin, among other substances.

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To the extent that petitioners have raised other issues on their appeal, these have been considered and rejected.

**CONCLUSION**

Because no substantive and significant issues have been raised that warrant adjudication, the ALJ's issues ruling is affirmed as modified by this decision. The matter is hereby remanded to Department staff. Department staff is directed to issue the requested permits and the water quality certification for the Southwest Brooklyn marine transfer station to DSNY, consistent with the draft permit prepared by Department staff and this decision, and in accordance with all applicable laws and regulations, including but not limited to SEQRA.

Because the Department is a SEQRA involved agency with respect to this project (for which an environmental impact statement has been prepared by applicant), Department staff is to file a findings statement in accordance with ECL Article 8 and 6 NYCRR Part 617.

New York State Department of  
Environmental Conservation

/s/

By: \_\_\_\_\_  
Joseph J. Martens,  
Commissioner

Dated: May 21, 2012  
Albany, New York