



ZACHARY W. CARTER
Corporation Counsel

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007

Telephone: (212) 356-2076
E-mail: hruinst@law.nyc.gov

September 23, 2016

BY U.S. MAIL AND EMAIL

Mr. David Vitale, P.E.
Director, Division of Materials Management
NYS Department of Environmental Conservation
625 Broadway, 9th Floor
Albany, NY 12233-7250
David.Vitale@dec.ny.gov

Mr. Kenneth B. Brezner, P.E.
Regional Materials Management Engineer
NYS Department of Environmental Conservation, Region 2
47-40 21st Street
Long Island City, NY 11101
Kenneth.Brezner@dec.ny.gov

RE: Fresh Kills Consent Order, Parag. XXIV.A.
DEC Case No. D2-9001-89-03
REQUEST FOR MODIFICATION

Dear Mr. Vitale and Mr. Brezner,

On behalf of the City of New York by its Department of Sanitation (DSNY), I hereby submit a request for a tenth modification of the above-referenced Fresh Kills Consent Order (Consent Order) pursuant to paragraph XXIV.A. of the Consent Order. This request is made (1) to extend by three years the date by which construction of the final cover at Section 1/9 of the Fresh Kills Landfill (the Landfill)

shall be completed to December 31, 2021,¹ (2) to improve the accessibility and quality of the public access document repository and (3) to remove from the Consent Order document all provisions which are no longer needed due to satisfactory completion of their requirements by DSNY and approval thereof by the New York State Department of Environmental Conservation (DEC) or as a result of the incorporation of textual changes made by previous modifications into the Consent Order document.

THE EXTENSION REQUEST

BACKGROUND

The original Consent Order was executed on April 24, 1990. Six other modifications were made before Modification No. 7 was added on April 27, 2000. Modification No. 7 reflected the need to establish appropriate measures for the accelerated closure of the Landfill as a result of the cessation of solid waste disposal at the Landfill after December 31, 2001 as agreed to in 1996 by DEC and the City and required by subsequent State legislation. In a new Appendix A-15 Schedule of Compliance milestone dates were established for cessation of the disposal of solid waste, submittal of final acceptable final cover design reports and initiation of final cover construction for each of Landfill Sections 6/7 and 1/9.

¹ Please note that an extension of the closure completion date for Section 1/9 should similarly extend the length of time that DSNY conducts the shoreline cleanups agreed to in the Order on Consent in DEC File No. R2-20071023-843, the July 28, 2014 Order, a copy of which is attached as Appendix J to proposed Modification No. 10. This is being requested in a separate letter, sent on the same date as this letter. A copy of that letter is enclosed herewith.

Modification No. 8 modified Appendix A-15 by allowing placement of material received from the site of the World Trade Center disaster of September 11, 2001 after the date for cessation of solid waste disposal operations of January 1, 2002. Modification No. 8 was executed and went into effect on January 17, 2002.

Modification No. 9 was added on December 17, 2009. A copy of Modification No. 9 is attached as **Exhibit 1** to this modification request. Among other things, it formalized an extension of the date for completion of final cover construction at Section 6/7 in Appendix A-15 to December 31, 2011. DSNY timely accomplished this task.

A date for completion of final cover at Section 1/9 had first been offered in the Final Cover Design Report dated January 4, 2002 prepared for milestone subject 6 in Appendix A-15. Reasons for changes to that report, which projected completion of Section 1/9 final cover at the end of 2011, are outlined in Modification No. 9.

Modification No. 9 also formalized an extension of the date for completion of final cover placement at Section 1/9 to December 31, 2018, based upon (1) the unplanned placement of approximately 1.5 million tons of material from the World Trade Center in Section 1/9 that was ongoing and not fully borne into account in the design work reflected in the January 4, 2002 Final Cover Design Report and (2) delays in closure work at Section 1/9 caused by the pendency of the appeal in the litigation captioned *World Trade Center Families for Proper Burial, Inc., et al. v. The City of New York, et al.* (05 CV 7243) (*WTC Families*) in which petitioners sued in 2005 to have DSNY

excavate, resift and relocate the World Trade Center material placed in Section 1/9, among other things. On July 7, 2008 the United States District Court for the Southern District of New York dismissed the petition and petitioners appealed.

It is important to note that formalization of December 31, 2018 as the date for completion of closure construction at Section 1/9 did not establish a milestone date with associated stipulated penalties for lack of timely compliance. Rather, it was a statement of DEC's and DSNY's mutual agreement as to what was a reasonable and achievable expectation as of the end of the year 2009. This statement, however, recognized the difficulty of keeping construction of any sort to a tight schedule in the face of field conditions that cannot be completely knowable as well as other unknowns which might affect construction.

Whereas paragraph 24 of Modification No. 9 explicitly acknowledged that meeting the deadline for completion of final cover placement by December 31, 2018 was contingent upon the timeliness and nature of the outcomes of certain identified variables. Whereas paragraph 24.a. and b. of Modification No. 9 recognized that timely completion of final cover construction at Section 1/9 could be dependent upon the outcome of *WTC Families*, insofar as it might necessitate major changes to the design of the final cover. As stated previously, on July 7, 2008 the United States District Court for the Southern District of New York had dismissed the petition and petitioners appealed. *WTC Families* was not fully resolved until October 4, 2010 when the U.S. Supreme Court denied the petition for a writ of certiorari after the Second

Circuit had affirmed the District Court's dismissal of petitioners' claims. Although not requiring a major design change *per se*, as an outcome of issues raised in the litigation, DSNY made significant changes to final cover construction methods in recognition of the presence of World Trade Center (WTC) materials in Section 1/9 to avoid uncovering any of them.

The changes to construction methods include building workarounds into the sequence of construction to entirely avoid excavation in the WTC area and implementing additional measures during construction to minimize the possibility of unexpected appearances of WTC materials. DSNY has a high level of confidence that it has accurately demarcated and surveyed the boundaries of the WTC material area in the Landfill. Nonetheless, WTC materials might appear outside those established boundaries as a result of raveling of the WTC area and intermediate cover that may have occurred at the edges of the WTC area in the landfill, particularly along the western slope of Section 1/9. This raveling may have shifted WTC materials outside the demarcated and surveyed boundaries of the WTC area. Although DSNY will also minimize excavation in the areas adjacent to the WTC area, some amount of excavation in these adjacent areas will be necessary. Accordingly, DSNY will require its contractors to perform enhanced inspection steps in preparation of closure construction work in the WTC and surrounding areas of Section 1/9 and to cover and, as necessary, recover the areas with clean fill as much as possible. These

additional construction measures are expected to hamper construction progress in the affected areas to some extent.

Another variable recognized by Whereas paragraph 24.d. of Modification No. 9 that would have a direct effect on DSNY's ability to meet the December 31, 2018 closure date for Section 1/9 was whether DEC issued a modification to the State Pollutant Discharge Elimination System (SPDES) permit for the Landfill to add outfalls to manage stormwater drainage on the western side slope of Landfill Section 1/9 into the Arthur Kill within ninety (90) days of completion of the permit application. DSNY submitted the complete permit application on June 17, 2014, but DEC did not issue the SPDES permit until March 13, 2015, nearly nine (9) months after submittal of the permit application.

Of even more significance to the timely completion of Section 1/9 final cover construction was the permit's addition, for the first time, of stormwater effluent discharge standards to the terms and conditions of the SPDES permit for the Landfill. DSNY and DEC reached conceptual agreement regarding changes needed to the previously approved sequence of construction to accommodate the new SPDES requirements after the SPDES permit was issued. After that, however, DSNY still had to work out the changes needed in the detailed final cover design. DEC granted its approval on June 30, 2015 to the detailed changes. DSNY then modified construction documents accordingly, which resulted in yet further delay before finally putting the construction contract out to bid in December 2015.

The means and measures needed for compliance with the SPDES permit requirements during the construction of final cover are heretofore untested, particularly on the steep western slopes of Section 1/9. A large amount of trial and error may be needed in the field to develop effective measures. In and of itself, this is likely to slow progress. Moreover, as evidenced by the occurrence of exceedances of Total Suspended Solids (TSS) standards at stormwater outfalls in the vicinity of ongoing construction at the Landfill, further potential delays to final cover construction may result from the need to limit the size of the area under construction to maintain compliance with the effluent discharge standards. Accordingly, it is foreseeable that in the event of the occurrence of future extreme rain events during final cover construction, DSNY may need to request additional time for completion of final cover to maintain compliance with SPDES permit requirements.

In addition to the delaying effects on construction of adjusting the bid documents to incorporate measures to maintain compliance with SPDES effluent standards, building in construction workarounds to avoid excavation in the WTC area and implementing measures such as enhanced inspections during construction to minimize the possibility of inadvertently uncovering WTC materials, DSNY also incurred significant delays in putting out to bid and processing the contract to construct the final cover at Section 1/9. These delays have been of greater length than those experienced previously for final cover construction at the other three landfill sections.

DSNY's initial expectation was to put the contract out to bid June 2015, anticipating that work would commence mid-March 2016. However, as explained above, NYSDEC's final approval of the design changes was not issued until June 30, 2015, after SPDES permit issuance and incorporation by DSNY of requisite detailed design changes. As a result, the bid documents could not be processed for legal and procurement approvals until after that, and the contract was not actually put out to bid until December 2015. The contract was registered by the Comptroller in July 2016 and the contractor commenced mobilization at Section 1/9 in August 2016.

As a consequence of the loss of most of the 2016 construction season, DSNY now plans to focus the contractor on preparing areas during 2016 for final cover and for other closure related construction to proceed during 2017. At a minimum, the site preparation work being planned for 2016 includes clearing vegetation, surveying, establishing stormwater controls (i.e. BMPs), securing materials and stockpiling soils. The first area scheduled for construction in 2017 includes the World Trade Center area and the steep western slope of Section 1/9 bordering on the Arthur Kill. Construction at both these areas is expected to be somewhat problematic.

DSNY has planned to minimize delays in construction by preparing each future construction phase area during the preceding sub-phase of final cover construction in another area of Section 1/9. This procedure of advancing the preparation of phase/sub-phase areas, however, will slow down final cover construction during the first year in which it is implemented. Implementation of this measure or other

measures to try to speed work up largely depends on the selected contractor's construction schedule and choices. DSNY's contract incentivizes speedy completion of construction but the contractor will decide how it plans to proceed with construction.

REQUEST TO EXTEND COMPLETION DATE BY THREE YEARS TO DECEMBER 31, 2021

As a result of the delays which have occurred up to this time and the measures to be employed in the future to complete the final cover without uncovering WTC materials and in full compliance with the new SPDES permit requirements, the City of New York by its Department of Sanitation hereby respectfully requests a three (3)-year extension of time to December 31, 2021 for the completion of final cover construction at Section 1/9 of the Fresh Kills Landfill. Also, as explained above, achieving completion by this date is contingent upon the non-occurrence of future extreme rain events and not uncovering WTC materials during construction.

If extreme rain events occur during construction, DSNY expects it will need to limit the size of the area of construction disturbance to maintain SPDES permit compliance, thereby slowing construction down. If WTC materials are inadvertently revealed, it is possible that work stoppages imposed by outside authorities may occur. If litigation ensues, long-term work suspensions might result. Although DSNY would expect the contractor to move work to other areas of Section 1/9 while delays are

imposed in a specific area, additional time may nonetheless be needed to complete the construction of final cover.

IMPROVING THE ACCESSIBILITY OF THE PUBLIC ACCESS DOCUMENT REPOSITORY

On September 21, 1990, Modification No. 1 added to the Consent Order the requirement for DEC and DSNY to maintain a public access document repository within the Borough of Staten Island. Appendix D-2 was added to the Consent Order at the time to require that two copies of the many types of required documents were to be included. DEC was charged with taking necessary measures to ensure that convenient public access to all documents related to the Consent Order was maintained. Over the years since 1990 the Repository served its purpose well, housing and maintaining access by the public to the many reports and other documents generated by DSNY and reviewed and approved by DEC to satisfy the over 100 milestone requirements of the Consent Order.

Problems have ensued, however, with maintaining the Repository in good shape and with assured access. First, the many voluminous documents quickly overran the space provided for them in the Staten Island Borough President's office. In partial response, on July 15, 1994, Modification No. 4 to the Consent Order reduced from two to one the number of copies of documents required to be maintained in the Repository. Second, the enthusiastic users of the Repository or

other unknown members of the public repeatedly defaced or misappropriated the contents of the Repository.

As a result of this history, as well as of the satisfactory completion of virtually all Consent Order-required work, it is now proposed to limit the contents of the Public Access Document Repository to those documents which have lasting value and to put the Repository on-line instead of maintaining a physical presence. The documents are the ones prepared in satisfaction of Consent Order milestones and other requirements. Only final, approved versions of investigation, engineering and monitoring reports will be included. No draft and interim versions of reports and no raw data submittals will be kept any longer.

The list of documents to be included has been the subject of discussions between DEC and DSNY, has been approved by DEC, and will be included in a new Appendix D to be incorporated into the revised Consent Order². Periodic updates of certain documents will also be listed in new Appendix D and included in the Repository. It is also proposed to improve the Repository's public accessibility by making it fully accessible on-line.

Our expectation is that over ninety percent (90%) of the listed documents will be included in the Repository as soon as it becomes available, either in advance or no later than four (4) months after Modification No. 10 taking effect. The remaining ten

² The new Appendix D will replace Appendix D-1, regarding City ash disposal capacity and D-2, as stated above, describing the requirements of the old Repository.

percent (10%) or less of the documents is expected to be added to the Repository within twelve (12) months after the Repository going on-line. It is anticipated that the Repository will be updated on an annual or more frequent basis, as needed. The Repository will be sited on New York City's Open Data Portal at data.cityofnewyork.us and, if feasible, a link may be provided on DSNY's own website at nyc.gov/dsny.

REMOVAL OF EXTRANEEOUS PROVISIONS

To this Modification Request I am attaching as **Exhibit 2** a draft annotated version of the 1990 Consent Order to which changes made to the Consent Order by previous Modifications have been incorporated into the text as well as deletions and adjustments that are being proposed at this time in recognition of the satisfaction and approval of nearly all of the requirements of the Consent Order. The annotations document the basis of each change. Out of over one hundred (100) milestones, only two (2) now remain. In addition, I am attaching as **Exhibit 3** a draft unannotated version of the Consent Order with all appropriate deletions and revisions made as were noted in the annotated document. This unannotated document is intended to be the version of the Consent Order to be used going forward, while the annotated version will be maintained in files, including the Public Access Document Repository, to memorialize all the work that has come before.

Enclosed via U.S. Mail are one original and two copies of this letter including the three exhibits described above to the DEC Region 2 office in Long Island City and two copies to DEC Headquarters in Albany, in accordance with current Consent Order communications requirements. I will also email the letter and exhibits to Messrs. Vitale and Brezner and to DEC Region 2 Regional Attorney Karen Mintzer and Associate Attorney John Nehila, in keeping with the new communications requirements provided in the proposed modification.

If you have any questions or require additional information about the subject matter of this letter, please contact me at (212) 356-2076.

Sincerely,



Heidi Rubinstein
Senior Counsel
Environmental Law Division

cc: K. Mintzer, Regional Attorney, DEC, Karen.Mintzer@dec.ny.gov
J. Nehila, Associate Attorney, DEC, John.Nehila@dec.ny.gov
D. Diggins, First Deputy Commissioner
J.A. Atkinson, Deputy Commissioner, Solid Waste Management
T. Killeen, Director, Solid Waste Management
G. Basciano, Director, Fresh Kills
P.J. Gleason, Assistant Commissioner, Waste Management Engineering
T.R. Nabavi, Director, Waste Management Engineering
R.D. Orlin, Deputy Commissioner, Legal Affairs
S. Brautigam, Assistant Commissioner, Legal Affairs