SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 7
Justice

ASSOCIATION FOR COMMUNITY REFORM NOW et al.,

Petitioners,

- v -

MAYOR MICHAEL BLOOMBERG, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF SANITATION, and THE NEW YORK CITY PLANNING COMMISSION,

Respondents.

INDEX NO. 114729/05

MOTION DATE 5/3/06

MOTION SEQ. NO. 001

MOTION CAL. NO. 10

The following papers, numbered 1 to 4 were read on this Article 78 petiton

	PAPERS NUMBERED
Notice of Petition — Affidavits — Exhibits	1
Answering Affidavits — Exhibits	2
Reply Affidavits	3, 4
Stipulation	5

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ordered that the Article 78 petition is decided in accordance with the annexed memorandum decision and judgment.

UNFILED JUDGMENT
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 9/19/06

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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THE ASSOCIATION FOR COMMUNITY REFORM NOW ("ACORN"), SALLY MALDINADO, ROSE BERGIN, THE GRACIE POINT COMMUNITY COUNCIL, by its President ANTHONY ARD, EMILY PAZZAGLINI, NICK CONTE, THOMAS NEWMAN, SUZANNE SANDERS, 1725 YORK OWNERS CORP., GRACIE GARDENS OWNERS CORP., BEACHFRONT CONCESSIONS, INC., D/B/A YORK GRILL, ANTHONY GRECO, and CHARLES GRECO,

Petitioners,

For Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

- against -

MAYOR MICHAEL BLOOMBERG, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF SANITATION, and THE NEW YORK CITY PLANNING COMMISSION,

Respondents.

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Index No. 114729/05

Decision and Judgment

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THE ASSOCIATION FOR COMMUNITY REFORM NOW ("ACORN"), SALLY MALDINADO, ROSE BERGIN, THE GRACIE POINT COMMUNITY COUNCIL, by its President ANTHONY ARD, EMILY PAZZAGLINI, NICK CONTE, THOMAS NEWMAN, SUZANNE SANDERS, 1725 YORK OWNERS CORP., GRACIE GARDENS OWNERS CORP., BEACHFRONT CONCESSIONS, INC., D/B/A YORK GRILL, ANTHONY GRECO, and CHARLES GRECO,

Plaintiffs,

- against -

MAYOR MICHAEL BLOOMBERG, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF SANITATION, and THE NEW YORK CITY PLANNING COMMISSION,

Defendants.

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Index No. 114711/05

Decision and Order

HON. MICHAEL D. STALLMAN, J.:

Before this Court are two lawsuits challenging aspects of the City's proposed "Solid Waste Management Plan," a plan which outlines a framework for managing the City's trash and recyclables

for the next 20 years. The first lawsuit, commenced under index no. 114729/05, is an Article 78 proceeding; the second, commenced under index no. 114711/05, is a plenary action alleging nuisance. Both lawsuits challenge actions relating to the proposed Solid Waste Management Plan by the City of New York, acting through its Department of Sanitation (DSNY) and through the City agencies responsible for land use determinations.

This decision addresses both the Article 78 petition and the City's motion to dismiss the plenary action.

BACKGROUND

New York City generates approximately 50,000 tons per day (tpd) of waste. Of that, approximately 11,123 tpd of refuse and 2,555 tpd of separately collected recyclables were generated in fiscal year 2002 by city residents, not-for-profit institutions, and other governmental agencies, including waste from special DSNY operations such as street and lot cleaning (Petitioners' Ex I, at 2-3). Commercial businesses or construction activities account for the remaining balance of the city's waste.

Since 1992, New York State has approved a local solid waste management plan (SWMP) for New York City, in accordance with the State's Solid Waste Management Act, which establishes the State's solid waste management policy (*see* Environmental Conservation Law § 27-0101 *et seq.*). For years, DSNY-managed waste ended up at the Fresh Kills landfill on Staten Island (the last active landfill site in the city). In 1997, the City began to phase out the use of the Fresh Kills landfill by entering into short-term export contracts with private companies for all the disposal of residential waste. After the Fresh Kills landfill closed in March 2001, DSNY-managed waste became handled by a private system of transfer stations, landfills, and waste-to-energy facilities. A large proportion

of city waste is delivered via truck to private in-city transfer stations, where the waste is transferred primarily to private long-haul tractor-trailers for transport to disposal facilities consisting mainly of landfills in other states (Czwartacky Aff. ¶ 4).[1]

Of the 55 privately-owned transfer stations in the city, 30 are located in Brooklyn, the Bronx and Queens, in but four of the city's 59 community districts. Almost 85% of commercial putrescible waste (i.e., waste containing organic matter susceptible to odor and decay) managed by private waste haulers is processed in these boroughs, with the remainder exported directly out of the city (*id.* ¶ 5). In Manhattan, where more than 40% of the city's commercial putrescible waste is generated, there are no privately-owned putrescible waste transfer stations.

On October 7, 2004, the Mayor and DSNY unveiled a new SWMP for management of the city's solid waste for the next 20 years (*see* Respondents' Ex 3 [SWMP]; *see* Petitioners' Ex C). The goal of the proposed SWMP is to convert the City's existing Marine Transfer Stations (MTSs) to enable waste to be containerized on site. Once containerized, the waste will then be taken by private waste management companies, pursuant to long-term (20-year) contracts with the City, and transported by barge or rail out of the city to final disposal facilities.

Respondents assert that the new SWMP has several major advantages over the current truck-based system. First, they maintain that it will more equitably distribute DSNY-managed waste across the five boroughs, rather than relying on only a few communities that currently house a number of waste transfer facilities. Each borough would be responsible for export of its own waste. Second, they assert that reliance on trains or barges to export waste will result in a dramatic

[1] Walter A. Czwartacky is the Director of Special Projects in the Bureau of Long Term Export for DSNY, responsible for the development and implementation of the City's Long Term Waste Export System, as embodied in the SWMP (Czwartacky Aff. ¶¶ 1-2).

reduction in the number of trucks that travel through the city under the current system (approximately 5.6 million fewer truck miles traveled annually within the city). Third, over the course of the 20-year term of the new SWMP, the anticipated cost will be lower than the cost of the City's continued reliance on the current truck-based system, as landfill capacity in neighboring states fills up and becomes more expensive. Fourth, they allege that the proposal will require a smaller investment by the City, and can be implemented more quickly than a system based solely on new City-owned facilities. Fifth, they assert that the City will further reduce the potential for negative impacts from the truck-based commercial waste stream, including air pollution from exhaust emissions. According to the City, the transition from a land-based and truck-based transfer and disposal network to a system built around barge and rail export would eliminate air pollution and many of the community impacts from the current waste management system, and reduce transportation costs for the system as a whole (SWMP, at ES-7). In this way, the City would purportedly take advantage of its waterways and existing infrastructure.

In sum, respondents believe that the SWMP sets forth a plan for the long-term City management of the city's solid waste in a cost-effective and environmentally responsible manner because of the rising cost of nearby landfill disposal, and because the proposed system would not be as truck-dependent.

One component of this long term export plan is "to convert and reactivate" a DSNY MTS at the site of a three-acre DSNY parcel located at East 91st Street in Manhattan (East 91st Street MTS). The existing MTS operated from 1940 until November 1999. Trucks accessed the facility via an elevated entrance ramp, which predates and still traverses the Asphalt Green sports and recreational complex on the other side of the FDR Drive to the west (Czwartacky Aff. ¶ 13). The

parcel on which the existing MTS sits is bounded by the East River to the north and east, Carl Schurz Park to the south and the FDR Drive to the west.

The SWMP proposes to demolish the existing MTS and construct a new, three-level facility in its place, approximately 200 feet wide by 300 feet long and 98 feet tall. According to respondents, the new structure will be completely enclosed, and designed with state-of-the-art dust suppression and odor control systems to prevent adverse impact on the community from noise, dust, and odors. Unlike the original MTS, the new structure is designed to containerize waste in sealed, leak-proof intermodal shipping containers specially designed for waste transport inside the facility (Czwartacky Aff. ¶¶ 14-17). Waste collected in Manhattan by DSNY will be either processed at the East 91st Street MTS, or sent directly by DSNY collection trucks to a waste-to-energy facility in New Jersey (*id.* ¶ 10). Trucks will access the new facility via the existing ramp, which will be redesigned to be larger, with 14-foot high sound barriers (*id.* ¶ 16).

DSNY assumed "lead agency" status to determine the environmental impact of the proposed SWMP under the State Environmental Quality Review Act (SEQRA) and the City Environmental Quality Review (CEQR) process (*see* ECL § 8-0101 *et seq.*; 62 RCNY 5-01 *et seq.*). A draft scoping document[2] was issued on May 17, 2004, followed by a public comment period that lasted from May 17 through July 11, 2004. DSNY issued the Draft Environmental Impact Statement (DEIS) for public review on October 22, 2004, which began a second public comment period that lasted from October 22, 2004 to January 24, 2005 (King Affirm. ¶ 13). DSNY issued the Final Environmental Impact Statement (FEIS) on April 1, 2005. In accordance with SEQRA and CEQR,

[2]Scoping is the process by which the lead agency identifies the significant issues related to the proposed action which are to be addressed in the DEIS (62 RCNY 5-02).

the FEIS was made available to the public for consideration during a 10-day review period (*id.* ¶ 15).

On November 9, 2004, DSNY also submitted an application for the proposed East 91st Street MTS to the New York City Department of City Planning (DCP) in accordance with the City's Uniform Land Use Review Procedure (ULURP). DCP certified the application as complete on November 15, 2004. Thereupon, the ULURP application was referred to Community Board 8 and the Manhattan Borough President for recommendations. Community Board 8 held a public hearing on January 12, 2005, at which time it adopted a resolution recommending disapproval of the application. Manhattan Borough President C. Virginia Fields issued a report also recommending disapproval of the ULURP application (*see* Petitioners' Ex P).

On March 2, 2005, the New York City Planning Commission (CPC) held a public hearing on DSNY's ULURP application, which the CPC approved by resolution adopted on April 13, 2005. On June 8, 2005, the City Council voted to disapprove the CPC's decision. On June 14, 2005, the Mayor vetoed the Council's disapproval, thus restoring the CPC's approval of the ULURP application. The Council did not override the Mayor's veto (Karnovsky Aff. ¶¶ 9, 11).[3]

PARTIES

The parties in the two lawsuits are identical. Petitioners and plaintiffs include (1) ACORN, an Arkansas corporation that claims to be the nation's largest organization of low- and moderate-income families, purportedly consisting of more than 175,000 member families, some of whom allegedly reside in the East 91st Street community; (2) residents, owners, and businesses in neighborhoods near the proposed East 91st Street MTS, some of whom use the recreational facilities

[3]David Karnovsky is DCP's General Counsel (Karnovksy Aff. ¶ 1).

at Asphalt Green;[4] and (3) the Gracie Point Community Council (GPCC), an unincorporated association for, among other things, "the betterment and prosperity of the Gracie Point neighborhood."

Respondents and defendants are the City, Mayor Michael Bloomberg, the Department of Sanitation, and the City Planning Commission.

PLEADINGS

The pleadings in both the Article 78 petition and the plenary action are virtually identical. Both pleadings assert the same five causes of action. The Article 78 petition was originally styled as an impermissible "hybrid petition-action" challenging agency determinations and asserting causes of action in tort. However, a plenary action was brought under a separate index number based on the same pleadings, so that the first lawsuit would be considered only as an Article 78 petition, and that the second lawsuit would assert only tort claims. Petitioners and plaintiffs clarified this distinction by stipulations dated September 6, 2006, by which they agreed to limit the Article 78 petition to the first three causes of action of the pleadings, and to limit the plenary action to the fourth and fifth causes of action.

In the Article 78 petition, the first cause of action alleges that DSNY's selection of East 91st

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[4] Petitioner-plaintiff Sally Maldinado resides with her son, who has asthma, at 1780 1st Avenue, in the John Haynes Holmes Towers; Rose Bergin resides at 419 East 93rd Street in the Stanley Isaacs Houses; Anthony Ard resides at 1725 York Avenue; Emily Pazzaglini resides at 1725 York Avenue; Thomas Newman resides at 1755 York Avenue; and Suzanne Sanders, who has suffered from lung cancer, resides at 200 East End Avenue (*see* Petition ¶¶ 13-24).

Petitioner-plaintiff 1725 York Owners Corp. owns the cooperative apartment building at 1725 York Avenue, and Gracie Gardens Owners Corp. owns four apartment buildings with 272 units between York and East End Avenues on East 89th Street and East 90th Street.

Petitioner-plaintiff Nick Conte owns Conte's Market, a food market located at 1692 York Avenue; Beachfront Concessions, Inc. operates the York Grill restaurant at 1690 York Avenue; Anthony Greco and Charles Greco are its principal shareholders (*ibid.*).

Street as the location of the proposed MTS was arbitrary and capricious, and an abuse of discretion, as being irreconcilably inconsistent with basic City policies and actions. The second cause of action asserts that DSNY violated SEQRA and CEQR by conducting a materially defective environmental review. The third cause of action asserts that the CPC violated SEQRA, CEQR and the New York City Waterfront Revitalization Program, when it approved site selection for each of the proposed MTSs based on the allegedly defective environmental review, and without any substantive analysis of the proposed SWMP's consistency with that program.

In the plenary action, the two extant causes of action (the fourth and fifth) assert that the proposed East 91st Street MTS will constitute a private nuisance and a public nuisance.

Petitioners and plaintiffs seek a judgment (1) declaring that DSNY's determination to locate a new MTS on East 91st Street was arbitrary and capricious, and annulling such determination; (2) declaring the environmental review conducted by DSNY for the proposed new SWMP and the East 91st Street MTS to be inadequate, and directing DSNY to prepare a new EIS; (3) annulling the CPC's approval of DSNY's application for the site selection to construct a new MTS at East 91st Street; (4) directing DSNY to withdraw the proposed new SWMP from City Council consideration, and enjoining DSNY from further pursuing City Council approval of the proposed new SWMP until DSNY has undertaken a sufficient environmental review of the proposed new SWMP;[5] (5) enjoining DSNY from further pursuing any approvals necessary to implement the proposed new SWMP until DSNY has undertaken a sufficient environmental review of the proposed new SWMP; (6) enjoining

[5]While these lawsuits were pending, the City Council approved the City's July 2006 Draft SWMP by local law adopted on July 27, 2006. The July 2006 SWMP is not part of the record because it post-dates the submission of the Article 78 petition and the defendants' motion to dismiss. Therefore, the Court does not consider the July 2006 SWMP.

DSNY from further pursuing the procurement of contracts with private entities to implement the proposed new SWMP until DSNY has undertaken a sufficient environmental review of the proposed new SWMP; (7) enjoining DSNY from constructing and operating the East 91st Street MTS or, in the alternative, enjoining DSNY from allowing commercial carters to use the East 91st Street MTS; (8) declaring the East 91St Street MTS to be a public nuisance; and (9) declaring the East 91St Street MTS to be a private nuisance.

I.

Judicial review of administrative action is limited to determining whether the agency's determination was made in violation of lawful procedures, was affected by an error of law, or was arbitrary and capricious (CPLR 7803). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). "In this regard, the court's scope of review is limited to an assessment of whether there is a rational basis for the administrative determination without disturbing underlying factual determinations" (*Matter of Heintz v Brown*, 80 NY2d 998, 1001 [1992]).

A.

Petitioners contend that the City's selection of the existing MTS as the site of the proposed East 91st Street MTS was arbitrary and capricious and an abuse of discretion. Petitioners believe that DSNY selected the site only because a MTS (albeit no longer in operation) was already there, but that should not have played a factor in its site selection given that a new facility will be constructed in its place, that it will be two times larger than the existing MTS, and that it can process up to five times the amount of waste that was processed in the original MTS.

It was rational for respondents to have selected the existing East 91st Street MTS as the site of the proposed facility. The record establishes that the location offers operational convenience for transferring waste collected in the area. No rezoning of the site is required, and using an existing City-owned property is more cost effective than the alternative of purchasing or condemning waterfront property elsewhere for a containerization facility (Czwartacky Aff. ¶ 18). Furthermore, the site is located near several truck routes, including First Avenue, Second Avenue, Third Avenue, and East 86th Street, which thereby facilitates truck access to the site (*see* Respondents' Ex 11 at 3). The original MTS operated for nearly a half-century– from 1940 until November 1999–before the closure of the Fresh Kills landfill in Staten Island. The impacts of the original MTS upon the neighborhood over this extended period of time provide the City with a unique insight of the feasibility of a new MTS for that neighborhood.

B.

Petitioners assert that the site is completely inappropriate for a new MTS, and that the determination to place it there is inconsistent with various City initiatives and policies. For example, over the past several decades, the City has rezoned many areas of the Gracie Point neighborhood from commercial C8 zones, in which residential development is prohibited, to C2 or R zones, which permit residential development. According to petitioners, these initiatives and policies have stimulated the conversion of the surrounding neighborhood from predominantly light manufacturing uses (such as automobile maintenance shops and garages) to a thriving and overwhelmingly residential neighborhood with important City-owned and sponsored recreational facilities. Petitioners also maintain that the proposed MTS is inconsistent with the rezoning of 175 blocks in Greenpoint and Williamsburg. Petitioners contend that the rezoning was intended to transform the

Brooklyn waterfront into a residential neighborhood for housing and recreation, and not for uses such as waste transfer stations and power plants.

Although the neighborhood around the original East 91st Street MTS has evolved since its construction in 1940, petitioners have not shown that, during the almost six years since the closure of the original MTS, the neighborhood has substantially changed, let alone as drastically and abruptly as they conclusorily assert. Playing fields and other recreational facilities around the existing MTS site came into being while the original MTS was in operation (Czwartacky Aff. ¶ 24). The City maintains that the new access ramp will occupy the same footprint as the existing ramp so that no parkland will be taken (Czwartacky Aff. ¶ 16; *see* FEIS at 2-45, 6-28). According to the City, a larger tipping floor in the processing building will eliminate on-street queuing (i.e., parking and idling) of collection trucks in the neighborhood (*ibid.*).

The public policy choices and the advisability of the City's decisions respecting location of all the MTSs and rezoning of areas near the MTS site for high-density residential development and commercial zoning is beyond the permissible scope of judicial review. "[T]he inclusion of a permitted use in a local zoning ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the local community" (*Matter of WEOK Broadcasting Corp. v Planning Bd. of Town of Lloyd*, 79 NY2d 373, 383 [1992]). Here, the site of the proposed East 91st Street MTS is located in a M1-4 (light industrial) zoning district (*see* FEIS at 6-6), and the facility is allowed in a M1 district, provided that it meets performance standards of the City's Zoning Resolution (*see* Respondents' Ex 11, Attachment 4–Zoning Analysis; *see also* New York City Zoning Resolution § 42-20 *et seq.*). The City maintains that operation of the proposed MTS will comply with the performance standards for noise, dust, and

odor (Karnovsky Aff. ¶¶ 15, 21).

As petitioners indicate, the analysis of noise impacts in the FEIS identified a point north of the entrance ramp to the existing MTS where noise levels could potentially exceed Zoning Resolution Performance Standards (FEIS at 6-148). In its decision approving DSNY's ULURP application for the proposed East 91st Street MTS, the CPC acknowledged this potential noise impact and imposed measures fully mitigating the impact, by limiting the number of collection trucks during the one hour period when the potential noise impacts would occur, and by limiting the number of commercial waste vehicles that could be routed to the East 91st Street MTS during the hours which commercial waste would be accepted (Respondents' Ex 12, at 9-10). In light of the mitigating measures that the CPC imposed on the operation of the proposed East 91st Street MTS, petitioners cannot show that its operation will violate the applicable Zoning Resolution Performance Standards.

Whether the proposed East 91st Street MTS is consistent with rezoning developments in Greenpoint and Williamsburg is irrelevant. The proposed East 91st Street MTS is not located in Brooklyn, and therefore cannot be inconsistent with rezoning in those areas. That the Mayor was quoted as having stated that Brooklyn's waterfront is not meant for waste transfer stations[6] has no bearing on the suitability of the proposed MTS in Manhattan.

C.

Petitioners also argue that the proposed MTS will not serve the City's stated goals, which include the reduction of truck traffic and the consequent air pollution produced by engine exhaust emissions. According to respondents, some of the commercial waste currently processed at private

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[6]*See* Petitioners' Ex B (Cardwell, *City Backs Makeover for Decaying Brooklyn Waterfront*, The New York Times, May 3, 2005 at A1).

waste transfer stations could be redistributed to new MTSs, which would accept privately carted waste between 8 PM and 8 AM. Respondents therefore conclude that truck traffic of privately-carted waste to the other boroughs would be reduced. Petitioners counter that, because DSNY has admitted that there is no mechanism to "lure" private carters to the new MTSs, the reduction in truck traffic is a flawed assumption. In any event, petitioners contend that the MTS in Manhattan will process only residential waste, and that none of the residential waste generated in Manhattan is currently transported to any other borough in the city.

The City's projection that a reduction in truck traffic would result from the proposed East 91st Street MTS had a rational basis. The proposed East 91st Street MTS will accept DSNY-managed (mostly residential waste) collected from Community Districts 5, 6, 8, and 11 during the day, and, contrary to petitioners' contentions, will accept commercial waste from the same general area at night (Czwartacky Aff. ¶¶14-15). Manhattan currently generates 41% of commercial putrescible waste in the city, and more than 85% of this waste is processed in Queens, Brooklyn, and the Bronx (*see* Respondents' Ex 5 [Commercial Waste Management Study, Volume II, March 2004, § 3.4 and table 3.4-1]). The City reasonably assumed that, instead of transporting some of Manhattan's commercial putrescible waste to the other boroughs, private haulers would opt to transport this waste to a MTS in Manhattan. Moreover, petitioners do not dispute the City's contention that collection trucks from Gracie Point and other East Side neighborhoods would go to the proposed East 91st Street MTS, instead of traveling through Harlem and Washington Heights to reach New Jersey, which occurs under the current system (Czwartacky Aff. ¶ 38). Thus, the SWMP would further the City's announced, rational goals of promoting equity among the boroughs for responsibility over waste disposal, and reducing truck traffic, because Manhattan waste will be delivered to a

Manhattan-located facility.

Petitioners argue that no evidence indicates that the long-term export plan will result in better long-term economics for the City's waste disposal system. They point out that the City's Independent Budget Office (IBO) compared the cost of constructing and operating the East 91st Street MTS with several private alternatives, including Waste Management's Harlem River truck-to-rail transfer station, located one-half mile into the Bronx via truck routes over the Willis Avenue Bridge from Manhattan's East Side. The IBO opined that, if the SWMP's principle of borough self-sufficiency were relaxed, then it would cost less to utilize this site than the East 91st Street MTS.

Petitioners' reliance on the IBO's opinion is misplaced, because the cost-savings is realized only by disregarding the important principle of borough self-sufficiency. In reviewing respondents' actions, it is not for the Court to "relax" that which the City has already determined to be an important policy consideration. The SWMP's principle of borough self-sufficiency is the corollary to a legislative policy already embodied in the criteria equitably distributing frequently unpopular, societally necessary uses among the boroughs, known as the "Fair Share Criteria" (NY City Charter § 203; 62 RCNY, Appendix A; *see* Section III.A, *infra*). One of the aims of the Fair Share Criteria is "to lessen disparities among communities in the level of responsibility each bears for facilities serving citywide or regional needs" (62 RCNY, Appendix A, Article 2 [f]). 30 of the 55 privately-owned waste transfer sites are located in but four community districts which are not in Manhattan. Petitioners apparently find it acceptable that other districts, which may already bear more than their fair share of waste transfer sites, take on even more for the benefit of petitioners' own

neighborhood.[7] Plaintiffs urge this Court, in effect, to second-guess and disregard the importance of the equity component of the SWMP, which the Court may not do.

II.

The State Environmental Quality Review Act (SEQRA) requires all state and municipal agencies to give "due consideration . . . to preventing environmental damage" resulting from the activities of the individuals, corporations, and public agencies that fall under their regulatory purview (*see* ECL § 8-0103 [9]). SEQRA and the City Environmental Quality Review (CEQR) require the preparation of an Environmental Impact Statement for any action that agencies propose or approve that may have a significant effect on the environment (ECL § 8-0109 [2]; 62 RCNY 6-08).

Here, the Final Environmental Impact Statement (FEIS) consists of two volumes containing 3,000 pages of text, tables, and figures, and a third volume containing a 444-page compendium of public comments and responses, and technical appendices issued on a CD-ROM. The Executive Summary of the FEIS summarizes the overall potential environmental impacts of, and mitigation measures for, the SWMP, including, among many other components, the proposed East 91st Street MTS (Mariani Aff. ¶ 15).[8] Chapter Six of Volume I analyzes the environmental impacts pertaining to the East 91st Street MTS in 17 sections: land use, zoning, and public policy; socioeconomic conditions; community facilities and services; open space; cultural resources; urban design, visual

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[7]Inasmuch as petitioners stress the importance of complying with the Fair Share Criteria for siting the proposed East 91st Street MTS (*see* Section III.A, *infra*), it is rather curious that they would advocate an alternative whose cheaper cost would be realized only by violating a principle in the SWMP which reflects the Fair Share Criteria's aims.

[8] Joyce Mariani is vice president of Henningson, Durham & Richardson, Architecture and Engineering, PC, an engineering and consulting firm engaged by DSNY to prepare the FEIS (Mariani Aff. ¶ 1).

resources, and shadows; neighborhood character; natural resources; hazardous materials; water quality; waterfront revitalization program; infrastructure, solid waste and sanitation services, and energy; traffic, parking, transit, and pedestrians; air quality; odor; noise; and commercial waste to the East 91st Street MTS.

As a threshold matter, petitioners' procedural argument that DSNY never issued SEQRA findings is now academic. DSNY issued its Statement of Findings on February 13, 2006 (*see* Respondents' Ex 2).

In reviewing SEQRA determinations, a court must (1) determine whether the agency procedures were lawful, and (2) determine from the record whether the agency identified the relevant areas of environmental concern, took a "hard look" at them, and made a "reasoned elaboration" of the basis for its determination (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]). A "rule of reason" governs the judicial inquiry, and not every conceivable environmental impact must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA (*id.*; *Matter of Holmes v Brookhaven Town Planning Bd.*, 137 AD2d 601 [2d Dept], *lv denied* 72 NY2d 807 [1988]). "While judicial review must be meaningful, the courts may not substitute their judgment for that of the agency, because it is not their role to 'weigh the desirability of any action or to choose among alternatives'" (*Akpan v Koch*, 75 NY2d 561, 571 [1990] [citation omitted]).

Petitioners contend that DSNY impermissibly segmented its environmental review of the SWMP's long-term export plan. Petitioners also maintain that DSNY failed to analyze a reasonable worst-case scenario and alternatives to the East 91st Street MTS. Petitioners believe that DSNY did not adequately analyze impacts to neighborhood character and visual, noise, and construction

impacts. Thus, petitioners conclude that DSNY's determinations should be annulled because DSNY did not comply with SEQRA and CEQR, and that DSNY should be compelled to conduct a environmental review de novo.

A.

Segmentation occurs when the environmental review is irrationally divided into smaller stages or activities, contrived as if the stages are independent and unrelated, needing individual determinations of significance (*Matter of Maidman v Incorporated Vil. of Sands Point*, 291 AD2d 499 [2d Dept 2002]; 6 NYCRR 617.2 [gg]). The regulations generally prohibiting segmentation are designed to guard against a distortion of the approval process by preventing a project with potentially significant environmental effects from being split into two or more smaller projects, each falling below the threshold requiring full-blown review (*Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven*, 204 AD2d 548, 550 [2d Dept 1994], *lv dismissed in part, denied in part* 85 NY2d 854 [1995]).

According to petitioners, DSNY improperly segmented its environmental review of the SWMP's long-term export plan, in that DSNY separated and neglected any environmental impacts as a result of transportation and disposal components of the proposed SWMP (after waste is containerized) from the impacts resulting from the construction and operation of the MTSs. Thus, petitioners contend that the City may not claim to reap any environmental benefits from transporting and disposing waste by barge and rail. The FEIS identified existing enclosed barge unloading facilities (EBUFs) that may be available to process containers, but the FEIS did not address whether the City will need to develop other EBUFs.

The Court does not find that impermissible segmentation occurred here. Waste containers

would be moved at existing intermodal port facilities that have already undergone environmental review in connection with their own development as transportation and freight handling facilities[9] (*see Matter of Concerned Citizens for Envt. v Zagata*, 243 AD2d 20, 22-23 [3d Dept 1998]; *cf Matter of Schodak Concerned Citizens v Town Bd. of the Town of Shodack*, 142 Misc 2d 590, 596 [Sup Ct, Rensselaer County], *affd* 148 AD2d 130 [3d Dept 1989]). In response to the comments made at public hearings, DSNY states, "The Harbor Operations Steering Committee (consisting of the Coast Guard, Port Authority, and Harbor Operations) was briefed on the Converted MTS program in April 2004, and saw no impact from the barge operations on harbor navigation" (FEIS at 40-214 [Response to Comment 233]). Finally, the FEIS Findings Statement states that "no environmental review was required for such intermodal movements of containerized waste," because "federal law provides that state or local authorities may not impose local approvals or environmental review requirements for the use of transporter-owned intermodal rail facilities, but limits jurisdiction over such matters to the federal Surface Transportation Board" (Respondents' Ex 2, at 50).[10]

B.

Petitioners also contend that DSNY's environmental review was flawed because it failed to analyze a reasonable worst-case scenario. They characterize the reasonable worst-case scenario as the operation of each new MTS at its maximum allowable capacity. They aver that DSNY analyzed "on-site" impacts based on a throughput of 4,290 tpd of waste and "off-site" impacts based on a throughput of 2,892 tpd of waste, ignoring that DSNY is seeking a permit that would allow the

[9]For instance, the Harlem River Yard Barge to Rail Intermodal Yard was previously analyzed as a site for an EBUF in 2000 (*see* FEIS at 9-1).

[10]Petitioners have not addressed respondents' contentions as to segmentation in their reply papers, which omit any discussion of the alleged improper segmentation.

facility to process 5,280 tpd of waste. Petitioners argue that DSNY's statement that it does not intend to use the full capacity of each MTS is without significance, because DSNY will have the discretion to increase the amount of waste processed at each MTS to its full amount.

The "degree of detail – the reasonableness of an agency's actions – will depend largely on the circumstances surrounding the proposed action" (*Matter of Neville v Koch*, 79 NY2d 416, 425 [1992]). The 4,290 tpd used for the worst case scenario analysis is an amount anticipated to be far greater than the expected daily usage (Mariani Aff. ¶ 30). As set forth in the FEIS (Table 40.3-3), the maximum 5,280 tpd is an "Emergency Condition," defined as "a rare, public emergency event affecting the entire or a large part of the waste management system," such as an extended snow emergency. DSNY would be allowed to use the maximum design capacity at all facilities to remove accumulated refuse from the streets as quickly as possible to protect public health. To reach 5,280 tpd, the proposed East 91st Street MTS would operate for 24 hours, without breaks, and at emergency staffing levels (FEIS, 40-81).

Thus, the analysis of 4,290 tpd, combined with the expectation that the maximum 5,280 tpd would be reached only under rare circumstances, satisfies the reasonable worst case scenario analysis with a reasonable degree of detail. DSNY is not obligated to consider theoretical possibilities "steeped in nothing more than unsupported speculation" (*Matter of Fisher v Giuliani*, 280 AD2d 13, 20 [1st Dept 2001]).

C.

SEQRA requires that an EIS set forth alternatives to the proposed action, including alternative sites, if appropriate, and to "act and choose alternatives, which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid

adverse environmental effects" (ECL § 8-0109 [1], [2] [d]; 6 NYCRR 617.14 [f]). Review of possible alternatives "has also been characterized as the 'heart of the SEQRA process'" (*Matter of Shawangunk Mountain Envtl. Assn. v Planning Bd. of Town of Gardiner*, 157 AD2d 273, 276 [3d Dept 1990] [citation omitted]). SEQRA does not require that every conceivable environmental impact, mitigating measure or alternative be identified and addressed; all that is required is that is that the agency analyze a reasonable range of alternatives to the proposed project (*Matter of C/S 12th Ave., LLC v City of New York*, __AD3d__, 815 NYS2d 516 [1st Dept 2006]; *Akpan v Koch*, 75 NY2d 561, *supra*).

Petitioners contend that DSNY should have studied the transport of more DSNY-managed waste to waste-to-energy (WTE) facilities as a reasonable alternative to its proposed long term export plan. Petitioners argue that DSNY should have considered more than three sites as alternatives to the East 91st Street MTS, and that it should not have limited its study to only City-owned sites, citing *Matter of Silver v Dinkins* (158 Misc 2d 550 [Sup Ct, NY County], *affd* 196 AD2d 757 [1st Dept], *lv denied* 82 NY2d 659 [1993]).

The alternatives which DSNY considered are summarized in Section 3.0 of the FEIS Findings Statement (*see* Respondents' Ex 2) and discussed in Chapter 1 of the FEIS. Contrary to petitioners' contentions, DSNY considered exploring emerging "waste conversion technologies, but found that it was unrealistic that a new commercial-scale waste conversion facility would be built in the New York City region in the next five years" (FEIS Findings Statement, at 83). DSNY considered the option of sending more Manhattan waste to a regional WTE facility, specifically in Rahway, New Jersey (FEIS at 1-19). However, DSNY concluded that this option was infeasible given that the Rahway facility had limited capacity and is closed at times when DSNY would need

to deliver waste there (FEIS Findings Statement, at 84).[11]

Among other alternatives, DSNY also considered the alternative of taking no action. It found that there would be more local and regional truck traffic from waste export from taking no action as opposed to the truck traffic that results from the proposed SWMP (FEIS Findings Statement, at 85).

The manner in which petitioners frame the issue of whether DSNY looked at reasonable alternatives to the East 91st Street MTS focuses too narrowly on alternatives to one aspect of the SWMP, as opposed to the SWMP as a whole. Instead of converting and constructing new MTSs, DSNY considered the alternative of reactivating existing MTSs, to be used in conjunction with an EBUF (FEIS Findings Statement, at 85-86). This would include reactivating the East 91st Street MTS. However, reactivation was disfavored because no commercial waste would be processed at existing MTSs, substantial refurbishment would be required, possibly requiring new state permits, and would require an EBUF whose location had not been found (*ibid.*). Moreover, the Mayor initially conceived of converting all eight existing MTSs to containerize waste (FEIS at 1-14). However, as an alternative to that initial plan, DSNY proposed converting only four existing MTSs, including the proposed East 91st Street MTS, because the latter option would be more cost-effective, could be implemented more quickly, and would avoid adding new in-City waste transfer capacity (*ibid.*).

In March 2004, the City prepared a Commercial Waste Management Study (CWMS), included in the FEIS as Appendix I (*see also* Respondents' Ex 5).[12] DSNY permissibly incorporated

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[11]Respondents also maintain that another WTE facility in Newark has limited capacity due to existing legal obligations to New Jersey communities, such that the long-term availability of this facility for all of Manhattan's waste is uncertain (Czwartacky Aff. ¶ 40).

[12]Appendices A-N are contained on a CD-ROM included with Volumes II and III of the FEIS.

the CWMS into the FEIS as part of its analysis of reasonable alternatives for waste transfer stations in Manhattan (*see* 6 NYCRR 617.9 [b] [7]; *see Matter of City of Ithaca v Tompkins County Bd. of Representatives*, 164 AD2d 726 [3d Dept 1991] [County's report considering alternative sites for waste processing facility, which was prepared prior to DEIS, complied with SEQRA requirements]). Volume 5 of the CWMS contains a report investigating potential sites for new waste transfer stations in Manhattan, identifying four Manhattan sites which neither then served, or were permitted, as waste transfer facilities. For the reasons discussed in that report and in the FEIS, three of the four sites were unsuitable locations for new waste transfer stations (FEIS at 1-14 to 1-20). Petitioners argue that, following the reasoning of the CWMS, the proposed East 91st Street MTS would be as unsuitable as the sites considered in the CWMS. However, petitioners omit the technical reasons and obstacles that rendered those sites unsuitable, reasons which are not applicable to the proposed MTS.

Given all the above, the Court finds that DSNY took the requisite hard look at the reasonable alternatives to the SWMP and to converting the East 91st Street MTS. *Matter of Silver v Dinkins*, which petitioners cite, does not apply to SEQRA review. *Matter of Silver* relates only to the City's analysis under the Fair Share Criteria. Thus, this argument is addressed in Section III of this decision.

D.

Petitioners' remaining arguments as to DSNY's compliance with SEQRA and CEQR relate to DSNY's analysis of impacts to neighborhood character, and visual, noise, and construction impacts.

As petitioners indicate, DSNY itself characterized the neighborhood across the FDR Drive

from the existing East 91st Street MTS as visually pleasant, with well-maintained apartment blocks lining the streets. It noted that the proposed East 91st Street MTS abuts three City parks, and would be located directly behind a playing field at Asphalt Green. The increased residential character of the neighborhood coincided with the operation of the original MTS, and market studies have shown that proximity to the MTS during its operation had no adverse effect on property values (FEIS at 40-237, 6-49, 6-50). The total population of the area surrounding the existing MTS grew 7% between 1990 and 2000, more than double the growth rate in Manhattan overall during the same period, but not as rapidly as the city as a whole (FEIS at 6-11). As set forth in the FEIS, the site is separated from nearby residential uses by the FDR Drive and Carl Schurz Park, which itself screens some street-level views to the waterfront (*id.* at 6-34). The site's waterfront location is strategically buffered from surrounding residential and open spaces by the FDR Drive, one of the city's busiest roadways (Czwartacky Aff. ¶ 18). Therefore, DSNY provided a reasoned elaboration for its finding that there would be no significant impacts to neighborhood character.

As for visual impact, the FEIS contains what petitioners objected as lacking in the DEIS: artist renderings of the East 91st Street MTS and a depiction of the sound barrier that will be along the ramp bisecting Asphalt Green (FEIS at 2-47 to 2-54, and 6-39 to 6-43).[13] The proposed East 91st Street MTS would resemble the original MTS in its building typology, massing and position, and

[13] "[T]he omission of a required item from a draft EIS cannot be cured simply by including the item in the final EIS" (*Webster Assoc. v Town of Webster*, 59 NY2d 220, 228 [1983]). Here, petitioners do not argue that artistic renderings are a required item of a DEIS (*see* 6 NYCRR [a] [5]). In any event, the omission is not necessarily fatal (*Webster Assoc.*,59 NY2d at 228; *Matter of Friends of Van Voorhis Park v City of New York*, 216 AD2d 259, 260 [1st Dept 1995]), and is not fatal here.

elevated access, as well as proximity to the East River esplanade to the north, despite being nearly double the height of the original MTS. The new ramp leading to the proposed East 91st Street MTS would follow the same footprint as the existing ramp (FEIS at 6-10, 6-39). The FEIS notes that the increase in height is not expected to affect inland views toward the waterfront because these views are largely screened by trees within Carl Schurz Park, which lies approximately 20 to 25 feet above the MTS site elevation.

A priori, a 100-foot high facility may block views of the water that a 50-foot high facility would not. However, petitioners concede that "SEQRA requires the imposition of mitigation measures only 'to the maximum extent practicable' 'consistent with social economic, and other essential considerations'" (*Matter of Jackson*, 67 NY2d at 422 [quoting ECL 8-0109 (8)]). Petitioners do not argue that construction of a lower, smaller MTS would still be consistent with the SWMP's objectives. Moreover, DSNY concluded that views toward the water from upper-story residential uses along East End Avenue would not substantially change, given the overall scale and appearance of the new facility. Thus, DSNY took a hard look at the visual impact of the proposed East 91st Street MTS, and provided a reasonable elaboration for its finding that the facility would not block significant views, or would not likely contribute to a substantial change of views.

As to noise, the proposed MTS would appear to violate applicable Zoning Resolution Performance Standards for noise, only at a point on the promenade to the north of the entrance ramp to the existing MTS, which is several hundred feet away from the nearest residence (*see* FEIS at 6-148, and Table 617-7). However, the FEIS concludes that there would be an absence of an adverse noise impact, because of already existing noise levels, which also exceed the Performance Standards of the nearby M1-4 zone by 4.9 dB to 42.8 dB (*see also* Mariani Aff. ¶¶ 27-28). Thus, DSNY

provided a reasoned elaboration for its finding of no significant noise impacts. Moreover, the CPC has imposed noise mitigation measures by limiting the number of trucks during the period which the noise is anticipated to exceed the Zoning Resolution Performance Standards.

As to construction impacts, it was not a violation of SEQRA or CEQR for DSNY to propose mitigation measures which are still under review. A more precise plan for mitigation would be impractical until construction plans are fully developed, given the specialized nature of the over-water and land side construction (*see Matter of Eadie v Town Bd. of the Town of North Greenbush*, 7 NY3d 306 [2006]). SEQRA "does not require an agency to impose every conceivable mitigation measure, or any particular one. . . . Moreover, nothing in the act bars an agency from relying upon mitigation measures it cannot itself guarantee in the future" (*Jackson*, 67 NY2d at 421).

Finally, petitioners cite no authority for the proposition that the change in methodologies between the DEIS and the FEIS in the air pollution analysis constitutes a violation of SEQRA or CEQR. Petitioners contend that the standard applied in the FEIS, MOBILE 6.2, assigns lower emission rates to cars and trucks than the MOBILE 5b standards in the DEIS (Roy Aff. ¶ 39).[14] However, DSNY used an area source modeling released by the EPA which is purportedly technically superior to prior model versions (Mariani Aff. ¶ 59), and it was rational for the agency to rely on federal standards in its analysis (*see Matter of Spitzer v Farrell*, 100 NY2d 186, 191 [2003]).

In sum, the record establishes that DSNY identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination, thereby fulfilling its responsibilities (*see Matter of Gernatt Asphalt Prod. v Town of Sardinia*, 87

[14]Leo Pierre Roy is the Director of Environmental Services of the planning, engineering and environmental services firm of Vanasse Hangen Brustlin, Inc., engaged as a consultant to the Gracie Point Community Council (Roy Aff. ¶ 1).

NY2d 668, 690 [1996]; *Matter of Nicklin-McKay v Town of Marlborough Planning Bd.*, 14 AD3d 858 [3d Dept 2005]). "The fact that plaintiffs disagree with the conclusion reached, does not prove that defendants did not take a 'hard look'" (*Akpan v Koch*, 152 AD2d 113, 119 [1st Dept 1989], *affd* 75 NY2d 561; *see also Matter of Save Easton Envt. v Marsh*, 234 AD2d 616, 618 [3d Dept 1996]["The mere fact that petitioners' concerns regarding certain aspects of the project were not resolved in their favor does not mean that DEC failed to discharge its statutory obligations under SEQRA"]).

Petitioners' remaining SEQRA arguments are either without merit, or raised improperly for the first time in reply (*Ritt v Lenox Hill Hosp.*, 182 AD2d 560 [1st Dept 1992]).

III.

Pursuant to the City's Charter, certain proposals concerning zoning and land use are subject to the City's Uniform Land Use Review Procedure (ULURP) (NY City Charter § 197-c). A ULURP application includes, among other things, information from environmental impact review under SEQRA and CEQR (*see* Rules of City of NY Dept of City Planning [62 RCNY] § 2-02 [a] [5] [v]). The New York City Planning Commission (CPC) reviews and approves ULURP applications, with recommendations from the affected Community Boards and the Borough President (NY City Charter § 197-c [c], [h]). In reviewing a ULURP application that involves the location of a City facility, the CPC must take into account criteria for the location of City facilities, known as the Fair Share Criteria (*see* 62 RCNY, Appendix A). For projects proposed for the City's Coastal Zone, ULURP also involves an analysis of the project's consistency with the City's Waterfront Revitalization Program, a local program authorized under New York State's Waterfront Revitalization and Coastal Resources Act (*see* Executive Law § 910 *et seq.*).

Petitioners allege that the CPC acted arbitrarily and capriciously, and in violation of CEQR

and the Waterfront Revitalization Program, when it approved DSNY's application for site selection for the proposed East 91st Street MTS. Petitioners contend that the CPC's determination to approve was based on a flawed environmental review that violated SEQRA and CEQR, because it failed to recognize any of the flaws in the DSNY review. They argue that the CPC simply accepted DSNY's allegedly erroneous conclusions regarding the lack of environmental impacts.

A.

The Fair Share Criteria, which the CPC adopted in December of 1990 pursuant to Section 203 of the City Charter, apply when the City locates a new facility, significantly expands, closes or significantly reduces the size of capacity for service delivery of existing facilities (NY City Charter § 203; *West 97th- W. 98th Sts. Block Assn. v Volunteers of Am. of Greater N.Y.*,190 AD2d 303 [1st Dept 1993]). The purpose of the Fair Share Criteria is to foster neighborhood stability and revitalization by furthering the fair distribution among communities of City facilities (*Ferrer v Dinkins*, 218 AD2d 89 [1st Dept 1996]). Petitioners contend that respondents failed to address the following Fair Share Criteria:

> "Compatibility of the facility with existing facilities and programs, both city and non-city, in the immediate vicinity of the site.
>
> Extent to which neighborhood character would be adversely affected by a concentration of city and non-city facilities.
>
> Suitability of the site to provide cost-effective delivery of the intended services. Consideration of sites shall include properties not under city ownership, unless the agency provides a written explanation of why it is not reasonable to do so in this instance."

DSNY addressed the Fair Share Criteria at issue. As part of its ULURP application, DSNY submitted a Fair Share Analysis (*see* Respondents Ex 11, Attachment 19-b). The Fair Share Analysis states that the East 91st Street MTS site is located in a M1-4 zoning district that permits MTSs, and

it would meet the Zoning Resolution Performance Standards for M1 zoning districts. The existing MTS co-existed with other uses in the area for a half-century, from its opening in 1940. Although there are residential, recreational, commercial, and industrial uses in the vicinity of the proposed MTS site, the site is separated from these uses by the FDR Drive and the waterfront esplanade east of the Drive, which run along the eastern edge of Manhattan adjacent to the East River. The FDR Drive is a major thoroughfare that would act as a buffer between the proposed MTS and the surrounding uses. Although the new facility will be larger than the existing facility, it will have more structure and equipment controlling odor, noise, and air quality. In addition, it would have more on-site queuing capacity to avoid the problem of trucks queuing on streets. The only other facility in the area that is similar in use, scale, or neighborhood impact is the DSNY Manhattan District 11 Garage, located on 99th Street and First Avenue. Thus, as noted by respondents, because of the absence of similar facilities in the community, concentration effects would be minimal or non-existent (*see* Karnovsky Aff., ¶ 31; *cf. Matter of Silver v Dinkins*, 158 Misc 2d 550, *supra*).

Moreover, under the SWMP's long-term export plan, the proposed East 91st Street MTS would be one of up to nine in-city facilities handling DSNY-managed waste from the Bronx, Brooklyn, Manhattan, and Queens. The plan provides for each borough to have facilities for collecting and exporting its own waste, thereby promoting borough equity in the waste management system (Karnovsky Aff. ¶ 7). The shift to containerization and long-range transport by barge and rail is anticipated to reduce dramatically truck traffic and emissions associated with the current system of waste transport, which relies on long-haul trailers, and to decrease transportation time and distance.

Petitioners also argue that DSNY's assessment of alternative sites for a new MTS was inadequate, because it was purportedly limited to DSNY-owned sites. They argue that the CPC's

reliance on DSNY's unreasonable analysis violates Fair Share Criteria which require a "meaningful" analysis of alternative sites.

The Fair Share Analysis included an evaluation of 20 sites. An initial screening process reduced that number to 15 sites. Petitioners concede that DSNY specifically considered a site at West 30th Street and 11th Avenue, which is not City-owned (*see* Fair Share Analysis, Table 2). DSNY considered a total of 27 facility options for the 15 sites but concluded that there were no practical alternative sites.

Matter of Silver (158 Misc 2d 550, *supra*) does not invalidate the Fair Share Analysis. Although the Fair Share Analysis included the cost-effectiveness of City-owned facilities as a consideration in siting the proposed MTS, DSNY also appropriately weighed other considerations, which petitioners do not specifically challenge as invalid. All of these other considerations were advantageously met by the East 91st Street MTS site: (1) waterfront access; (2) manufacturing zoning; (3) accessibility to truck routes; (4) location within the borough (Manhattan) where waste is generated, to the extent feasible; (5) reasonable distance from residences, schools, parks, and other sensitive receptors; (6) ability of the site to accommodate a 60,000 square foot footprint; and (7) a vacant or underutilized site.

Petitioners also contend that the CPC incorrectly relied on DSNY's explanation that the proposed East 91st Street MTS would be permitted under DSNY's new siting regulations, which provide that transfer stations shall be at least 400 feet from a residential district, hospital, public park, or school (16 RCNY 4-32 [b] [1] [ii]). The buffer distance increases depending on the concentration of facilities in that community district (*see* 16 RCNY 4-32 [b] [4], [5]). Petitioners expressly concede, however, that these regulations pertain to privately-owned facilities, not those operated by DSNY (Reply Mem. at 2, 7). They do plausibly argue that it should not matter whether

the facility is privately-owned or a DSNY facility, because any negative impacts from a transfer station are the same. Nevertheless, this argument is disingenuous because the regulations are inapplicable. In Community District 12 in Jamaica, Queens, there are three transfer stations that are each within 400 feet of a residential district, which have had permits for years, two of which have permits to accept both putrescible waste and construction and demolition debris (Orlin Aff. ¶ 7).[15]

B.

Petitioners conclusorily assert a violation of the City's Waterfront Revitalization Program (WRP) but cite no policies or provisions of the WRP which were allegedly violated.

The CPC's determination that the proposed action was consistent with WRP policies had a rational basis. DCP had reviewed the ULURP's application for consistency with WRP policies, and consistency assessments forms were part of the ULURP application (*see* Respondents' Ex 13). Chapter 6.12 of the FEIS also analyzes the compatibility of the proposed East 91st Street MTS with the WRP's policies.

IV.

The plenary action sounds in private and public nuisance. The pleadings allege that the East 91st Street MTS will subject plaintiffs to significant air pollution, noise, odors, and traffic, and create significant hazards and risks to health and safety. Plaintiffs further claim that the proposed East 91st Street MTS will allegedly offend, interfere with, and cause damage to the public in the exercise of rights common to all, such as visiting the Asphalt Green complex, Carl Schurz Park, and the East River esplanade, and will allegedly substantially interfere with the use and enjoyment of the land that plaintiffs own or lease.

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[15] Robert Orlin, Esq. is the Deputy Commissioner for Legal Affairs and General Counsel to DSNY (Orlin Aff. ¶ 1).

Defendants move to dismiss the action on the ground that government planning projects or government-approved action cannot be the subject of nuisance claims. They also contend that plaintiffs cannot meet the standard of proof for nuisance. Finally, defendants argue that the pleadings fail to state a cause of action, because they do not allege a harm that is different from the harm that would affect the public at large, which they maintain is a necessary element of both private and public nuisance.

"When assessing the adequacy of a complaint in light of a CPLR 3211 (a) (7) motion to dismiss, the Court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff . . 'the benefit of every possible favorable inference'" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]).

Here, viewing plaintiffs' claims in a light most favorable to plaintiffs, it appears that plaintiffs have alleged a specific injury arising from the anticipated MTS so as to permit them to bring a private action for public nuisance (*see 532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 292 [2001]; *Copart Inds. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 568 [1977]). The alleged depreciation in plaintiffs' property values, if proven, would constitute special injury resulting from the air pollution, noise pollution, odor and traffic that allegedly would arise out of the proposed MTS (*see Scheg v Agway, Inc.*, 229 AD2d 963 [4th Dept 1996]; *Allen Avionics, Inc. v Universal Broadcasting Corp.*, 118 AD2d 527, 528 [2d Dept 1986], *affd sub. nom Sun-Brite Car Wash v Board of Zoning and Appeals of Town of North Hempstead*, 69 NY2d 406 [1987]).

Defendants' argument that plaintiffs' alleged harm is speculative speaks to plaintiffs' ultimate burden of proof, not to the legal sufficiency of the allegations in the pleadings. Defendants cannot show that the allegations of harm inherently lack credibility as a matter of law on this pre-answer motion to dismiss. Plaintiffs' ultimate burden of proving entitlement to an injunction against

defendants[16] is not the standard applicable here to defendants' motion.

The City enjoys no blanket immunity from nuisance claims involving the proposed MTS solely because the SWMP has received government approval. "By overwhelming weight of authority local governments creating or maintaining nuisances are liable in tort, regardless of whether the activity resulting in harm is locally characterized as 'proprietary,' 'ministerial,' or 'governmental" (Antieau on Local Government Law § 37.01 [2d Ed]). "Moreover, the municipality cannot escape liability on the ground that the construction was authorized by statute, . . . or that in performing the work the municipality was exercising a governmental function . . . ." (McQuillin Mun Corp § 53.59.40 [3rd Ed]; *see Clawson v Central Hudson Gas & Electric Corp.*, 298 NY 291, 298 [1948] ["even if the dam and its site had been so approved, the defendant company would not be relieved thereby of liability for maintaining a public nuisance"]).

The out-of-state cases that defendants cite in support of a *per se* rule of immunity reflect a minority view, which New York has not adopted. In New York, the Legislature has granted immunity from nuisance claims only in specific instances, not blanket immunity (*see e.g.* Agriculture and Markets Law § 308 [3] [a sound agricultural practice shall not constitute a private nuisance]; Public Health Law § 1300-c; Executive Law § 915-b [certain water dependent uses not considered

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[16] "[I]in order to recover for apprehended consequences [of a public nuisance] not presently manifest, [plaintiffs] must establish a degree of probability of occurrence as to amount to a reasonable certainty that they [the consequences] will result. When a harm feared does not yet exist [plaintiffs] must show a menace of imminent and substantial import to the public welfare to obtain the equitable relief" (*State of New York v Fermenta ASC Corp.*, 166 Misc 2d 524, 532 [Sup Ct, Suffolk County 1995]).

"'[I]f the complainant's right is doubtful, or the thing which it is sought to restrain is not a nuisance per se and will not necessarily become a nuisance, but may or may not become such, depending on the use, manner of operation, or other circumstances, equity will not interfere'" (*City of Yonkers v Dyl & Dyl Dev. Corp.*, 67 Misc 2d 704, 707 [Sup Ct, Westchester County], *affd without opinion* 38 AD2d 691 [2d Dept 1971] [citation omitted]).

a private nuisance]).

Weiss v Fote (7 NY2d 579 [1960]), which defendants cite, is not controlling. In *Weiss*, the Court of Appeals held that a municipality enjoyed immunity from tort actions for the negligent design and planning of a traffic signal light, "absent some indication that due care was not exercised in the preparation of the design or that no reasonable official could have adopted it" (*id.* at 586). The *Weiss* Court reasoned that a jury's verdict as to the reasonableness and safety of a plan of governmental services should not be preferred over the judgment of the governmental planning body. *Weiss* and its progeny establish the limited circumstances under which a plaintiff may sue a municipality for negligent planning or design, thereby placing limits on duties in tort law that a municipality owes to the public (*Friedman v State of New York*, 67 NY2d 271, 283 [1986]). Here, it is not the design of the proposed MTS itself that would purportedly create a nuisance.

Nothing in *Weiss* changes or was intended to change a municipality's well-established liability for the creation of a nuisance (*see e.g. Hill v Mayor of New York*, 139 NY 495, 501 [1893] [City's use of a dumping board at a pier for loading garbage onto scows in performance of a public duty not a defense to pier owner's action for nuisance, because the City had no specific, express statutory authority for such use]; *Gordon v Village of Silver Creek*, 127 AD 888 [4th Dept 1908], *affd* 197 NY 509 [governmental function argument not a defense to nuisance created by smoke from Village's pumping plant]). That has remained the law since *Weiss* (*see Higgins v Village of Orchard Park*, 277 AD2d 989 [4th Dept 2000] [municipality created private nuisance when it installed a drainage line that caused flooding on plaintiff's property]). The rationale is that, if the harm from nuisance was unavoidable, the court may not assume that the Legislature granted the municipality permission to destroy plaintiff's property without compensation (*Gordon*, 127 AD2 at 890). Thus, the policy considerations in allowing recovery for nuisance against a municipality differ from the

concerns raised in *Weiss*.

Nevertheless, given this Court's determination that defendants have complied with SEQRA and CEQR, plaintiffs may not assert any nuisance claims based on the environmental impacts that DSNY reviewed. To allow a cause of action for nuisance to go forward here would allow plaintiffs to challenge the underlying merits and substance of the agency's determinations of environmental impact, which is not permitted. In reviewing SEQRA findings, "it is not the role of this Court to second-guess respondent's determination and/or substitute our judgment for the conclusions it has reached" (*Matter of Anderson v Lenz*, 27 AD3d 942, 944 [3d Dept 2006]). Here, DSNY concluded that the proposed East 91st Street MTS would not significantly impact air quality in the area (FEIS at 6-121). No significant adverse impacts from odors are expected to occur (*id.*, at 6-135). DSNY also found that, with minor traffic signal adjustments and limits on commercial waste deliveries, the proposed East 91st Street MTS would not cause significant adverse traffic impacts (FEIS at 6-119, FEIS Findings Statement, at 67).

To prove their causes of action for nuisance, plaintiffs must adduce evidence which would essentially contradict DSNY's environmental findings. Plaintiffs' causes of action for nuisance are based on their contention that the proposed MTS will create significant air pollution, noise, odors, and traffic, even though DSNY has concluded otherwise. Thus, under the guise of a common-law nuisance action, plaintiffs seek to circumvent the limited judicial review of an agency's SEQRA findings.

This Court holds that plaintiffs may not collaterally attack DSNY's SEQRA findings via causes of action for nuisance (*see e.g. Fiala v Metro. Life Ins. Co.*, 6 AD3d 320, 322 [1st Dept 2004]; *Brawer v Johnson*, 231 AD2d 664 [2d Dept 1996]; *State of New York v Khan*, 206 AD2d 732, 733 [3d Dept 1994]). The Court rejects plaintiffs' argument that an action for nuisance should be

permitted because SEQRA does not require mitigation of all adverse impacts. This argument misses the mark. The bar against plaintiffs' causes of action for nuisance results because the agency either has found no significant adverse environmental impacts, or has implemented measures mitigating significant impacts.

Therefore, defendants' motion to dismiss is granted. In light of the Court's determination, the Court need not reach defendants' remaining arguments. As discussed above, defendants' remaining arguments actually address plaintiffs' burden of proof, which cannot be considered on a pre-answer motion to dismiss. The issue of whether the alleged interference is "substantial" may not be determined as a matter of law based on the pleadings, but is academic given the Court's analysis.

To the extent that nuisance is based on the allegations that the proposed MTS will operate at full capacity, 5,280 tpd, instead of 1,500 tpd, the nuisance claims are premature. To a large extent, such claims would be dependent upon the usage to which DSNY makes of the facility. Thus, the issue of whether plaintiffs may assert nuisance claims after the proposed East 91st Street is constructed and operational is not before this Court.

CONCLUSION

Accordingly, it is

ADJUDGED that the Article 78 petition, Index Number 114729/05, is denied and the proceeding is dismissed; and it is further

ORDERED that the defendants' motion to dismiss the action, index number 114711/05, is granted, and the complaint is dismissed, and the Clerk is directed to enter judgment accordingly.

This constitutes the decision, order and judgment of this Court.

ENTER:

Dated: September 19, 2006
New York, New York

J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).