

To Be Argued By:  
John R. Low-Beer

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# New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT



In the Matter of the Application of

DAISY WRIGHT, NATHANIEL ROBERT LIVINGSTON by his parent Daisy Wright,  
OLIVER WRIGHT LIVINGSTON, by his parent Daisy Wright, ELIZABETH WRIGHT,  
BERNIE WRIGHT by his parent Elizabeth Wright, VIVIAN DEE, SONIA GARCIA,  
JOAN HEITNER, PATRICIA LOFTMAN, LILLIAN PRYOR, EILEEN SALZIG, VALERIA SPANN  
and WALTER REINHARDT,

*Petitioners-Respondents,*

for a Judgment under Article 78

*against*

NEW YORK STATE DEPARTMENT OF HEALTH, HOWARD ZUCKER, As Acting  
Commissioner of the NEW YORK STATE DEPARTMENT OF HEALTH,  
PWV OWNER, LLC, 156 W. 106TH STREET HOLDING CORPORATION, and  
102 W. 107TH CORPORATION,

*Respondents,*

*and*

JEWISH HOME LIFECARE, MANHATTAN,

*Respondent-Appellant.*

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## BRIEF FOR PETITIONERS-RESPONDENTS

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## PRELIMINARY STATEMENT

Petitioners-Respondents Daisy Wright, Nathaniel Robert Livingston, Oliver Wright Livingston, Elizabeth Wright, Bernie Wright, Vivian Dee, Sonia Garcia, Joan Heitner, Patricia Loftman, Lillian Pryor, Eileen Salzig, Valeria Spann and Walter Reinhardt respectfully submit this brief in opposition to the appeal by Jewish Home Lifecare, Manhattan (“JHL”) from the Decision, Order and Judgment of the Supreme Court, New York County (Hon. Joan B. Lobis, J.), dated December 9, 2015 (“Decision”).

The Decision granted final judgment for Petitioners in this and another, related Article 78 proceeding captioned *In the Matter of the Applications of The Friends of PS 163, Inc. et al. v. Jewish Home Lifecare, Manhattan, et al.*, Index No. 100546/2015 (“the PS 163 proceeding”), annulling and vacating the New York State Department of Health’s (“DOH’s”) approval of JHL’s application for a Certificate of Need to construct a 20-story nursing home (“the Project”) only 60 feet from PS 163, an elementary school, and residences on West 97<sup>th</sup> Street in Manhattan as violative of the State Environmental Quality Act (“SEQRA”), Environmental Conservation Law (“ECL”) Art. 8.

The Petition herein and the companion PS 163 petition raised a number of issues. This Petition focused, *inter alia*, on the harms from lead and

other toxics. The PS 163 petition challenged the EIS's analysis of a number of impacts, including the noise impacts of construction. On this appeal, Petitioners-Respondents herein address only the Decision's ruling with respect to lead. Additionally, however, Petitioners-Respondents adopt the arguments of the PS 163 petitioners-respondents, and respectfully request that the Court treat them as if fully stated here.

The Court below correctly recognized that one of the two major deficiencies of the environmental review in this case is its misleading and inadequate investigation of lead hazards by Respondent-Appellants' consultant, AKRF, Inc. ("AKRF"), and the consequent failure of DOH, as the lead agency, to take a hard look at those hazards, their potential impacts on Petitioners and on the school children, and how those impacts might be mitigated so as not just to reduce the harm – which in this case is irreversible neurological damage – but to prevent it entirely.

As Respondents-Appellants state, “[a]n EIS that was prepared in accordance with the proper procedures will not be struck down on the basis of its content unless the document is exceptionally poor in some specific respect.” GERRARD, RUDZOW, & WEINBERG, ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 7.04(4) (Matthew Bender 2015).” JHL Br. at 27. This EIS is indeed

exceptionally poor in its investigation and analysis of lead hazards and their mitigation.<sup>1</sup>

The root of the failure herein is a site investigation that did not collect even the minimally recommended number of soil tests and that misrepresented and minimized the lead contamination revealed by the few samples it did collect. From this initial failing, a cascade of grievous omissions followed: the failure to recognize the Site's soil lead as a hazard; the consequent failure to take any kind of look at impacts on highly vulnerable and extremely close "receptors," *i.e.*, small school children and elderly neighbors in extremely close proximity to the Site; and the further consequent failure to consider the only mitigation that could provide a measure of real assurance that the neighbors and the 600 children in the school will not suffer irreversible damage.

### **SUMMARY OF ARGUMENT**

The first step in any environmental review is to identify "relevant areas of environmental concern." *Bronx Comm. for Toxic Free Schools v. New York City School Constr. Auth.*, 20 N.Y.3d 148, 155 (2012) (quoting *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986)). It was at this first step that Respondents-Appellants stumbled so badly, initiating a cascade of further gross errors: JHL's consultants failed to identify lead hazards as an area of serious

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<sup>1</sup> It is also procedurally flawed. *See* PS 163 Br. at 43 *et seq.*

concern. The two site investigations – Phase I and Phase II Environmental Site Assessments (“ESAs”) – performed under JHL’s auspices and those of its counsel Greenberg, Traurig LLP were woefully inadequate, and manifestly and grossly biased in favor of finding no hazard. The results of the Phase II ESA were then incorporated lock, stock and barrel into the EIS.

More specifically:<sup>2</sup>

-- In declaring that the Site contained no Recognized Environmental Condition (“REC”), the Phase I ESA failed to consider the likely presence – subsequently confirmed – of debris from buildings that were demolished there. According to the City Environmental Quality Review (“CEQR”) Technical Manual at 12-2, such debris commonly contains “elevated levels of hazardous materials.”<sup>3</sup>

-- Based on the erroneous conclusion that there were no RECs on the site, AKRF decided that it was not required to do a Phase II ESA, but would do one anyway. JHL Br. at 52. Perhaps for this reason, its Phase II ESA was perfunctory and misleading in its sampling and in its analysis.

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<sup>2</sup> Regulatory authority and record support for each of the following points is provided in the Argument section below.

<sup>3</sup> “CEQR” is the City Environmental Quality Review. Although DOH is a State agency, it stated that it would conduct this environmental review pursuant to the requirements of the CEQR standards and requirements. A2608. Those requirements are set forth in the CEQR Technical Manual (available at <http://www.nyc.gov/html/oec/html/ceqr/ceqr.shtml>).

-- In particular, contrary to specific CEQR and State Department of Environmental Conservation (“DEC”) guidance, the Phase II ESA took insufficient shallow soil samples, failed to focus on shallow soil, and failed to focus on the most contaminated portion of the site.

-- Contrary to specific CEQR guidance, AKRF made only eight borings instead of eleven.

-- AKRF then reported only the average of all the lead test results, and separately the average of the results from six tree pit samples – but not the average of results from the eight shallow soil samples, which were much more highly contaminated.

-- Based on this biased averaging, AKRF concluded that the site’s lead contamination did “not pose a significant threat to public health.” Had it considered the shallow soil samples, it would have found that their average contamination was 2.7 times above the federal soil-lead hazard, and that the resulting dust would exceed the National Ambient Air Quality Standard (“NAAQS”) for lead. 40 C.F.R. part 50.

-- In reaching its conclusions, DOH relied on standards used to measure risks from exposure to bare ground and ambient air, not risks from the

cumulative impact of migration of lead-contaminated dust through the air to the nearby school and residences.

-- The State standards for lead in soil relied on in the FEIS are outdated. They were required by statute to be updated a decade ago, but have not been. Additionally, the United States Environmental Protection Agency (“EPA”) has recognized that the federal lead dust standard is outdated, and is in the process of updating it.

-- In concluding that the lead on the site did not pose a public health threat, the FEIS relied on two letters from State DEC that misapprehended the lead test data and applied the wrong standard.

After identifying the relevant areas of environmental concern, the lead agency must take a “hard look” at them. *Bronx Comm.*, 20 N.Y.3d at 155 (quoting *Jackson*, 67 N.Y.2d at 417). But unsurprisingly DOH, relying on AKRF’s misleading Phase II ESA investigation of lead hazards, which failed to identify lead as an area of environmental concern, failed to take any look at all, let alone a hard look, at the potential effects of fugitive lead dust on the children of the adjacent school and the site’s elderly neighbors.

More specifically:

-- Despite the many comments during the environmental review on how lead

dust was hazardous to the neighboring school children and elderly, the FEIS's discussion of lead hazards did not even mention these potentially harmed populations.

-- Having found no lead hazards, the FEIS omitted the required analysis of the exposure pathways by which lead dust and other toxics might reach the nearby children and elderly and of the effects it might have on them, as required by DEC and CEQR guidance.

-- The FEIS failed to analyze the worst case scenario of lead dust migration, as mandated by the CEQR Technical Manual at 2-5.

-- To address the lead contamination problem that it misleadingly denied, the FEIS relied entirely on a generic Remedial Action Plan ("RAP") and Construction Health and Safety Plan ("CHASP"), which, contrary to DEC guidance, contains no special measures to address the very nearby presence of vulnerable receptor populations.

-- The RAP and the CHASP require respirators for site workers, but provide for only the most basic protection for others: wetting the soil during activities that raise dust, covering trucks with tarpaulins, and monitoring the air for particulates.

-- Building on the inadequate sampling and misleading lead test averages described above, DOH found that the RAP and the CHASP would “limit” the potential for exposure to airborne lead in excess of existing – but outdated – standards. Therefore, DOH concluded, there would be no adverse impacts on public health.

An EIS must include “mitigation measures proposed to minimize the environmental impact.” ECL § 8-0109(2)(f). Petitioners-Respondents’ experts Bartlett, Carpenter, and Lester all testified that tenting the Site is the only way to ensure beyond peradventure that children will not suffer irreversible neurological damage. A435; A457; A498.<sup>4</sup> Yet, having failed to identify soil lead as an area of serious environmental concern, and then having failed to take a hard look at the potential effects of the lead on the Site, DOH went on to fail even to consider, let alone require, any mitigation measures to minimize the potential adverse effects of lead dust from the Project to the fullest extent practicable.

More specifically: :

-- DOH failed to take a hard look at the possibility of tenting the site. Its only mention of this mitigation option came in the FEIS’s response to public

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<sup>4</sup> “A” refers to Respondents-Appellants’ Appendix in this matter. “PS 163 A” refers to Respondents-Appellants’ Appendix in the PS 163 proceeding. “RA” refers to Petitioners-Respondents’ Appendix in this matter.

comments, where it reiterated the mantra that given the low average lead soil levels, the RAP and the CHASP were sufficient to control and limit harm.

DOH is mandated by law to “protect[ ] . . . the public health against the hazards of lead poisoning.” Public Health Law (“PHL”) § 206(1)(n). A 2009 State Task Force report co-authored by DOH declares that “primary prevention (taking action before a child is harmed) is critical to address the problem” of lead exposure, and “aggressive action to reduce childhood exposure to lead remains a State public health priority.” A250-51. DOH’s failure even to consider the only mitigation that could surely protect children is beyond arbitrary and capricious: it is unconscionable.

### **QUESTION PRESENTED**

Was the decision of DOH approving an FEIS for JHL’s proposed nursing home arbitrary and capricious where DOH relied on a site investigation that grossly understated the Site’s lead hazards, applied outdated standards concerning lead, provided no analysis whatsoever of the pathways through which hazardous lead dust and other toxics might enter the neighboring elementary school and apartments, and generally failed to take any look, let alone the required hard look, at the health impacts and feasible alternatives for mitigation of harms to neighboring residents and school children from lead dust from excavation and construction?

The Court below answered: Yes.

## **BACKGROUND**

### **A. The Proposed Project and Its Site**

On or about February 8, 2012, Respondent JHL filed an application for a Certificate of Need to build a nursing home at 125 West 97<sup>th</sup> Street (“the Site” or “the construction site”), on the site of a parking lot for residents of a residential building complex known as Park West Village. The Project would be built between Amsterdam Avenue and Columbus Avenue, on a superblock occupied, *inter alia*, by Park West Village, a public elementary school called PS 163, and a large playground next to the school known as the Happy Warrior Playground.

JHL’s application was filed after it abandoned prior plans, which had been approved and raised no environmental concerns, to build a facility on West 100<sup>th</sup> Street and to rebuild its existing facility on West 106<sup>th</sup> Street. Petition ¶ 32.

The Project Site is flanked by PS 163 and two residential buildings, 784 Columbus Avenue and 788 Columbus Avenue. All three of these buildings are only a few feet from the construction site. And because they are located on a superblock, they do not present blank side walls to the construction site, as would ordinarily be the case with a mid-block Manhattan construction site: rather, all three buildings have windows that immediately and directly overlook the

construction site.

Respondent Appellant JHL asserted that construction of the Project would take two and a half years. A129.

## **B. Lead Is Highly Toxic, Especially to Young Children**

Lead is a highly toxic metal. Children are particularly vulnerable to lead, as it causes irreversible damage to the developing brain. Lead exposure can affect nearly every system in the body. There is no safe level of exposure to lead.<sup>5</sup> The CDC states: “Even low levels of lead in blood have been shown to affect IQ, ability to pay attention, and academic achievement. And effects of lead exposure cannot be corrected. The most important step parents, doctors and others can take is to prevent lead exposure before it occurs.”<sup>6</sup> Lead is not metabolized, and doses taken in over time accumulate in the body. A456; A496.

Because the damage from lead is irreversible, the CDC has emphasized the need to prevent rather than merely mitigate lead exposures. “By shifting our focus to *primary prevention* of lead exposure,” the CDC states, “we can reduce or eliminate dangerous lead sources in children’s environments BEFORE they are exposed.” A2485 (emphases in original); *see also* A296-97.

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<sup>5</sup> A2488-A2511; *see also* Centers for Disease Control (“CDC”), *Lead* (accessed Mar. 21, 2016 at [www.cdc.gov/nceh/lead](http://www.cdc.gov/nceh/lead)); A73.

<sup>6</sup> Centers for Disease Control and Prevention, “What Do Parents Need to Know to Protect Their Children?” ([http://www.cdc.gov/nceh/lead/ACCLPP/blood\\_lead\\_levels.htm](http://www.cdc.gov/nceh/lead/ACCLPP/blood_lead_levels.htm)) (accessed Mar. 17, 2016).

DOH's position echoes CDC's. According to a 2009 State report co-authored by DOH and other State agencies, "Since there is no medical treatment that permanently reverses the neuro-developmental effects of lead exposure, primary prevention (taking action before a child is harmed) is critical to address the problem."<sup>7</sup> A250.

### **C. The Petitioners**

Petitioners reside in apartments that directly overlook the construction site from a few feet away. Some are very elderly and suffer from heart and lung diseases that make them extremely vulnerable to toxic dust. Others are children who are particularly vulnerable to lead and other toxics. Many of them have lived in their buildings for decades. For example, Petitioner Daisy Wright has lived at 788 Columbus Avenue, approximately 60 feet from the proposed site, since 1977. She lives with her two children, Nathaniel, age 11, and Oliver, age 7. Petitioner Vivian Dee is 89 years old, and has emphysema. She has lived in 788 Columbus Avenue for over 42 years. Petitioner Sonia Garcia has lived at 120 West 97<sup>th</sup> Street, approximately 103 feet from the proposed site, for over 40 years. She

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<sup>7</sup> With respect to the health effects of lead on adults, EPA reports that, "A large body of evidence from both epidemiologic studies of adults and experimental studies in animals demonstrates the effect of long-term Pb exposure on increased blood pressure (BP) and hypertension (Section 1.6.2). In addition to its effect on BP, Pb exposure can also lead to coronary heart disease and death from cardiovascular causes and is associated with cognitive function decrements, symptoms of depression and anxiety, and immune effects in adult humans." 80 Fed. Reg. 278, 291 (Jan. 5, 2015).

suffers from Chronic Obstructive Pulmonary Disease and heart disease, and has experienced several recent hospitalizations. A55-A61.

The PTA, the School Leadership Team, and a number of parents of students at PS 163 are also challenging DOH's approval of the environmental review of the Proposed Project. Approximately 600 pre-K, kindergarten and elementary school children, some as young as three years old, attend PS 163. As stated in the PS 163 Petition, 7.5% of them suffer from asthma, and 14% have learning disabilities. PS 163 A56. Many of the classrooms face the construction site. In addition, the school has four kindergarten classrooms in trailers. Because the school lacks central air conditioning and is served by an antiquated steam heating system, the windows must be, and are, kept open all year round to provide sufficient fresh air and to regulate the temperature. PS 163 A80.

#### **D. The Example of PS 51**

The history of the construction adjacent to PS 51, on West 45<sup>th</sup> Street in Manhattan, is a cautionary tale. It begins much like this one, with a proposed construction project right next to an elementary school, an environmental review process, parents deeply concerned about construction noise and dust containing toxic substances, and an EIS that promised mitigation. The School Construction Authority assured the parents that the students and teachers would suffer no ill

effects from the construction, and that the proposed mitigation was fully adequate.

After construction began, children and teachers began to fall ill with bloody noses, breathing issues, and unexplainable headaches. A2403. “Air conditioners, air purifiers, and watering down of the soil did not work.” RA6, RA10. Construction was so loud that students were unable to hear their teachers. Only after children had suffered serious harm did the City move the school to a relatively distant location until the construction was finished.

Given that the impacts of lead poisoning are irreversible, it would be wrong to be complacent about the dangers posed by JHL’s Project.

### **RULES AND REGULATIONS CONCERNING LEAD**

DOH’s FEIS relied primarily on State Soil Cleanup Objectives (“SCOs”), adopted by DEC, in consultation with DOH, to determine whether and to what extent soil must be cleaned up at a site to make it safe for a future use. SCOs are used to assess risks from ground and leachate runoff, not from migration of soil dust through the air to other environments.

NYSDEC has established four different levels of SCOs: Unrestricted SCO’s (“USCOs”), which, if met, allow the soil to be used without any restrictions; Restricted-Residential SCO’s (“RRSCOs”) for which no single family housing or vegetable gardens are allowed; “Commercial use SCOs;” and

“Industrial Use SCOs.” 6 N.Y.C.R.R. § 375-1.8. RRSCOs can only be used when NYSDEC determines that it is not feasible to achieve USCOs. A2177.

Lead in soil is measured in milligrams per kilogram (“µg/kg”), or parts per million (“ppm”), which are equivalent. In 2006, NYSDEC adopted an USCO for lead of 63 µg/kg and a RRSCO of 400 µg/kg. The ECL commands that these contaminant-specific remedial action objectives are to be “updated every five years.” ECL § 27-1415(6)(c). The lead guidelines adopted in 2006, however, have not been updated, and are still in effect a decade later.

EPA defines a soil-lead hazard for children’s play areas as 400 µg/kg or more.<sup>8</sup> This standard is designed to determine whether and to what extent soil must be remediated, not to measure the impacts of lead-laced construction dust.

The EPA has set a National Ambient Air Quality Standard (“NAAQS”) for lead at 0.15 µg/m<sup>3</sup>. As its name suggests, the NAAQS measures the amount of lead in ambient air, not the cumulative transmission and deposition of dust to nearby receptors.

In short, there are several lead standards, but there is no single measure that captures the degree of danger from airborne lead transmitted to nearby receptors over time.

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<sup>8</sup> “A soil-lead hazard is bare soil on residential real property or on the property of a child-occupied facility that contains total lead equal to or exceeding 400 parts per million (µg/g) in a play area or average of 1,200 parts per million of bare soil in the rest of the yard based on soil samples.” 40 C.F.R. § 745.65(c).

Over many years, as scientific knowledge of lead's toxicity, even at very low levels, has grown, government action levels and standards for lead have fallen. This strengthening of lead regulations has continued unabated in recent years. In November 2008, “[i]n consideration of the much expanded health effects evidence on neurocognitive effects of Pb [lead] in children, the EPA substantially revised the primary [NAAQS] standard from a level of 1.5  $\mu\text{g}/\text{m}^3$  to a level of 0.15  $\mu\text{g}/\text{m}^3$ ,” a ten-fold reduction in the permissible amount. 80 Fed. Reg. 278, 283 (Jan. 5, 2015). In 2009, in response to a Citizen Petition requesting that EPA lower the lead dust standards from 40  $\mu\text{g}/\text{ft}^2$  to 10  $\mu\text{g}/\text{ft}^2$ , EPA agreed that “[m]ore recent epidemiological studies indicate that the current hazard standards may not be sufficiently protective,” and began proceedings to lower them. A324; A334. In 2012, the CDC lowered the level of concern, or “reference level,” for lead in the bloodstream from 10 to 5  $\mu\text{g}/\text{dl}$ .<sup>9</sup> By law, the SCO for lead was to have been updated in 2006, but was not. ECL § 27-1415(6)(c).

This history demonstrates that any lead standard that is more than a few years old must be viewed with caution.

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<sup>9</sup> The record contains an illustration showing the step-by-step fall in the level of concern from 60  $\mu\text{g}/\text{dl}$  in 1970 to 5  $\mu\text{g}/\text{dl}$  today. A2481.

## THE ENVIRONMENTAL REVIEW

### A. The Phase I ESA

In May 2011, commencing the environmental review for the Project, JHL commissioned Ethan C. Eldon Assocs. (“ECEA”) to carry out a Phase I Environmental Site Assessment (“ESA”). A2718-20; A2135-67. A Phase I ESA, which is required under CEQR,<sup>10</sup> involves a visual inspection of the site and a review of the site’s history and of available databases to determine whether there are any Recognized Environmental Conditions (“RECs”) that would necessitate a Phase II ESA, in which samples are taken and testing is done.

The Phase I ESA revealed that until at least 1951, the Project Site was occupied by several 4-story buildings, subsequently demolished. These demolitions generated a thick layer of “historic/urban fill” on the Site. A2171. The CEQR Technical Manual states that such fill is frequently characterized by “elevated levels of hazardous materials,” and its presence requires further assessment of potential hazards. CEQR Technical Manual at 12-2, 12-4. Such fill is likely to contain lead from paint, asbestos, and other toxic chemicals. The historical research also revealed that the Site was used as a surface parking lot accessory to the residential complex since at least 1976 and quite possibly since the 1950s. A2155. This use, too, could have generated hazardous lead waste from the

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<sup>10</sup> CEQR Technical Manual at 12-4.

exhaust gases of vehicles using leaded gasoline. A1521; A1525; A1531; A1612; A2360; A2405; A2414; A2460; A2627; RA16-28.

Despite the likely presence of hazardous materials, subsequently confirmed, JHL's consultant found that there were no RECs on the Site that would necessitate a Phase II ESA. A627.

## **B. The Phase II ESA**

Even now, JHL seeks to justify the inadequacies of the Phase II ESA on the ground that having found no RECs in its Phase I ESA, it was not required to carry out a Phase II ESA at all. JHL Br. at 52. But, as explained below, a Phase II ESA was required under CEQR, and DOH had determined that CEQR was generally to be followed. A1376.4. Therefore, in December 2013, AKRF, Inc. ("AKRF") carried out a Phase II ESA, and its results were incorporated into the EIS. A2171.

CEQR guidance requires 11 soil borings for a site of this size (37,496 sq. ft.), and recommends taking numerous shallow soil samples. A2429; CEQR Technical Manual at 12-9. The Phase II ESA, however, was limited to only eight borings, each up to 20 feet below grade, all taken only within the proposed cellar footprint, plus six grab soil samples collected from the top six inches of soil in six tree pits on the site. No other shallow soil test results were reported.

From these soil borings, 16 samples were taken to test for metals and other toxics: one sample from the top *foot* of each boring and one from the bottom foot. A270. These samples are denominated “SB-1 top,” “SB-1 bottom,” “SB-2 top,” “SB-2 bottom,” and so on through SB-8. A281-A284. From the same eight borings, 16 additional composite samples were taken for waste characterization purposes, *i.e.*, to obtain information about how the excavated soil from the Site would need to be disposed of. For this purpose, instead of taking a sample from the top and bottom *foot* of each boring, a sample was composited from the top *half* and another from the bottom half. Compositing tends to dilute any hotspots. A293. These composited samples are denominated “WC-1 top,” “WC-1 bottom,” “WC-2 top,” “WC-2 bottom,” and so on through WC-8. In total, 32 samples from the borings were tested, plus the six samples from six tree pits (denominated “TS-1” through “TS-6”), making a total of 38 samples. A281-A285.

Testing of those samples revealed that the Site is contaminated with lead and other toxic substances. Lead was found in each of the 38 soil samples. Twenty-four of the 38 samples exceeded the USCO of 63 µg/kg and ten exceeded the RRSCO of 400 µg/kg. A281-A285. Three exceeded 1,000 µg/kg, having levels of 1,110 µg/kg, 1,830 µg/kg and 3,850 µg/kg. A281.

The shallow soil samples were the most highly contaminated. Yet

although DEC's Technical Guidance for Site Investigation and Remediation (known as "DER-10")<sup>11</sup> recommends focusing sampling around the highly contaminated portions of a site to determine the extent of contamination (DER-10 at 74), the Phase II ESA took no additional shallow soil samples.

As described further below, in assessing the significance of these soil samples, AKRF compared them to New York State and federal soil cleanup guidelines that were not designed to measure harms to nearby residents or school children from dust stirred up by construction work, and that were, moreover, years out of date.

AKRF's comparisons also used misleading and biased average lead contamination levels. AKRF reported an average of all 38 samples, diluting the high and low results. The average was 290 µg/kg. Strangely, AKRF also reported the low average level of the six tree pit samples (304 µg/kg), even though the soil in the tree pits was likely brought in with the trees, and therefore not representative of the rest of the site. A292. More strangely still, AKRF did not report the high average lead level (1079 µg/kg) of the eight SB samples taken from the tops of the borings. Yet these eight were the only shallow soil samples that were representative of the soil immediately below the asphalt. Six of these eight were

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<sup>11</sup> DEC's Technical Guidance for Site Investigation and Remediation, or DER-10, is published by DEC's Division of Environmental Remediation, and is available at [http://www.dec.ny.gov/docs/remediation\\_hudson\\_pdf/der10.pdf](http://www.dec.ny.gov/docs/remediation_hudson_pdf/der10.pdf).

over the 400 µg/kg, which is the RRSCO standard as well as the EPA soil-lead standard, and the two most heavily lead-contaminated samples on the Site (3,850 and 1,830 µg/kg) were among those six shallow soil samples. A2177. In short, the shallow soil was heavily contaminated with lead.<sup>12</sup>

AKRF concluded that, “[i]n general, detected levels in soil . . . samples were consistent with those typically found in the kinds of urban fill material encountered in the borings.” A2177. With regard to the lead levels, AKRF claimed that its findings “do not indicate a ‘soil-lead hazard’ defined by USEPA at 40 C.F.R. § 745.65(c).” *Id.* AKRF failed to note that the average of the shallow soil samples was more than double the USEPA’s soil-lead hazard level for a children’s play area.

By AKRF’s own admission, the Phase II ESA investigation was inadequate. Under the heading “Limitations,” AKRF stated that “further investigation may reveal additional data or variations of the current data, which may differ from our understanding of the conditions presented in this report and require the enclosed recommendations to be reevaluated or modified.” A278. AKRF also cautioned that “[c]oncentrations of the various contaminants in historic fill can be highly variable, and upon further testing, the material could contain

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<sup>12</sup> This point was made repeatedly during the comment period and by Petitioner’s expert Stephen Lester in the Court below. *See, e.g.*, A293-94; A496; RA30.

higher contaminant concentrations than outlined in this investigation. Portions of this material could be classified as hazardous waste.” A279.

### **C. The RAP and the CHASP**

Together with the Phase II ESA investigation, AKRF presented a Remedial Action Plan (“RAP”) (A2236-54) and a Construction Health and Safety Plan (“CHASP”) (A2256-67). Neither the Phase II ESA report nor the RAP nor the CHASP so much as mentioned the fact that the construction site is right next to an elementary school and that numerous apartments directly overlook the site. The only remedial measures proposed to control lead dust were that the soil be wetted and that trucks leaving the site be covered with tarpaulins. During the implementation of air monitoring, construction workers would be required to wear protective gear, including full-face respirators. A2262-A2263. However, the RAP and the CHASP proposed no measures to protect the elementary school students and the elderly in the immediately adjacent apartments who would be exposed to construction dust containing lead over a prolonged period.

### **D. The SEQRA Hearings and Issuance of the FEIS**

Earlier, in June 2013, DOH had issued a Positive Declaration, declaring that the Project may have a significant environmental effect, and that an EIS would be required. A1376.1. In March 2014, DOH issued a Draft

Environmental Impact Statement (“DEIS”) for the Project.

At two public hearings on the DEIS, numerous individuals, civic groups and elected officials advised the DOH about its deficiencies and the adverse impacts the Project would have on the nearby residences, the public school and the community. Numerous comments concerned the high levels of lead found on the Site and the shortcomings of the two ESA investigations. A286-A294; RA28-RA42. Among the comments was the statement by the Environmental Technology Group that “an enclosed area tent should be utilized during excavation to prevent any particles and odors from emanating from the site,” and a similar comment by the PTA and School Leadership Team of PS 163. A2369; A2433-34; A2989; A3013.

On November 14, 2014, Respondent DOH issued the Final EIS (“FEIS”) together with a Notice of Completion of Final Environmental Impact Statement for the Proposed Project. A113. On December 10, 2014, the DOH issued a Findings Statement for the Project.

The FEIS did not examine the methodology or assertions of the Phase II ESA. In its Findings Statement, DOH conceded that:

The Proposed Project would involve subsurface disturbance for the construction of the proposed new building and outdoor improvements. Soil that would be disturbed by the Proposed Project would include widespread historical fill materials that contain elevated levels of lead, limited petroleum-contaminated soil

..., and some soil exceeding the hazardous waste threshold for barium content. The Proposed Project would disturb these materials, potentially increasing pathways for human exposure. However, impacts would be avoided by implementing the [RAP and the CHASP].

A3163 (emphasis added). At no point did the FEIS analyze alternatives to prevent, rather than simply measure and mitigate, migration of contaminated dust from the site.

The FEIS referred to the issue of lead-contaminated dust in three chapters: chapter 5, “Hazardous Materials,” chapter 11, “Public Health” and chapter 13, “Construction.” None of these chapters discusses exposure pathways through which lead dust could reach the children in the immediately adjacent elementary school or the neighbors, or even mentions, in its discussion of lead hazards, the fact that there is an elementary school immediately adjacent to the proposed construction site.

In response to the numerous comments concerning the dangers of lead poisoning from dust from the construction site and the inadequacy of the proposed mitigation, the FEIS simply reiterated the findings of the Phase II ESA that the levels of lead were low on average and that the wetting of soil and air monitoring were sufficient mitigation. A2931-2938; A2978; A2982; A2989-2990; A3011-3013; A3017.

## THE DECISION BELOW

On December 9, 2015, the Supreme Court (Lobis, J.), issued a Decision, Order and Judgment vacating and annulling the determination of DOH approving JHL's application for a Certificate of Need and remitting the matter to DOH "for preparation of an amended FEIS, to reconsider the findings on the issues of noise and hazardous material." A48.

With respect to hazardous materials, the Supreme Court held that DOH had not taken a sufficiently hard look at remediation and safety measures to address the potential harm to children from lead dust that would be generated during construction. A40-42. The Court noted that "the circumstances here, involving young children at a school very close to the construction site, present extraordinary and uniquely difficult challenges." *Id.* The Court accepted DOH's finding that 15-minute average respirable dust levels would stay below 150 micrograms per cubic meter, but stated that "by DOH's own acknowledgment 'there is controversy as to whether there is any level of lead exposure that can be considered 'safe.'" A42. The Court observed that with respect to lead poisoning, the goal was not to lessen or minimize exposure, but to prevent it altogether, and that Petitioners' experts had uniformly attested that the only way to ensure the achievement of this goal was by tenting the site and placing it under negative air

pressure. *Id.* The Court concluded:

Given the special concerns here, DOH’s determination that containment measures, such as a tent, were not warranted because the RAP and CHASP were sufficient to control and measure dust levels, does not demonstrate that DOH took a hard look at all relevant mitigation measures or made a reasoned elaboration for its failure to consider containment measures.

*Id.*

## ARGUMENT

### I. DOH FAILED TO TAKE A HARD LOOK AT THE IMPACTS OF LEAD DUST ON SCHOOL CHILDREN AND NEIGHBORS

#### A. SEQRA Requires a “Hard Look” at Environmental Impacts and Mitigation

SEQRA declares that environmental protection is a matter of intergenerational consequence,<sup>13</sup> a procedural bulwark against short-term, political or economic exigencies that may otherwise overwhelm environmental considerations in public decision-making. As noted by the Court of Appeals, “[t]he heart of SEQRA is the Environmental Impact Statement (EIS) process.” *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 415 (1986) (citation omitted). SEQRA commands agencies to implement the EIS process “to the fullest extent possible . . . in accordance with” the legislative goals of protecting and enhancing the environment. ECL § 8-0103(6). The EIS must accurately and

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<sup>13</sup> See ECL § 8-0103(8) (declaring it to be “the intent of the legislature that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations”).

thoroughly describe the short term, long term, cumulative, and other associated impacts of a proposed action, as well as of the alternatives to that action.” ECL § 8-0109(2)(a); 6 N.Y.C.R.R. §617.9(14)(f)(3); 10 N.Y.C.R.R. § 97.12(c).

Courts have developed a well-established approach to judicial review in SEQRA cases: “In reviewing the sufficiency of an EIS, the role of a court is ‘to determine 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.’” *Bronx Comm. for Toxic Free Schools v. New York City School Constr. Auth.*, 20 N.Y.3d 148, 155 (2012) (quoting *Jackson*, 67 N.Y.2d at 417). A reviewing court must also satisfy itself that the EIS has included ““mitigation measures . . . to minimize the environmental impact.’ ECL § 8-0109 [2] [a], [b], [f].” *Bronx Comm.*, 20 N.Y.3d at 155.

Courts generally follow a contextual, common sense approach when applying the “hard look” and “reasoned elaboration” standard. *Matter of Chinese Staff Workers’ Assn. v. Burden*, 88 A.D.3d 425, 429 (1st Dep’t 2011), *aff’d* 19 N.Y.3d 922 (citing *Matter of Town of Henrietta v. Department of Env’tl. Conservation of State of N.Y.*, 76 A.D.2d 215, 224 (4th Dep’t 1980)) (“The reviewing court must employ reasonableness and common sense, tailoring the intensity of the ‘hard look’ to the complexity of the environmental problems

actually existing in the project under consideration.”); *Jackson*, 67 N.Y.2d at 417 (“The degree of detail with which each factor must be discussed obviously will vary with the circumstances and nature of the proposal.”).

In applying this approach, courts “may not substitute their judgment for that of the agency for it is not their role to weigh the desirability of any action or to choose among alternatives.” *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990) (quoting *Jackson*, 67 N.Y.2d at 416). However, it is well-established that “[a]n agency determination under SEQRA will . . . be set aside where the agency’s review of the environmental impacts is unsupported by studies and data or is conclusory.” *Develop Don’t Destroy (Brooklyn) Inc. v. Empire State Dev. Corp.*, 33 Misc.3d 330, 346 (Sup. Ct. N.Y. County 2011), *lv. den.* 74 A.D.3d 1880 (2010) (citing *Tupper v. City of Syracuse*, 71 A.D.3d 1460 (4th Dep’t 2010); *Matter of Baker v. Village of Elmsford*, 70 A.D.3d 181 (2d Dep’t 2009); *Matter of Serdarevic v. Town of Goshen*, 39 A.D.3d 552 (2d Dep’t 2007).

As shown below, the FEIS in this case (1) misrepresented the data (which was also inadequate) so as to underestimate the dangers from lead dust as an area of environmental concern; (2) failed to take any look, let alone the required “hard look,” at the potential impacts of lead dust on school children and neighbors; and (3) also failed to take any look at the feasibility of mitigation measures

sufficient to prevent lead poisoning. As the Court below recognized, these very basic deficiencies required annulling DOH's approval of the FEIS and the Certificate of Need.

**B. DOH Failed to Identify Lead Hazards as a "Relevant Area of Environmental Concern."**

The first step in a court's review of an EIS is "to determine whether the agency identified the relevant areas of environmental concern." *Bronx Comm.*, 20 N.Y.3d at 155 (quoting *Jackson*, 67 N.Y.2d at 417). Here, DOH failed to identify lead hazards as an area of serious concern.

JHL's counsel retained two different consultants to do the two site investigations. The Phase I ESA was performed by ECEA in 2011 – well before the commencement of DOH's environmental review. The Phase II ESA was performed by AKRF in 2013-2014. Both investigations were grossly biased in favor of finding no hazard and in other respects, too, woefully and manifestly inadequate.

**1. Directly Contrary to CEQR Guidance, JHL's Phase I ESA Concluded That the Site Contained No Evidence of RECs That Would Warrant a Phase II ESA.**

As JHL and ECEA stated in their Phase I ESA report, "The main objective of the ESA was to identify the presence or likely presence, use, or release on the property of hazardous substances or petroleum products . . . as a *recognized*

*environmental condition.*”<sup>14</sup> A2139 (italics in original). The report’s conclusion that there was “[n]o evidence of recognized environmental conditions” (A2139) was directly contrary to CEQR guidance as applied to the recognized facts, and so was simply wrong.

Under CEQR, “a hazardous materials assessment is warranted” for a project where there is “[d]evelopment on a vacant or underutilized site if there is a reason to suspect . . . historic/urban fill.” CEQR Technical Manual at 12-4 (emphasis added). The CEQR Technical Manual also states that “[i]t is not uncommon to find elevated levels of hazardous materials in . . . ‘historic fill.’” *Id.* at 12-2. ECEA knew that there was reason to suspect the presence of construction and demolition debris on the Site – as indeed was found in the Phase II ESA (A2177) – because ECEA itself reported that at least until 1951, the Site contained “multiple 4-story dwellings” that were subsequently demolished. According to the State DEC’s DER-10, construction and demolition debris is a form of “historic/urban fill.” DER-10 at 10. As Petitioners-Respondents’ expert Robert K. Simon testified, this demolition debris would likely have contained lead from

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<sup>14</sup> “The presence or likely presence of any hazardous substance . . . on a site under conditions that indicate an existing release, past release, or a material threat of release of any hazardous substances . . . into structures on the property or into the ground, ground water, or surface water of the property is known as a Recognized Environmental Condition, as defined by the American Society for Testing and Materials (ASTM) . . . . A Recognized Environmental Condition (REC) should be disclosed under CEQR.” CEQR Technical Manual at 12-2.

paint. A522. But regardless of this, CEQRA requires a hazardous materials assessment, *i.e.*, a Phase II ESA, under these circumstances.

Yet despite this obvious “reason to suspect” the presence of hazardous materials on the Site, and despite the express statement of the CEQR Technical Manual that a hazardous materials assessment was therefore warranted, ECEA and JHL found no REC, and consequently no need for a Phase II ESA.

Perhaps because JHL believed, and even now contends, that it was not required to do a Phase II ESA (JHL Br. at 52), its Phase II ESA was perfunctory and, like the Phase I ESA, contrary to CEQR guidance. Moreover, it misrepresented the data collected. This inadequate Phase II ESA contained JHL’s only analysis of the hazards posed by lead and other toxics, and was carried forward unchanged into the DEIS and the FEIS.

**2. The Number of Soil Samples in JHL’s Phase II ESA Fell Far Short of What Is Required by CEQR and DER-10 Guidance.**

The inadequacies of the Phase II ESA began with insufficient sampling of surface soil and an insufficient number of borings. Contrary to the guidance of the CEQR Technical Manual at 12-9–12-10, the NYC Office of Environmental Remediation guidance (A2418), and DEC’s DER-10, the Phase II ESA took insufficient shallow soil samples, failed to focus on shallow soil, and

failed to focus on the most contaminated portion of the site.

State guidance informs that a Remedial Investigation (“RI”) should:

include provisions to identify all soil which may contain contaminants above the unrestricted use soil SCGs.

Soil sampling during the RI is intended to determine the areal and vertical extent of those areas found to be contaminated. Sampling locations should be biased toward locations expected to be contaminated . . . .

DER-10 at 74. The CEQR Technical Manual advises that during a Phase II ESA,

A large number of shallow soil samples can be collected in a relatively short time using direct push technology (DPT). This type of DPT probing is routinely done during first stage surveys to collect a number of preliminary soil samples to assist in the characterization of the site. . . .

CEQR Technical Manual, at 12-9; *see also id.* at 12-10; A2418 (OER Guidance for Environmental Field Work) (“Always collect shallow soil samples (0-2 foot depth).” Moreover, in a lot the size of this Site – 37,496 square feet (A2139) – OER’s CEQR Guidance recommends 11 borings (A2429), whereas AKRF only made 8 in its Phase II ESA.

The only shallow soil samples for which test results are shown in the Phase II ESA tables are the eight samples taken from the top foot of each boring and the six tree pit samples. The soil in the tree pits would have come with the root ball and/or been placed during planting, so it is likely different from the soil elsewhere on the site. That leaves only the eight samples from the tops of the

borings. These show high levels of lead, by far the highest on the site. They average 1079 ppm. The two highest are 3,850 and 1,830 ppm respectively, and all eight of them exceed the USCO of 63 ppm by a large margin.

Even without these results, OER's specific Guidance requires many more shallow soil samples and three more borings. But especially given these results indicating high levels of contamination of shallow soil, AKRF should have taken additional shallow soil samples to examine the extent and amount of contamination there.<sup>15</sup>

DOH's reliance on a very small number of largely unrepresentative samples means that its analysis was "unsupported by . . . data," and so must be set aside. *Develop Don't Destroy*, 33 Misc.3d at 346.

**3. The Reporting of Averages From All of the Samples Taken Together and From the Tree Pit Samples Was Misleading, and Failed to Consider the "Reasonable Worst Case" Scenario.**

AKRF averaged the 38 lead test sample results, and found average contamination of 290 µg/kg of lead.<sup>16</sup> Separately, AKRF also reported the average

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<sup>15</sup> The issue of inadequate testing was raised in comments during the environmental review. *See, e.g.*, A2363 ("samples were too few in number for an area the size of the construction site"); A289 ("More samples should have been collected from throughout the entire site."); RA27 ("Without additional testing, the potential risks that construction at this site poses to children . . . pregnant women, the elderly and those with respiratory problems . . . are unknown."); RA1 (same).

<sup>16</sup> AKRF included in its averaging the results from the waste characterization samples, which composited soil from different locations within the top half or within the bottom half of each of

of the results from six tree pit samples, which averaged 304 µg/kg. However, given that the tree pit soil was likely imported, the results from the tree pits are not representative of the rest of the shallow soil. A292.

Having reported the low average lead levels in the six tree pit samples, it is strange that AKRF did not see fit to report the much higher average lead levels (1,079 µg/kg) in the eight shallow soil samples from the borings. If AKRF had done additional sampling of the shallow soil, it might well have found even higher average lead levels, and concentrations of contamination, in the shallow soil.<sup>17</sup>

The way AKRF chose to present the Phase II ESA results for lead masked the very much higher levels of contamination found in these eight shallow surface samples. A293-94; A496; RA30. The shallow surface is not only the most highly contaminated portion of the site, but also the place where the soil is most friable and would be most disturbed during construction.

Based on this biased averaging, the FEIS concluded that the site's average level of lead contamination of 290 µg/kg, although exceeding DEC's USCOs (63 µg/kg), was below the federal soil-lead hazard level of 400 µg/kg. The

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the soil borings. DEC informs that “[c]ompositing of samples . . . is generally not acceptable when establishing the nature and extent of contamination.” DER-10 at 60.

<sup>17</sup> In contrast, the eight samples from the bottom of the borings averaged only 35.6 µg/kg of lead. In other words, the shallow soil samples had, on average, thirty times as much lead in them as the bottom soil samples.

FEIS stated that “[t]hese findings do not indicate a ‘soil-lead hazard’ as defined by the USEPA at [40 C.F.R. § 745.65(c)] . . . .”<sup>18</sup> A2721.

Also based on this biased assumed average lead level of 294 µg/kg, the FEIS calculated the amount of airborne lead expected during excavation and construction. The calculation assumed that the dust monitoring program required under the RAP and the CHASP would never fail, and would ensure that overall dust levels were kept below 150 µg/m<sup>3</sup> as required under the RAP and the CHASP. A2796. The result was that, according to the FEIS, the concentration of lead in the air would be no higher than .04 µg/m<sup>3</sup>, which is well below .15 µg/m<sup>3</sup>, the NAAQS for lead.

However, had DOH and AKRF done the same calculation using the 1079 µg/kg average lead contamination level of the eight shallow soil samples, it would have found that the contamination of the shallow soil was 2.7 times above the federal soil-lead hazard, and that the resulting dust could contain up to 0.16 µg/m<sup>3</sup>, which exceeds the 0.15 µg/m<sup>3</sup> NAAQS for lead.<sup>19</sup>

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<sup>18</sup> Under that definition, soil on residential property or property of a child-occupied facility may not exceed 400 ppm (which is the same as 400 µg/kg) in a play area.

<sup>19</sup> In concluding that the lead NAAQS would not be violated, the FEIS reasoned as follows:

The respirable dust monitoring to ensure total dust levels stay below 150 µg/m<sup>3</sup> means that 15-minute average airborne lead levels would on average stay below 0.0435 µg/m<sup>3</sup> (since with a total dust level of 150 µg/m<sup>3</sup> only a 290/1,000,000 fraction of this total would be lead and (290/1,000,000) x 150 µg/m<sup>3</sup> equals 0.0435 µg/m<sup>3</sup>). This average lead level of 0.0435 µg/m<sup>3</sup> would be less than one-third of the (3-month average) 0.15 µg/m<sup>3</sup> lead NAAQS.

As Petitioners-Respondents' experts Paul Woods Bartlett and Stephen Lester both testified, the arithmetic average is an incorrect way to estimate emission, dispersion and exposure. CEQR requires that the effects of a Project be considered under a "reasonable worst case" scenario. CEQR Technical Manual at 2-5. The Site does not consist of a homogeneous mix of contaminants. A435-36. The range of lead concentrations spans three orders of magnitude, with over 25% at the high end of the distribution, over the 400 µg/kg threshold. This distribution has a cluster of samples at the high end, which need to be considered separately. *Id.*

Extrapolating from the inadequate number of samples taken, it might be expected that 25% of the soil is above 400 µg/kg, and up to and over 3,850 µg/kg. For any individual, there is no such thing as an average level of exposure. However, it is predictable that given the high lead levels on the Site, at some locations and at some times some individuals will be exposed to particles with high concentrations of lead. *Id.*; A496; A293-94.

DOH's reliance on a grossly understated and misleading soil-lead average did not constitute a hard look, and was arbitrary and capricious.

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A2796. If, instead of 290 µg/kg, the average lead level were 1079 µg/kg, the resulting average lead level in dust of 150 µg/m<sup>3</sup> would be 0.16 µg/m<sup>3</sup>.

**4. DOH Relied on Outdated Standards Not Intended to Measure the Cumulative Impact of Fugitive Dust Migrating Off-Site.**

In denying that lead was a “relevant area of environmental concern” on the Site, DOH relied on standards that are not intended to measure the cumulative impact of migration of contaminated soil dust through the air to a nearby school and residences. DEC’s SCOs were developed as guidelines for determining appropriate levels of cleanup based on current or future uses of a property. A494. EPA’s soil-lead hazard definition is intended to measure risks from exposure to bare ground and leachate runoff. A76; A497.

The NAAQS lead standard is intended to measure ambient air quality. The measure that would be taken is a 15-minute average of air-suspended inhalable dust. It does not address the deposition and accumulation of lead dust particles, including larger particles that would not be monitored, on surfaces that children will touch, over a lengthy site preparation and construction process.<sup>20</sup> A506.

The federal and State standards for lead in soil and in dust relied on by the Phase II ESA and the FEIS are also concededly outdated, and therefore must be applied with extra caution. The State SCOs for lead were required to be updated in

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<sup>20</sup> Moreover, common sense tells us that soil disruption and excavation is not a uniform process producing homogenous emissions, so air monitors placed at various points around the perimeter will not provide a truly reliable measure of contaminated dust escaping from the site. Preventing dust migration, rather than merely attempting to measure it, should have been given a full and fair consideration as an alternative.

2006, but were not. ECL § 27-1415(6)(c); A334-35. In November 2008, the EPA revised the NAAQS standard, lowering it to one tenth of the former limit. 80 Fed. Reg. 283 (Jan. 5, 2015). In 2009, in light of new evidence on lead neurotoxicity, EPA agreed to begin a proceeding to lower the lead dust standards from 40  $\mu\text{g}/\text{ft}^2$  to 10  $\mu\text{g}/\text{ft}^2$ , but it has not yet done so. That lead dust standard is the most relevant here, because that is the exposure pathway through which children and residents are most likely to be affected. Nevertheless, there is no mention whatsoever of this standard, and whether it will be met even in its present form, in the FEIS or Findings Statement.

DOH's reliance on outdated standards and its failure to consider the impact on indoor lead dust in the school was arbitrary and capricious.

**5. DOH Relied on Letters From DEC That Misapprehended the Facts and the Receptor Population to Conclude That "No Remediation of Lead Contamination Is Required."**

In both the Findings Statement and the FEIS, DOH relied on two letters from DEC that stated, "the Project Site does not pose a significant threat to public health or the environment based on the lead concentration present and, therefore, no remediation of lead contamination is required." A2721; A2796; A3176.

The first letter, dated August 6, 2014, signed by the DEC

Commissioner, is based on the mistaken belief that “only one of the 38 soil samples collected at the site exceeds the unrestricted use soil cleanup objectives.” A319. To the contrary, 25 of the 38 soil samples exceeded the USCOs. Inasmuch as it was based on a complete misapprehension of the facts, the Commissioner’s letter carries no weight at all.

The second letter, dated September 24, 2014, signed by the Regional Remediation Engineer, reaches its conclusion of “no significant threat to public health or the environment” after reviewing the lead test results and comparing them to the Commercial Use SCOs of 1000 parts per million. A320. This SCO is stated to be applicable in assessing the threat to occupants of the completed facility, but it does not even purport to apply in assessing the threat to children and the elderly from construction dust.

Given these facts, reliance on these letters was arbitrary and capricious.

**D. DOH Failed to Take a “Hard Look” at the Potential Impacts of Lead Dust on Vulnerable Receptor Populations**

Based on inapplicable and outdated standards applied to inadequate data that was misleadingly reported, DOH wrongly concluded that the standard measures used to control construction dust embodied in a standard Remedial Action Plan (RAP) and a standard Construction Health and Safety Plan (CHASP)

would suffice to avoid “any significant adverse impacts from dust or lead on public health.” A3176. Having thus failed to identify lead as a relevant area of environmental concern, DOH next failed to take any look at all, let alone the required hard look, at the potential effects of fugitive lead dust on the children of the adjacent school and the Site’s elderly neighbors. DOH’s cavalier analysis of the lead hazards in this case was at odds with its own mission of primary prevention of lead poisoning, and arbitrary and capricious.

**1. The FEIS, in Its Discussion of Lead Hazards, Failed Even to Mention the Potential Impact on Nearby Children and Elderly Neighbors**

It is astonishing that despite the public’s copious comments on lead dust hazards at all stages of the environmental review, and despite the submissions of independent expert analysts concerning the dangers of fugitive lead dust to the elderly neighbors and elementary school children who live and go to school next to the site, the FEIS does not even mention the children or the neighbors anywhere in its discussions of lead and other toxic hazards in chapters 5 (Hazardous Materials), 11 (Public Health), or 13 (Construction).

**2. The Generic RAP and CHASP Did Not Address the Need to Prevent Lead Poisoning of Children and the Elderly at This Site**

The only discussion in the FEIS of impacts from hazardous waste is

the repeated statement that any impacts “would be avoided by implementing” a generic RAP and CHASP. *See, e.g.*, A2722. The RAP and the CHASP, in turn, repeat the same few tired and conclusory paragraphs from the Phase II ESA to the effect that the Site presents no soil-lead hazard. This is not the “reasoned elaboration” concerning impacts on the school and the neighbors that SEQRA requires.

The RAP and CHASP require Site construction workers to wear full-face respirators. A2262-63. However, they proffer only the most basic protection for school children and neighbors: wetting the soil during activities that raise dust, covering trucks with tarpaulins, and monitoring the air for small particulates – but not for larger particulates and not specifically for lead. A2245-48.

The air monitoring would be according to a generic plan set forth in DER-10, Appendix 1A – “NYSDOH Generic Air Monitoring Plan (GCAMP) of the NYSDEC Division of Environmental Remediation.” A2246.

Like the FEIS, the RAP and the CHASP do not mention the presence of young children in the immediate proximity of the Site. The entrance to PS 163 is on the east side of the school building, directly facing the construction site and is about 75 feet from West 97th street on the eastern side of the school, the side facing the Site. Thus, children entering and leaving the school, or gathering near

the school entrance, will be less than 20 feet from the construction site. DER-10 states that special requirements should be put in place if work is being done “within 20 feet of potentially exposed individuals.”<sup>21</sup> In accepting the generic air monitoring plan without modification, DOH ignored this requirement.

### **3. DOH Failed to Consider the Exposure Pathways Through Which Lead Dust From the Site Could Have Cumulative Effects on Children and Neighbors**

Having found no lead hazards, the FEIS omits the required analysis of the exposure pathways by which lead dust and other toxics might reach the nearby vulnerable children and elderly. Nor does it characterize the receptor populations and the potential health impacts on them. All this is mandated by DEC’s guidance in DER-10, § 3.3(c)(4) and Appendix 3B, and by the CEQR Technical Manual, Ch. 20.

DEC’s guidance requires documentation of “all five elements of an exposure pathway”: (1) a description of contaminant sources; (2) an explanation of the release and transport mechanisms to the exposed population; (3) identification of all potential exposure points where human contact with the contaminant may occur; (4) description of the routes of exposure, *e.g.*, ingestion, inhalation, dermal absorption; and (5) a characterization of the receptor

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<sup>21</sup> “Depending upon the proximity of potentially exposed individuals, more stringent monitoring or response levels than those presented below may be required. Special requirements will be necessary for work within 20 feet of potentially exposed individuals or structures.” DER-10 at 204 (App. 1A).

populations who may be exposed. DER-10 at 220 (App. 3B). The CEQR Technical Manual sets forth the same elements (CEQR Technical Manual at 20-1), and goes on to state that “[s]oil contaminants are a concern particularly with projects having unmitigated significant impacts where . . . disturbance of topsoil is possible during construction . . . .” *Id.* at 20-5.

Moreover, SEQRA requires that the impact of the hazard be considered cumulatively, as it acts during the entire period of construction, and not just at any one moment in time. 6 NYCRR § 617.9 (EIS should address cumulative impacts where significant). This is particularly important with respect to lead, because lead is not metabolized in the body, but accumulates. A456; A496.

The standards that the FEIS used to evaluate the lead hazard do not fit within the above framework. They simply are not apposite to dealing with lead dust that is transported over time to a neighboring location where there are very vulnerable receptors.

The FEIS did not discuss at all how lead dust might migrate into the school, (*e.g.*, by being tracked in, by coming in through the classroom windows, which must always be kept open, by being sucked into ventilation intakes. etc.) or onto the playground, and where precisely the dust would likely be deposited.

Because the FEIS used inapplicable standards and very faulty data, it never reached the only question of importance, namely, What impacts would the heavily leaded shallow soil from the construction site, stirred up by construction, have over time on the children of PS 163?

**4. DOH’s Failure to Take a Hard Look at Lead Hazards Is Inconsistent With Its Mission to Prevent – Not Mitigate – Lead Poisoning**

In approving a fundamentally flawed, if not actively misleading, analysis, DOH found that given the amount of lead dust purportedly on the Site, the dust control measures to be implemented would “control” and “limit” the “potential for airborne exposure to dust and lead.” A3176; *see also* A2248, A2259 (RAP and CHASP will ensure that the lead NAAQS will only “rarely” be exceeded). DOH did not say that lead exposures would be prevented. Yet DOH’s own policy requires prevention, not just mitigation. The 2009 State report cited above declares that “primary prevention (taking action before a child is harmed) is critical to address the problem” of lead poisoning. A250. In failing even to consider the reasonable worst case scenario based on the true levels of lead in significant portions of the Site’s soil, DOH is betraying the trust reposed in it by the Legislature and the people of the State.

**D. DOH Failed to Consider Any Measure, Let Alone Tenting, to Mitigate the Hazard of Lead Dust Migrating Off-Site**

Having first failed to identify soil lead as a relevant area of serious environmental concern, and having secondly failed to take a hard look at lead's potential effects, DOH thirdly failed even to consider, let alone require, any mitigation measures that might prevent, insofar as practicable, the irreversible and serious neurological harms to children and neighbors from lead dust. The FEIS's chapter 14, "Mitigation," in fact contains no mention of lead dust hazards.<sup>22</sup>

The sole mention in the FEIS of potential harms from lead dust to Petitioners in this and the related PS 163 proceeding were in DOH's responses to comments from the Environmental Technology Group, Inc. (A338) and from the PS 163 School Leadership Team (A2369) regarding the need to tent the Site. DOH responded with its usual mantra: "NYSDOH and NYSDEC concluded that the proposed RAP/CHASP . . . were sufficient to control and measure dust levels." A2989; *see also* A3013 ("impacts would be avoided by implementing a NYSDOH-approved RAP and associated CHASP").

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<sup>22</sup> The CEQR Technical Manual prescribes that "[a] hierarchy of mitigations should be considered that prioritizes engineering or process controls that minimize the presence of hazards first, reduces the potential for exposure second, and mitigates the effect of exposure only as a last resort." CEQR Technical Manual at 20-7.

This conclusory statement is not the “reasoned elaboration” or the “hard look” that SEQRA mandates. Petitioner-Respondents’ experts Bartlett, Carpenter, and Lester all testified that tenting the Site was the only way to provide real protection from the irreversible damage of lead. A435; A457; A498. The Court below properly required DOH to go back and take a “hard look” at this option.

## **II. THIS COURT SHOULD CLARIFY THE SUPREME COURT’S REMEDIAL ORDER**

In their Verified Article 78 petition, Petitioners-Respondents sought an injunction requiring DOH to comply with the requirements of SEQRA. A99. In its Decision, however, the Supreme Court “remitted the matter to DOH for preparation of an amended EIS, to reconsider the findings on the issues of noise and hazardous material.” A48.

An “amended FEIS” is not defined or even referenced anywhere in SEQRA. Instead, where the Supreme Court has vacated and annulled the EIS, SEQRA requires the lead agency to issue a Supplemental Environmental Impact Statement (“SEIS”). An SEIS is subject to the “full procedures” set forth in SEQRA, including, *inter alia*, a public hearing, an opportunity for the public to comment on a draft SEIS that DOH may issue, and issuance of the final SEIS. 6

N.Y.C.R.R. § 617.9(a)(7)(iii). “This implies that preparation of a supplemental EIS will parallel that of other EISs. Thus, the draft version of the supplemental EIS will undergo public review and necessary revisions, eventually emerging in final form, all as generally outlined in the regulations.” GERRARD, § 3.14[b].

Petitioners-Respondents respectfully request that this Court clarify that the amended EIS take the form of a Supplemental EIS that affords the full protections of SEQRA.

## CONCLUSION

For the foregoing reasons, this Court should affirm the Decision of the Supreme Court annulling and vacating DOH's December 10, 2014 Findings Statement and clarify that the remedial order requires DOH to issue a supplemental environmental impact statement and afford the public all of the corresponding procedural requirements.

Dated: New York, New York  
March 23, 2016

Respectfully submitted,

NEW YORK ENVIRONMENTAL  
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