

WRITTEN TESTIMONY OF KEVIN OLSON & DAVE PALMER
NEW YORK LAWYERS FOR THE PUBLIC INTEREST
New York City Council: Landmarks, Public Siting & Maritime Uses Subcommittee
December 4, 2006

Good Morning Chairperson Lappin and other members of the Subcommittee on Landmarks, Public Siting & Maritime Uses. Thank you for the opportunity to provide testimony today.

My name is Dave Palmer, and I am here with my associate Kevin Olson. We are Staff Attorneys with New York Lawyers for the Public Interest (“NYLPI”). NYLPI is a nonprofit civil rights law firm formed in 1976 to address the unmet legal needs of New Yorkers. In 1991, NYLPI formed its Environmental Justice & Community Development Project to represent communities of color and low-income neighborhoods in environmental justice matters in New York, and our comments today draw from the experience and knowledge that NYLPI has developed over that time period.

We are speaking today on behalf of the Bronx Committee for Toxic Free Schools. The Bronx Committee is a group from the neighborhood where the SCA is proposing to build the school at issue, made up of community residents, parents and teachers who work at the neighboring P.S. 156.

General Position on Mott Haven Site

At the outset, we would like to stress that we are not here to make the case against building schools on this site, but we believe that the City should only approve placing a school on this site if the proper environmental protections are in place. Because this rushed process has prevented the community from conducting an independent assessment of the cleanup, and because our preliminary assessment reveals that the cleanup plan should be improved, we are asking the Subcommittee today to reject the site application. By doing so, you are not preventing the schools from ever being built on the site, but you *are* in effect forcing the SCA to address the environmental problems and sending the message that the City should follow the highest standards in protecting its school children. We appreciate the need for new schools and the City’s desire to move quickly, but taking the necessary time to ensure that a contaminated site is environmentally sound is worth the delay, as we’re sure most parents would agree.

The Bronx Committee asked the Department of Education for time to make an independent assessment of the site and the Remedial Work Plan - the SCA’s “Cleanup Plan” for the site. (This letter is attached to our written testimony.) The city needs to understand that community members, not to mention most lawyers, politicians, and government staff, are often ill-equipped to fully analyze highly technical environmental data, and properly assess whether a proposed remedial scheme is sufficient to protect the health of children – the population most vulnerable to toxic chemicals.¹

¹ Source: *Center for Children's Health and the Environment, American Academy of Pediatrics.*

It simply does not make sense to build a learning facility on a property that could impede a child's ability to learn.² The preliminary view of the Cleanup Plan provided to the Bronx Committee by environmental consultants, the disproportionate exposure to environmental burdens in communities like the South Bronx, and the SCA's current practices at the construction site have created a reasonable level of heightened concern in the community. Because of these things, our clients and the coalition have expressed to us an unwillingness to support any plan that will put children on this site without further independent assessment.

Reasons for Concern

The land where the SCA wants to build the schools is highly toxic. The mix of pollutants in the soil and groundwater in excess of relevant standards includes probable carcinogens such as benzene (up to 383 times the allowable amount) and chrysene (up to 23 times the allowable amount), as well as other volatile organic compounds ("VOC") and metals such as: naphthalene, PERC, mercury, lead, antimony, arsenic, barium, beryllium, cadmium, chromium, copper, iron, magnesium, manganese, nickel, and zinc.³ Additionally, TCE, another suspected carcinogen, was found in excess of the "screening levels" in soil gas, and (troublingly) the source of this TCE is unclear.⁴

You may hear the SCA state that their Cleanup Plan is thorough and safe, as they have repeatedly informed the community. However, three environmental consultants have preliminarily reviewed the SCA's Cleanup Plan and told the Bronx Committee that the Cleanup Plan needs to be improved, particularly in light of the serious contamination of the site, and the fact that the buildings proposed for the site are schools.⁵

Long-Term Maintenance and Monitoring Needed

The consultants informed us that the biggest problem with the SCA's Cleanup Plan is that it leaves behind contamination but contains no long-term maintenance and monitoring protocol. A long-term maintenance and monitoring protocol would guarantee, for example, that the controls built into the site continue to work and that no digging is done in the toxic soil that will remain throughout most of the site

² Exposure to toxic chemicals can lead to behavioral problems, learning disabilities and decreased I.Q. (Source: *Third Report on Human Exposure to Environmental Chemicals*" CDC's National Center for Environmental Health, July 2005, <http://www.cdc.gov/exposurereport/3rd/pdf/thirdreport.pdf>). "There is a large body of evidence that even simply living near or going to school near a toxic site creates a risk of being exposed to dangerous chemicals, causing cancer, respiratory illnesses like asthma, and a reduced ability to learn." Dr. David O. Carpenter, M.D., Institute for Health and the Environment at SUNY Albany. We also note that the New York State Board of Regents has adopted guiding principles that state that school officials and appropriate public agencies should be held accountable for environmentally safe and healthy school facilities.

³ Source: *SCA Draft Remedial Investigation Report* (dated November 15, 2005), Tables and Maps.

⁴ Source: *SCA Draft Remedial Investigation Report*, Table 10A, Appendix H.

⁵ Our environmental consultants include Mathy Stanislaus from Allegiance Resources Corporation and Lenny Siegel from the Center for Public Environmental Oversight.

(under a two-foot “soil cap”). The Cleanup Plan should have contained a “complete description” of any monitoring and maintenance,⁶ but the Cleanup Plan instead indicated there will be *no* long-term monitoring at the site, thus raising legitimate and serious concerns on our part. In various documents the SCA has consistently asserted that the only monitoring that will be done on the site will cease once construction is complete.⁷

Because the SCA plans to install controls at the site (rather than undertake a fuller cleanup), such as a “hydraulic barrier” to keep polluted water out and a “soil cap” to cover toxic earth, we need a plan in place to monitor the site. And to ensure that this plan is sufficient there must be public input and independent review.⁸ The SCA recently told us that they do intend to draft a plan and submit it to the DEC and Department of Health, despite previous written statements to the contrary.⁹ Yet when we asked the SCA to withdraw this site application so we could discuss the matter in greater depth, they refused.

Active Soil Vapor Barrier System

Our consultants were also unanimously worried that an active “soil vapor” barrier system might not be utilized in the school.¹⁰ The SCA said that it will install an active system one year before the schools open, then “use this period of time to perform additional sampling ... to demonstrate to the satisfaction of the NYSDOH that [a soil vapor barrier] is not required all together.”¹¹ This statement is further evidence that the SCA is hoping to walk away from any obligation to the site once the kids are actually there – and it is unacceptable. We need assurance that the active soil vapor system will stay in place and that it too will be monitored and maintained. Again, the SCA recently offered concessions to us on this point – indicating to us that the active barrier might “remain in place and operational for the life of the schools” – but refused to pull the site application to finalize details on this point.

⁶ N.Y. ECL § 27-1415(7)(a)(ii).

⁷ Source: *Draft Remedial Action Work Plan* (dated November 15, 2005) (hereinafter “Cleanup Plan”); *Letter of Shaw Construction revising Cleanup Plan*, dated June 14, 2006; *SCA Final Environmental Impact Statement* (dated October 2, 2006) (“Monitoring of the engineering controls will *cease* once the remedy has proven to be effective, which is expected to be within two (2) years”).

⁸ See, e.g., *New York Times*, October 2, 2006. (An article on a remediation in Weehawken, NJ, quotes Murray McBride, soil scientist at Cornell University, as stating “that the current reliance on capping ‘seems to me to be a stopgap, short-term approach’ and another environmental consultant Michael Campion, the township’s environmental consultant, acknowledged ‘that nearly all caps eventually suffer erosion’”).

⁹ Source: *SCA Memo regarding Bronx Committee Environmental Issues*, dated November 14, 2006.

¹⁰ “Soil vapors” are vapors that seep from polluted soil, where VOCs are releasing gases. Soil vapors become a problem when they seep into buildings and concentrate. An “active” barrier system essentially uses a fan to vent these vapors from under the schools, where they are diluted in the air outside.

¹¹ Source: *Letter of Shaw Construction revising Cleanup Plan*, dated June 16, 2006.

P.S. 156 and I.S. 151

The SCA is also utterly ignoring P.S. 156 and I.S. 151, which are located directly north of the worksite, and which are built on similarly toxic soil. This disregard takes a number of forms. First, although the SCA's investigation revealed the presence of the same toxins underneath P.S. 156,¹² it has not proposed a cleanup of these toxins in conjunction with the cleanup of the neighboring site.¹³ (P.S. 156 and I.S. 151 are supposedly kept safe by being built on 30-foot stilts.) Second, the SCA failed to take into account the high number of children in the area when it evaluated the environmental impact of its work in its Environmental Impact Statement. (Cardinal Hayes High School is also directly south of the site.) Third, and worst of all, the SCA's plan will potentially make the ground underneath P.S. 156 even more toxic: one intended result of the SCA's cleanup plan is "redirecting contaminated groundwater from upgradient sources around the footprint of the [new] school."¹⁴ At least some of this polluted water is likely to be "redirected" under P.S. 156. Instead of simply redirecting polluted water, the SCA could install a pump-and-treat system or iron-filing barrier to actually clean the water, but it has chosen not to. These are the types of concerns that should be further explored through an independent assessment.

DEC Approval

The SCA's Cleanup Plan was approved by the DEC and the Department of Health. However, this fact alone is no rebuttal to arguments for improving the Cleanup Plan. In 1997, at P.S. 141 in Harlem, after the Department of Health had approved opening the school on polluted soil, the school was evacuated and closed down a month after it opened when soil vapors coming into the school were detected.¹⁵ Notably, the City ignored a group of area residents who argued for more testing of the school in that case. In other testimony you will also hear of environmental problems in a school in the Soundview section of the Bronx. You should also be aware that the Brownfield Program has four tracks, each of which require a different type of cleanup, and the SCA itself chose to apply for the Brownfield Program in Track 4, *which is the least protective and requires the least amount of cleanup*.¹⁶ As a legal matter, this means that the DEC could approve the plan even though it does not comply with the highest possible cleanup standards on the books.¹⁷ (For example, no single-family housing could be built on the site after the SCA's limited cleanup.)¹⁸

¹² Source: *SCA Draft Remedial Investigation Report*, Tables and Maps.

¹³ We have been informed that the area under the schools would be "encapsulated", but it is not clear to us what is meant by this term or whether this is sufficient to address the problem.

¹⁴ Source: *Cleanup Plan*, §3.1.

¹⁵ Source: *New York Times*, October 7, 1997.

¹⁶ Source: *Cleanup Plan*, Art. 4; N.Y. ECL §27-1415(4).

¹⁷ The DEC also ignored the legal requirement that the SCA analyze two alternative (better) cleanup tracks in its Cleanup Plan (in contravention of N.Y. ECL §27-1413(2)).

¹⁸ 6 NYCRR 375-1.8(g); 6 NYCRR 375-3.8(e) (Rules effective December 14, 2006).

Effect on Neighborhood

The SCA also needs to take better care to avoid negatively affecting the neighborhood. Although the SCA will proudly tell you that it has an air monitoring program already in place, and that this monitoring program has registered *no* dust or vapors being emitted from this site, last month we personally witnessed dust exiting the site and coating the area (and we brought photographs to show the extent of the dust).¹⁹ Notably, these pictures were taken directly next to P.S. 156's kindergarten playground; we were informed that the school had to change its dismissal point so the children could avoid these conditions. The SCA says that it tested this dust and that it was not toxic, but given the fact we know there *is* highly toxic dirt and water on site and the clear visual evidence that the SCA's monitoring plan is unlikely to detect it leaving the site, it is an open question whether the SCA's current monitoring program is sufficient. This is another issue that needs further assessment.

As previously mentioned, we are also concerned about the effects on the neighborhood of the SCA's plan of "redirecting contaminated groundwater from upgradient sources around the footprint of the school." The SCA has not said where in the community this polluted water will go when it is "redirected", and the SCA's Environmental Impact Statement indicates that it actually did no studies on this question.²⁰

Construction Underway Already

Finally, we note that the SCA has not respected the spirit of the City Council's approval process. As you know, N.Y. Public Authorities Law §1732 states that: "*prior to initiating construction of new educational facilities, the authority shall submit the site plan of such projects to the mayor and the council for review.*" The SCA submitted the site plan to the City Council on November 16, but as our pictures of the site from that very date reveal, work had already begun by that time. The SCA says this work is not "construction" because no buildings are going up yet. To argue that the activity in these photos is not "construction" is in our opinion too clever by half, and insults the process that requires this body's approval.

Conclusion

There are a number of other important issues not covered in this oral testimony that are also deserving of attention and are briefly noted in our written testimony.²¹ But we feel that the issues we have spoken of provide sufficient reason to

¹⁹ See attached photographs.

²⁰ Source: *SCA Final Environmental Impact Statement*.

²¹ The Draft Remedial Investigation Report concludes that metals in the soil and groundwater throughout most of the site need not be remediated because "[t]he site is located in an urban setting and the concentrations observed may be indicative of background and/or historic site conditions and not related to Site contamination." (Source: *SCA Draft Remedial Investigation Report*, §4.2.) The consideration of "background levels" should not be used as an excuse in the context of cleaning land for schools.

deny the site application until an independent assessment is completed and the SCA can better guarantee that the site will be a safe place to build schools.

Thank you again for the opportunity to provide testimony on these important issues, and for your consideration of these recommendations. I note that our written testimony contains footnoted references to support the information we have provided. We welcome any questions from the Subcommittee.

We are not aware of controls in place for the workers currently on site. Contrary to several public statements by Shaw Environmental, pollutants were found in the most shallow soil samples. Benzene was found in samples taken at a depth of 4-5 feet depth. (Source: *SCA Draft Remedial Investigation Report*, Table 3B.) Chrysene and Benzo(a)pyrene were found in samples taken a depth of 2-3 feet. (*Id.*) Metals such as mercury, arsenic, chromium, and zinc were found at a depth of only 0-2 feet. (*Id.*, Table 4A.)

The hydraulic barrier will not extend the length of the school on the North side, and it *may* be possible that contaminated water will enter the school's footprint beyond the edges of the barrier.

Additionally, the views of the community were not sufficiently solicited or considered by the SCA. Community Board 4 drafted a letter to the Mayor in July 2006 complaining about the insufficient cleanup and lack of long-term maintenance and monitoring. Community Board 4 also stated in its District Needs Statement that: "While there is a need for more schools in the district, we have a concern with the siting of schools over brownfield areas. The addition of four new schools over the Old Mott Haven Rail yard, poses a real concern to the surrounding neighborhood." No response was ever received to these documents. The broad coalition of area groups opposing this plan is, in part, testament to feelings of alienation from this process.

Finally, the City is in the process of drafting a "sustainability plan" to accommodate 1 million new residents over the next 20 years. Part of this plan involves building several new schools on polluted brownfield sites. (Source: *New York Times*, Nov. 26, 2006, "Bloomberg Administration Is Developing Land Use Plan to Accommodate Future Populations".) The City Council's actions regarding this site can, therefore, set a positive *or negative* example for the City to follow in building numerous schools on polluted land in the coming years.