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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF THE FRIENDS OF P.S. 163,  
INC., et al.,

Appellants,

-against-

NO. 128

JEWISH HOME LIFE CARE, MANHATTAN,

Respondent.

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-----  
MATTER OF DAISY WRIGHT, et al.,

Appellants,

-against-

NO. 128

NEW YORK STATE DEPARTMENT OF HEALTH,  
et al.,

Respondents.

20 Eagle Street  
Albany, New York  
November 16, 2017

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN



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1 CHIEF JUDGE DIFIORE: Please be seated. Good  
2 afternoon everyone. The first appeal on this afternoon's  
3 calendar is appeal number 128, the Matter of the Friends of  
4 P.S. 163 v. Jewish Home Life Care. Counsel.

5 MR. SHAHABIAN: Good afternoon, and may it please  
6 the court. Matt Shahabian for the friends of P.S. 163  
7 appellants.

8 Your Honor, may I reserve two minutes for  
9 rebuttal?

10 CHIEF JUDGE DIFIORE: You may, sir.

11 MR. SHAHABIAN: The Department of Health failed  
12 to take a hard look at two critical environmental impacts  
13 on students at P.S. 163: construction noise and lead dust.

14 For noise, the Department relied on a made-up two  
15 years of noise rule to avoid evaluating the impact noise  
16 would have on P.S. 163 students, and whether those impacts  
17 could be mitigated.

18 JUDGE RIVERA: Well, I'm a little confused by  
19 that argument, because didn't they, nevertheless, do an  
20 actual study?

21 MR. SHAHABIAN: They did the - - - the first step  
22 in - - -

23 JUDGE RIVERA: But I thought your argument is  
24 that, you know, they've got this two-year durational  
25 standard that shouldn't have been applied and that that



1 taints everything else, but the fact of the matter is they  
2 did do a study.

3 MR. SHAHABIAN: That was just step one in the  
4 process. So step one is to conduct the assessment and  
5 actually measure how much noise is going to be expected at  
6 the school. Once that analysis was complete, the noise the  
7 Department measured will exceed the forty-five decibels  
8 significance threshold in the CEQR manual.

9 At that point, because it was significant, it  
10 should have been mitigated. That's where the Department -  
11 - -

12 JUDGE STEIN: Well, didn't they require some  
13 mitigation measures, several mitigation members - - -  
14 measures. Maybe not exactly what you had wanted them to,  
15 but they - - - but they certainly did employ some measures.

16 MR. SHAHABIAN: So there were no initial measures  
17 required specifically that - - - to mitigate below the  
18 forty-five decibel threshold in the initial draft  
19 statement. JHL proposed installing soundproofing windows  
20 and window units to P.S. 163 after we raised these issues  
21 in the comment period. But because the Department relied  
22 on this two-year noise rule to avoid actually evaluating  
23 the impacts expected - - -

24 JUDGE RIVERA: But doesn't this boil down to more  
25 on the noise side? You want the central air conditioning.



1           Isn't that really - - - isn't that the crux of the  
2           argument?

3                       MR. SHAHABIAN: At the end of the analysis, yes.  
4           Our expert - - -

5                       JUDGE RIVERA: Okay. But then isn't it within  
6           the agency's authority to decide, when it has a choice of  
7           how to mitigate what measures to adopt, and aren't we  
8           limited in trying to force upon them something that you  
9           might think is better?

10                      MR. SHAHABIAN: So what this court said in  
11           Jackson is where the analysis is properly conducted, where  
12           there is actually a hard look taken at the impacts, it will  
13           not require an agency to choose between mitigation  
14           measures.

15                      And so for example, in Jackson, the issue was  
16           secondary displacement effects on people living in the Time  
17           Square area. The agency looked at the issues, decided the  
18           mitigation efforts were anti-harassment laws for tenants.  
19           The petitioners wanted a fund that would help the tenants  
20           relocate, and the court said, well, the agency took a hard  
21           look at the issue, and at the stage of which mitigation  
22           measure is better suited to this, we're going to defer to  
23           the agency. But because the failure here started at the  
24           reliance on a two years of noise rule, there was no hard  
25           look that could be relied on to pick a proper mitigation -

1 - -

2 JUDGE RIVERA: But are there - - - I'm sorry.  
3 I'm misunderstanding then. Are there conclusions based on  
4 their assessment that it's less or more than two years?  
5 I'm really not clear. I thought they actually looked at  
6 what the decibels would be, what the impact would be.  
7 Again, the Department didn't agree with you on central air  
8 conditioning, but they did make those assessments.

9 MR. SHAHABIAN: So I have two answers to that  
10 question - - -

11 JUDGE RIVERA: Yeah.

12 MR. SHAHABIAN: - - - Judge Rivera. On the first  
13 step, the Department reported what the measured impacts  
14 would be. But it repeatedly said throughout the statement  
15 process that because noise would not exceed a two-year  
16 threshold, it was not significant under the technical  
17 manual criteria and need not be evaluated for mitigation.

18 JUDGE STEIN: But - - - but they looked at, I  
19 thought they looked at the certain periods in which it  
20 would - - - it would, in fact, exceed the threshold and - -  
21 - and implemented some additional measures such as certain  
22 work not taking place during certain times and things like  
23 that. So I mean, my impression was that - - - that they -  
24 - - even though they thought as Judge Rivera indicated,  
25 even though they thought that the two - - - may have



1 thought that the two-year rule was in place, they  
2 nevertheless did things to mitigate when the - - - when the  
3 noise level would exceed - - -

4 MR. SHAHABIAN: So I do not dispute - - -

5 JUDGE STEIN: - - - the ideal levels.

6 MR. SHAHABIAN: - - - that - - - that there were  
7 some medication proposals adapted here. However, in the  
8 Department's assessment, they were unnecessary. They were  
9 not required because of the two-year rule. And even under  
10 that analysis, because it was - - -

11 JUDGE RIVERA: But then what is the matter if  
12 they if they are requiring the mitigation, that they are  
13 doing more than is necessary, what - - - I'm still  
14 confused, what's - - - what does it matter - - -

15 MR. SHAHABIAN: It matters - - -

16 JUDGE RIVERA: - - - if they got that two-year  
17 durational criteria wrong?

18 MR. SHAHABIAN: It matters because the proper  
19 criteria is will noise exceed forty-five decibels. And it  
20 will still do that here, even with the mitigation proposals  
21 that were adapted. Even on the Department's analysis, it  
22 is undisputed that noise will reach levels that - - -

23 JUDGE FAHEY: Isn't your argument really - - -  
24 you're not asking us, as I understand it, a noise - - - for  
25 de novo review of the factual determination the validity of



1 the mitigation measures. Instead, you're saying that this  
2 two-year rule is what makes this illegal here. Isn't that  
3 the core of it?

4 MR. SHAHABIAN: That's correct, Your Honor.

5 JUDGE FAHEY: All right. So - - - so - - - so  
6 that being the case, now am I right that the - - - the  
7 traffic levels or the noise levels here were comparable to  
8 the noise levels in the heavily traveled New York City  
9 Street?

10 MR. SHAHABIAN: That's correct, Your Honor.

11 JUDGE FAHEY: All right.

12 MR. SHAHABIAN: It would exceed that forty-five  
13 decibel threshold and reach those levels.

14 JUDGE FAHEY: Well, I suppose the argument is is  
15 if it does it for twenty-three months, but not twenty-four  
16 months, that seems to be arbitrary and capricious, I  
17 suppose that's the core of it.

18 MR. SHAHABIAN: And that is why it was flawed to  
19 ride on this two-year rule. That's right.

20 JUDGE FAHEY: I - - - I see. Okay. All right.  
21 Because you know, I live in Buffalo, but New York City  
22 streets always seemed kind of noisy to me, you know. And  
23 it's not that - - - it's not that they aren't, but - - -  
24 but when you compare them, so I suppose there's some  
25 validity to that argument. The problem with it is, I



1 think, is that - - - is the suggestion that there's - - -  
2 there's a - a mitigation measure that we should be looking  
3 at, and - - - and I wondering if that's beyond our powers  
4 to do that kind of review.

5 MR. SHAHABIAN: So it's not beyond the court's  
6 power to actually look at whether a hard look was taken at  
7 mitigation measures because SEQRA has a substantive  
8 requirement that the agency mitigate environmental impacts  
9 to the greatest extent practical. That's reviewable under  
10 this court's power.

11 All this court has said in cases like Jackson is  
12 where there is a hard look, where the analysis is properly  
13 conducted, and there's a choice of various mitigation  
14 efforts that would each be tailored to that impact, the  
15 court's not going to interfere in the policy decision to  
16 choose among the impacts. But that requires a proper  
17 analysis be conducted in the first place.

18 CHIEF JUDGE DIFIORE: Thank you, counsel.

19 MR. SHAHABIAN: Thank you, Your Honor.

20 CHIEF JUDGE DIFIORE: Counsel?

21 MR. LOW-BEER: Good afternoon, Your Honors. John  
22 Low-Beer for the Wright petitioners.

23 The Department of Health admits that soil that  
24 would be disturbed by the proposed project would contain  
25 elevated levels of lead and potentially increase exposure



1 pathways. But they never analyzed those pathways as they  
2 pertain to this site to the children or to the neighbors.  
3 Their chapter on mitigation doesn't mention lead dust. I'd  
4 just like to highlight - - -

5 JUDGE GARCIA: Counsel, I'm sorry. In - - - in  
6 that analysis, though, aren't they looking at whether the  
7 lead dust can move from the site two other areas, which  
8 would include the school?

9 MR. LOW-BEER: Well, they did not look at that,  
10 actually, Your Honor.

11 JUDGE GARCIA: But aren't there mitigation  
12 measures aimed at containing the lead dust on the site like  
13 putting topsoil down, or watering, or whatever they are.  
14 Aren't those measures of containment?

15 MR. LOW-BEER: Well, they did undertake to spray  
16 water on the site as is required by a generic - - - by the  
17 generic construction plan that they adopted, but they  
18 didn't do any evaluation of how dust, lead dust, might  
19 travel to affect the children or the neighbors. And I - -  
20 - if I may, the reason they didn't is that no fewer than  
21 eighteen times they repeat that the test results don't  
22 indicate a soil lead hazard as defined by U.S. EPA, and  
23 that "the site does not pose a significant threat to public  
24 health or the environment based on the lead concentrations  
25 present".



1 JUDGE STEIN: But they said they followed the  
2 federal rules about lead dust, and those rules, as I  
3 understand it, are aimed at protecting vulnerable  
4 populations such as children and the elderly. So if they  
5 comply with those rules, why is that not a reasonable - - -

6 MR. LOW-BEER: Well, first of all, the federal  
7 rule at issue is that National Ambient Air Quality Standard  
8 for Lead, which has to do with - - - which concededly does  
9 not apply to dust that's transported to another location  
10 and deposited over time. It applies to inhalation during -  
11 - - over a short time period.

12 JUDGE STEIN: Okay. So you would - - - so you  
13 would agree then that at least as to inhalation, that  
14 that's a rational - - -

15 MR. LOW-BEER: No. No, I would not, Your Honor,  
16 because the fundamental basis of our challenge is that the  
17 test results were manipulated. They were disingenuously  
18 presented with an intent - - -

19 JUDGE FEINMAN: But - - - but that brings me to a  
20 more macro question which is, what's our role in this, vis-  
21 a-vis the Appellate Division versus the trial court, the  
22 motion court I should say, in - in terms of standard of  
23 review?

24 MR. LOW-BEER: Yes, well - - - while I think this  
25 court can look at whether the decision reached was



1 arbitrary and capricious. In this context, that means  
2 looking at whether the respondents took a hard look at the  
3 environmental hazards that they concede are present.

4 JUDGE WILSON: Does that include - - -

5 MR. LOW-BEER: If they manipulated the test  
6 results - - -

7 JUDGE WILSON: Right. And so that's where - - -  
8 exactly where I was going to ask you. Do we have, for  
9 example, are we - - - are you asking us to look at whether  
10 the test results were manipulated and decide that to  
11 determine that a hard look was not taken?

12 MR. LOW-BEER: Well, yes I am, and they think in  
13 this case it is so obvious. I mean JHL takes the position  
14 that under no circumstances can you look inside that black  
15 box. I submit that that cannot be the law; that they  
16 included in concluding that the soil did not pose a lead  
17 hazard under the federal standards, they used - - - of the  
18 thirty-eight samples they used, sixteen of those were  
19 samples that they themselves said they weren't going to  
20 use, that shouldn't be used. If you - - - and that - - -  
21 and that were contrary, not only to state guidelines, but  
22 also to the CEQR Technical Manual. This isn't in our  
23 brief, but I did alert respondents two days ago that I was  
24 going to refer to page 12-7 of the CEQR Technical Manual.  
25 It's - - - so it's against state guidance. It's against

1 the Technical Manual. And it's against their own statement  
2 of what they said they did.

3 So they said they took these sixteen samples to  
4 look at how the waste should be disposed of, and then they  
5 took other samples to look at whether the lead - - - the  
6 site was hazardous. But instead, what they - - - when they  
7 found that the average didn't come out like they wanted it  
8 to, they added these sixteen samples in to bring it down  
9 below the federal soil lead hazard level.

10 CHIEF JUDGE DIFIORE: Counsel, were there any - -  
11 -

12 JUDGE STEIN: So does this - - -

13 CHIEF JUDGE DIFIORE: Counsel, were there any  
14 recommendations made by the petitioners that weren't  
15 addressed?

16 MR. LOW-BEER: Yes. Well, while tenting the site  
17 was only addressed very, very - - - in a - - - in response  
18 to a comment in which basically the response was, well,  
19 there's no real hazard here, so we don't have to do it, and  
20 that was what they said, no fewer than eighteen times in  
21 the FEIS and the fining statement that the reason they  
22 didn't have to do anything further with respect to lead  
23 dust was that the - - - that the soil on the site did not  
24 present a lead hazard. And I would submit that - - -

25 JUDGE RIVERA: Counsel, as already been pointed



1 out, they did take measures - - -

2 MR. LOW-BEER: They - - -

3 JUDGE RIVERA: - - - the sprinkling of the water,  
4 the con - - - the covering of the trucks - - -

5 MR. LOW-BEER: Yes.

6 JUDGE RIVERA: - - - the cleaning off. So I  
7 think it does boil down to whether or not they give you the  
8 tent. So what you want is full containment, because as I  
9 understood the argument here, it's that you disagree with  
10 the government as to whether or not there really is an  
11 acceptable level of lead dust.

12 MR. LOW-BEER: We say they should - - -

13 JUDGE RIVERA: That anyone could breathe in, but  
14 especially the - - -

15 MR. LOW-BEER: We say - - -

16 JUDGE RIVERA: - - - children.

17 MR. LOW-BEER: Yes. We say they should have  
18 considered that. They didn't consider it, other than - - -

19 JUDGE FAHEY: So - - - so - - - so the - - -

20 MR. LOW-BEER: - - - to dismiss it in a com - - -

21 JUDGE FAHEY: - - - so the - - - excuse me.

22 MR. LOW-BEER: - - - in a response to a comment.

23 JUDGE FAHEY: So the - - - the cutoff, the work  
24 cutoff that that's been - - - that's part of the mitigation  
25 required, as I understood it, it was if the dust levels



1 were between 100 and 150 parts per million, which is 250  
2 below the - - - I think, the EPA guidelines. I'm not sure.  
3 Is that correct? Do you understand it that way? That  
4 there's a work cutoff when the dust levels - - -

5 MR. LOW-BEER: Yes.

6 JUDGE FAHEY: - - - exceed a certain level.

7 MR. LOW-BEER: Yes.

8 JUDGE FAHEY: And that cutoff level is  
9 substantially below the 400 parts per million, which is the  
10 accepted level.

11 MR. LOW-BEER: No. No, Your Honor.

12 JUDGE FAHEY: Okay.

13 MR. LOW-BEER: The cutoff level for - - - you  
14 mean, for when they're going to stop work?

15 JUDGE FAHEY: Right.

16 MR. LOW-BEER: So their whole calculation on that  
17 has an input, it takes the average soil - - - the average  
18 level of lead in the soil on this site as an input into  
19 that calculation. And because they didn't treat the data  
20 appropriately, their average, which they say is 290 parts  
21 per million, it's actually above the federal soil hazard  
22 level. It's 488 parts per million. So if you had input  
23 that, you would come out with a different result on that  
24 air quality as well. And can I just make one very brief  
25 additional point?



1 CHIEF JUDGE DIFIORE: You may.

2 MR. LOW-BEER: So I know - - - yes? Okay. I  
3 just wanted to point Your Honors to the two letters from  
4 the Department of Environmental Conservation that they cite  
5 ten times as saying that the soil is fine. And in the  
6 first of those letters, DEC said that only one of thirty-  
7 eight soil samples exceeded the - - - the - - - the federal  
8 standard.

9 Then they were informed of their mistake, that  
10 twenty-five of the thirty-eight actually exceeded, so they  
11 came back with a second letter in which they moved the goal  
12 post. They said, oh well, whereas before they had said,  
13 oh, we're going to make you comply with the highest cleanup  
14 standard, 63 parts per million. So now they say, oh, no,  
15 the applicable standard is 1000 parts per million - - - and  
16 - - - and which is the standard applicable to a commercial  
17 - - - commercial land use, and they say it's applicable  
18 here, but if you look at their own regulations, the DEC  
19 rules say this standard shall only be considered for land  
20 whose primary purpose is buying, selling, or trading of  
21 merchandise or services. And that cite is in our brief.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 MR. LOW-BEER: Thank you.

24 CHIEF JUDGE DIFIORE: Counsel?

25 MS. MURDUKHAYEVA: May it please the court.



1 Ester Murdukhayeva for the state respondents. I'd like to  
2 start with the noise analysis.

3 The petitioners are incorrect in stating that DOH  
4 disregarded the impact of noise on the students at P.S.  
5 163, and that DOH disregarded the impacts that the noise  
6 level after mitigation would have.

7 I'd like to address one of Judge Fahey's  
8 questions first. You had asked whether the noise would  
9 reach the levels of an - - - traffic on a street.

10 JUDGE FAHEY: Heavily traveled New York City  
11 street.

12 MS. MURDUKHAYEVA: That would be the noise on the  
13 outside of the building. On the inside of the building,  
14 the noise would be well under the forty-five decibel  
15 threshold that the CEQR sets for school classrooms.  
16 Occasionally, that noise level would rise into the low  
17 fifties when - - -

18 JUDGE FAHEY: Well, that's when you get into the  
19 open window and closed window problem, right?

20 MS. MURDUKHAYEVA: That's correct, but the - - -  
21 just to finish my prior answer, the low fifties number is  
22 equivalent to background noise in a quiet office or to the  
23 sound of moderate rainfall. So on the intermittent  
24 occasions that the noise level would exceed forty-five  
25 decibels, it would not be equivalent to a trafficked



1 street. It would be equivalent to an office. And DOH can  
2 - - -

3 JUDGE RIVERA: But they say the only way to  
4 properly ventilate this building is to keep these windows  
5 open, so - - -

6 MS. MURDUKHAYEVA: That - - -

7 JUDGE RIVERA: - - - so aren't you back to this  
8 external sound, the noise that's external is really the - -  
9 - the - - - the level that you have to measure?

10 MS. MURDUKHAYEVA: No, Your Honor.

11 JUDGE RIVERA: Wasn't it that?

12 MS. MURDUKHAYEVA: No, Your Honor. The  
13 petitioners do claim that it is impossible to leave the  
14 windows closed and use the window air conditioning units in  
15 the classrooms. But they don't actually provide any  
16 empirical data to support that assertion. They claim that  
17 ordinarily, they have to leave the windows open because the  
18 window air conditioning units don't work. But DOH  
19 evaluated the - - - the standards in the classroom and the  
20 situation in the classroom and determined that the window  
21 units - - -

22 JUDGE RIVERA: Well, how - - -

23 MS. MURDUKHAYEVA: - - - which have been - - -

24 JUDGE RIVERA: - - - how - - - how did you do  
25 that?



1 MS. MURDUKHAYEVA: Well, the window units have  
2 been in place in the school for decades.

3 JUDGE RIVERA: Well, that's already a problem,  
4 but - - - but how did you confirm what they argue which is  
5 it's an old building. We've got to open all of the windows  
6 to circulate the air. And what more can they do but tell  
7 you that's the case? So what - - - what did you do to  
8 confirm or see whether or not the building could function  
9 with all of the windows closed, because as I understood - -  
10 -

11 MS. MURDUKHAYEVA: Well - - -

12 JUDGE RIVERA: - - - the mitigation with the air  
13 conditioners - - - there's other mitigation, but with the  
14 air-conditioners, where you just said we'll give you more  
15 window air conditioners. Just keep your windows closed and  
16 we'll give you more air conditioners. And they've said,  
17 that's what we have now, and it doesn't work.

18 MS. MURDUKHAYEVA: Well, Your Honor, there - - -  
19 they could have provided empirical data to support that  
20 assertion, and they did not. They also - - -

21 JUDGE RIVERA: I'm - - - I'm sorry, would have  
22 been what?

23 MS. MURDUKHAYEVA: Would have been - - -

24 JUDGE RIVERA: Since it's your burden, right, to  
25 do this - - - to do the SEQRA evaluation, right?



1 MS. MURDUKHAYEVA: It is our burden to do the  
2 SEQRA evaluation, but DOH reasonably concluded that because  
3 the window units had been in use at the school for years  
4 and because the windows could be left open during times  
5 that construction is not happening, which is the early  
6 morning, late afternoon, and early evening, that those two  
7 measures combined would provide adequate ventilation.

8 JUDGE RIVERA: And - - - and - - - and was there  
9 - - - was there an analysis of whether or not - - - now I'm  
10 going to go to the lead, the migratory lead dust - - - if  
11 indeed they would have to open the windows at other times  
12 for these periods of time, if indeed, that meant that lead  
13 - lead dust would migrate into the classrooms?

14 MS. MURDUKHAYEVA: No, Your Honor. And that is  
15 because of the mitigation measures that DOH imposed with  
16 respect to the lead dust. And DOH concluded that those  
17 mitigations measures would eli - - - most likely eliminate  
18 all risk of lead dust, or at a minimum - - -

19 JUDGE FAHEY: Can I - - - can I ask you about  
20 those for a second?

21 MS. MURDUKHAYEVA: Yes.

22 JUDGE FAHEY: You - - - you - - - the mitigation  
23 measures, you rejected the tent proposal; is that correct?

24 MS. MURDUKHAYEVA: Yes.

25 JUDGE FAHEY: Do you know of any instances - - -



1 I couldn't find any instance, you may know of it - - -  
2 where it's either been as part of a SEQRA review - - - it's  
3 either been suggested or required that a sealed tent was  
4 put over a con - - - over a full construction site.

5 MS. MURDUKHAYEVA: No, Your Honor. We're not  
6 aware of any such instances. And in fact, the CEQR Manual,  
7 which governs environmental reviews in this city, does not  
8 contemplate a tent - - -

9 JUDGE FAHEY: So nowhere within the city itself,  
10 how about anywhere else in the state?

11 MS. MURDUKHAYEVA: I'm not aware if it's required  
12 anywhere else in the state. The petitioners have not cited  
13 - - -

14 JUDGE FAHEY: The reason I ask is I was  
15 particularly interested and I wanted to know what kind of  
16 settings. For instance, would a sealed tent be required,  
17 perhaps, if you're mitigating possible environmental  
18 exposure in the context of children being close or - - - or  
19 - - - or a heavily-packed urban environment as opposed to a  
20 - - - a more rural or - - - or a more spacious environment.  
21 I just didn't know.

22 MS. MURDUKHAYEVA: Certainly, but the fact that  
23 it's not required in the city CEQR Manual is actually quite  
24 illustrative here. The petitioners also have cited no  
25 industry-standard and no agency guideline that requires - -



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JUDGE STEIN: The - - - I'm sorry. Could I ask a more general statement about this because a lot of this seems to focus the way we get to whether the tent is necessary or not has to do with how the samples were taken and how the arithmetic was done, if you will, okay. And so I assume you would agree with me that although we have a differential standard of review it has to be - - - it still has to be meaningful.

MS. MURDUKHAYEVA: That's right, yes.

JUDGE STEIN: So - - - so - - - so what if they - - they went around this property, and they figured out areas where there was no lead contamination and they took the soils only from those areas, okay, and then they said oh, there's no lead problem here. You would agree with me that that would be irrational. That would - - - okay?

MS. MURDUKHAYEVA: If there's any evidence of that, that might be irrational, that's right.

JUDGE STEIN: So how do we - - - what - - - how - - what is our role in determining at what point that their methodology went from being arbitrary and - - - or from being rational and reasonable to being arbitrary and capricious? How - - - how do we do that, and should we do it here?

MS. MURDUKHAYEVA: Well, the Rule of reason

1 applies to an agency's reliance on an expert report. And I  
2 would be happy to explain how that sampling protocol was  
3 developed. The sampling protocol itself is on pages 3005  
4 to 3014 of the record, and that page 3771 of the record,  
5 DOH further explain some of the methodological choices that  
6 it had made.

7 There are no standards for the number of samples  
8 that have to be taken in a particular site. This site is  
9 about three-quarters of an acre, and the number of samples  
10 that was taken was derived from the total number of cubic  
11 feet of soil that would be excavated.

12 JUDGE STEIN: How about where on that three-  
13 quarters of an acre that they took it from?

14 MS. MURDUKHAYEVA: The location was selected in  
15 consultation with DOH and DSNY, which was assisting DOH in  
16 this process. And the locations were selected to be in the  
17 areas of the footprint of the building because that was the  
18 soil that was most likely to be excavated.

19 JUDGE STEIN: So you're saying that as long as it  
20 wasn't randomly done or done without any basis or any  
21 expert advice, then it's okay.

22 MS. MURDUKHAYEVA: That's right. As long as the  
23 agency reasonably explains the methodological choices that  
24 the study relied on made.

25 JUDGE FAHEY: Could you could you respond to - -



1 - I - - - I think that - - - that the petitioner's expert  
2 said that he had questioned the methodology and he had  
3 never seen anything like it in over thirty years.

4 MS. MURDUKHAYEVA: The petitioner, the  
5 petitioner's expert did say that, but notably, the  
6 petitioner's expert did not state a number of samples that  
7 would've been appropriate to take. They have identified no  
8 standards about the number of samples that would be  
9 appropriate.

10 JUDGE FAHEY: I didn't think it was so much the  
11 numbers, but the on using the same site to take the test  
12 borings from over. I thought more of a situation like  
13 that.

14 MS. MURDUKHAYEVA: Well, my understanding is that  
15 they have two complaints. One is about the number of  
16 samples that were taken of shallow soil.

17 JUDGE FAHEY: I see.

18 MS. MURDUKHAYEVA: And about the use of the tree  
19 pit samples. And with respect to the tree pit samples,  
20 this CEQR Manual expressly requires shallow soil samples to  
21 be taken. These are shallow soil samples on the location  
22 of the site that will be excavated.

23 JUDGE RIVERA: Let me ask you this. Is there any  
24 science to indicate that there would be a portion of this  
25 property - - - if there is indeed lead and hazardous waste

1 and so forth - - - that would not have been contaminated?  
2 That is to say, where would you look for something that's  
3 not contaminated if you've got hazardous material on this  
4 small lot?

5 MS. MURDUKHAYEVA: My understanding is there is  
6 no way to determine - - -

7 JUDGE RIVERA: But it's soil based, right?

8 MS. MURDUKHAYEVA: It's soil based, and DOH  
9 explained that the way lead appears in soil is in lognormal  
10 distributions, which means that some areas have a  
11 concentration that is ten times higher than the average  
12 just because of the way in which lead appears in soil. And  
13 that is why the averaging is appropriate because individual  
14 samples are actually not representative.

15 JUDGE RIVERA: But throughout - - - if I'm - - -  
16 just confirm for me then, but that means throughout the  
17 property, if there - - - if there's hazardous waste, it's  
18 everywhere on the property although there might be various  
19 - - - variable concentrations in different pockets.

20 MS. MURDUKHAYEVA: That's correct.

21 JUDGE RIVERA: Am I understanding you?

22 MS. MURDUKHAYEVA: That's right.

23 JUDGE RIVERA: Um-hum. Okay. So any  
24 concentration could indeed result in the disbursement of  
25 the lead.



1 MS. MURDUKHAYEVA: Certainly. And that is why  
2 the mitigation measures are imposed; one to prevent the  
3 creation of dust to begin with, and that is why the soil  
4 will be saturated. The DOH also addressed other exposure  
5 pathways such as migration of dust, and that is why it  
6 required the covering of the trucks and the cleaning of the  
7 cars that are leaving the site.

8 JUDGE GARCIA: Counsel, as part of this process  
9 or another that you're aware of, during this construction,  
10 will tests be taken periodically of the levels?

11 MS. MURDUKHAYEVA: In DOH's approval of the  
12 construction permit, they specifically stated to the  
13 developer that they, DOH, retains authority to do onsite  
14 visits and inspections, and require remedial measures of  
15 any violations are found.

16 JUDGE GARCIA: Including this particular issue,  
17 lead dust?

18 MS. MURDUKHAYEVA: If the lead dust compli - - -  
19 if the - - - if the measures are not being complied with,  
20 DOH would be entitled to ensure that they are being  
21 complied with.

22 JUDGE GARCIA: But I guess it's really not my  
23 question. My question is forget the measures, are they  
24 entitled to go in or are there scheduled periodic tests of  
25 what the levels are during the course of the project?



1 MS. MURDUKHAYEVA: The RAP requires - - - has  
2 contingency plans if there are heightened levels of  
3 contaminants that are found in the soil as the - - - as the  
4 project is happening.

5 CHIEF JUDGE DIFIORE: Thank you.

6 JUDGE RIVERA: I guess the question is - - - I'm  
7 sorry. May I?

8 CHIEF JUDGE DIFIORE: Yes.

9 JUDGE RIVERA: Just to follow up on Judge  
10 Garcia's point. How will you know if they're elevated? At  
11 the end of the day, how do you know?

12 MS. MURDUKHAYEVA: Mr. Greenberg may be better  
13 able to answer - - -

14 JUDGE RIVERA: Okay. Fine. Thank you.

15 MS. MURDUKHAYEVA: - - - what the procedures are  
16 on site. I'm - - -

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 MS. MURDUKHAYEVA: Thank you very much.

19 CHIEF JUDGE DIFIORE: Mr. Greenberg.

20 MR. GREENBERG: May it please the Court, Chief  
21 Judge DiFiore, members of the Court.

22 I'd like to, if I might, take up on questions  
23 that were asked by Judge Feinman and Judge Stein, which in  
24 a sense, go perhaps, to the heart of this case.

25 I think virtually everything you heard from



1 opposing counsel, virtually everything that's in their  
2 briefs totaling nearly 200 pages, virtually everything in  
3 the massive administrative record in seven amicus briefs,  
4 virtually all of it underscore the wisdom of this court's  
5 jurisprudence crafted over thirty years.

6 A hard look standard of SEQRA jurisprudence is  
7 about the most settled rule of environmental law that there  
8 is. It is understood perfectly well by the Appellate  
9 Divisions. It is applied predictably and consistently  
10 almost always by the trial courts. And fundamentally, what  
11 that rule requires is the rule of reason, deference - - -  
12 Judge Stein's quite right. The review needs to be  
13 meaningful. But nevertheless, what the rule does not  
14 require is to turn appellate courts, Appellate Division,  
15 this court, into juries negotiating and adjudicating  
16 battles of experts.

17 The importance of that rule this Court over and  
18 over, starting in Jackson, from Akpan v. Koch, through Save  
19 the Pine Bush. Over and over, has counseled the lower  
20 courts, they must apply the rule of reason in deference,  
21 why? Why has that rule been settled for thirty years?

22 Well, one, the court instructed the lower courts  
23 because after all, after all, it is the lead agency's  
24 responsibility, not the courts, to comb through thousands  
25 of pages of documents, to engage consultants, to have



1 expert analysis and discussion.

2 Consider this case, for example. This case,  
3 unlike almost any SEQRA case this Court has ever heard  
4 doesn't involve a town board, or a city council, or a  
5 zoning board. This case involves the preeminent public  
6 health agency in the State of New York, and arguably the  
7 nation, the preeminent environmental conservation agency,  
8 not just in this state - - -

9 JUDGE STEIN: Mr. Greenberg, what - - - what - -  
10 - what if there was an allegation that somebody was paid  
11 off here by - - - by somebody, and therefore they - - -  
12 they - - - they took the word of a particular expert over  
13 another expert. How would - - - how would that be borne  
14 out? How would that be reviewed? How would that be dealt  
15 with?

16 MR. GREENBERG: If there was a credible  
17 allegation of a bribe of one of the consultants, that would  
18 be a very, very different case. And I don't think it would  
19 threaten the stability and predictability of the hard look  
20 doctrine such that you have the City of New York's coming  
21 before this court begging this court please don't change  
22 the settled principles that the compliance with the CEQR  
23 Manual are necessary. The real estate board of the City of  
24 New York which is more expert than anyone one can imagine  
25 in terms of economic development projects, particularly in



1 the City of New York, is pleading with this court, don't  
2 alter the hard look doctrine.

3 However much opposing counsel may profess, oh no,  
4 oh no, we're just asking you to apply the hard look  
5 doctrine, Justice Lobis, while I believe she erred with  
6 commendable candor, acknowledged, acknowledged, there was a  
7 hard look. There was a comprehensive investigation of  
8 evaluation of all the issues.

9 CHIEF JUDGE DIFIORE: So in that hard look, Mr.  
10 Greenberg, you would agree that the exposure of children to  
11 lead dust is damaging, correct?

12 MR. GREENBERG: Chief, I'm so glad you asked that  
13 question. That is precisely why the standards that were  
14 applied by the Health Department, a public health agency  
15 that cares deeply in its core mission about children and  
16 potential risks of lead, applied the National Ambient Air  
17 Quality Standard. Why that standard? Because that's the  
18 standard to use to protect sensitive populations like  
19 children. That's why the Department of Health applied the  
20 federal U.S. EPA lead hazard standard. Why that standard?  
21 Because that's the standard that's used to determine  
22 whether lead - - - where, in playgrounds where children  
23 are. So it's absolutely a vital environmental concern.

24 And I must say, there's an unreality. An  
25 absolute unreality in opposing counsel's argument. They're



1 suggesting, oh no, nobody really knew there were kids at  
2 P.S. 163. There were three days of administrative hearings  
3 in this case. Where were they held? At P.S. 163. Do a  
4 word search of the final environmental impact statement.  
5 See how often P.S. 163 is mentioned; almost 400 times.

6 JUDGE RIVERA: No, well, I understood their  
7 argument to be that the methodology that was used  
8 underestimated two things. First of all the concentration  
9 of lead dust, and second of all, the actual migratory path  
10 of that lead dust into the school - - - into the air,  
11 really, into the school and as a con - - - so there's that  
12 problem. And as a consequence, the mitigation measures are  
13 insufficient. They don't get the job done. So on the  
14 first part, what - - - what's the response to that?

15 MR. GREENBERG: Your Honor, your question  
16 highlights exactly what is at stake in this case and what  
17 does it risk if the court would even entertain that  
18 argument. Yes, that's what their experts say. And the  
19 consultants relied on by the Department of Health said  
20 something different.

21 Our trial courts in Article - - -

22 JUDGE RIVERA: So then the answer is that's what  
23 they claim but you've got experts on the other side that  
24 say otherwise - the Court has to step back because the  
25 agency gets to decide which expert to rely on?



1 MR. GREENBERG: And it's more - - - it - - -  
2 well, in sum and substance, yes.

3 JUDGE RIVERA: Okay.

4 MR. GREENBERG: But it's more than just because  
5 deference. There are reasons for the deference and the  
6 reasons go beyond simply the expertise in this case of the  
7 Health Department and DEC. The reasons go to what I think  
8 the Real Estate Board and the City of New York said, which  
9 is the predictability of the doctrine.

10 If you were to authorize the lower courts to use  
11 what Judge Lobis called the hard enough look standard, if  
12 you authorized that, SEQRA reviews will turn into battles  
13 of experts. These were Article 78s on cold records. Are  
14 we going to have trial courts bringing in experts on both  
15 sides and trying to figure out in these highly complex and  
16 technical matters who's right and who's wrong?

17 New York is proud of its history and tradition of  
18 having amongst the most robust environmental laws and  
19 regimes in the nation. We are proud of it. No one has  
20 ever looked at the SEQRA Doctrine or the immense - - -

21 JUDGE RIVERA: What about the point - - - I know  
22 your red light is off. If the Chief will permit me this  
23 one last question.

24 CHIEF JUDGE DIFIORE: Of course.

25 JUDGE RIVERA: What about their point related to



1 the - - - the construction noise? That they say look, the  
2 windows have got to stay open to ventilate this building.  
3 So on the noise, it's also about the dust, but it's really  
4 about the noise. They say that the mitigation measures of  
5 just giving us more air conditioning units for the windows  
6 that don't have them is not good enough. How does that  
7 satisfy the hard look in - - - doctrine? If it - - -

8 MR. GREENBERG: And frankly, why their position  
9 reduces to mere absurdity?

10 JUDGE STEIN: Um-hum.

11 MR. GREENBERG: Because here we are in the  
12 State's highest court. Amongst the sixteen arguments that  
13 they think you should address seriatim is that one. And  
14 they would have you sit and try to figure out, oh, is  
15 central air conditioning any better or worse than oh,  
16 window air mounted conditioning? I don't mean to  
17 trivialize - - -

18 JUDGE RIVERA: Oh, but their argument is that  
19 your assumption about the windows is the problem. Not that  
20 window air conditioning could work. I don't - - - I don't  
21 think that's really where they're going with that. Their  
22 argument is well, if we could leave the windows closed and  
23 turn on the air conditioners that would perhaps work where  
24 you get to choose - - - DOH gets to choose, but we can't do  
25 that and that's where DOH fail - - -



1 MR. GREENBERG: So let's apply the Rule of  
2 reason, the Rule of pragmatic reason this court has  
3 insisted be applied. Are we really prepared to believe  
4 that in the midst of construction, that all of a sudden,  
5 school teachers are going to pop open the windows and not  
6 rely on the window air mounted air conditioning? Are we  
7 really to believe that?

8 By the way, you can take notice that in the City  
9 of New York where there are innumerable, elementary and  
10 high schools constructed at the turn or the middle of the  
11 last century that window air conditioning units are widely  
12 used with little difficulty. That's why the Appellate  
13 Division ultimately concluded it was reasonable and  
14 rational for DOH to accept that mitigation measure.

15 CHIEF JUDGE DIFIORE: Thank you, Mr. Greenberg.

16 MR. GREENBERG: For all of those reasons, we ask  
17 that you affirm. Thank you.

18 CHIEF JUDGE DIFIORE: Counsel?

19 MR. SHAHABIAN: Thank you, Your Honor. So I'd  
20 like to begin where Mr. Greenberg left off, which is what  
21 is the standard of review this Court applies. And a hard  
22 look standard, in their view, is blind deference. It is to  
23 ignore what is actually written in the final statement and  
24 simply assume that the agency considered the issues  
25 presented. I urge the Court to look at the final statement



1 here, starting with - - -

2 JUDGE STEIN: Well, but isn't it more than that?  
3 I mean, it - - - we - - - we do have this record. We can  
4 see that there were discussions of these issues. It wasn't  
5 that they were overlooked. And I know that looking isn't  
6 nece - - - the same as hard look, but doesn't that get us  
7 into a hard enough look? Isn't that what you're saying?  
8 So - - - so if we say yes, they seemed to really  
9 investigate and - - - and they accepted expert advice and  
10 so on and so forth, I - - - I think as I understand it,  
11 their position is that's as far as we go.

12 MR. SHAHABIAN: And I understand that to be their  
13 position, Judge Stein. And to be frank, I don't understand  
14 what the difference between a hard enough look and a hard  
15 look is. I mean, that - - - that's what we're trying to  
16 figure out here, whether there was a hard enough look. But  
17 take, for example, lead dust. Look at the actual final  
18 statement on lead dust. It never once mentions P.S. 163  
19 students despite a whole section on noise, specifically  
20 addressed at P.S. 163, it fails at step one of the hard  
21 look process. It does not identify that P.S. 163 students,  
22 600 students, thirty feet from a construction site, could  
23 be exposed to lead dust.

24 CHIEF JUDGE DIFIORE: But doesn't that - - -

25 MR. SHAHABIAN: If that doesn't vio - - -



1                   JUDGE GARCIA: A function somewhat of the risk,  
2                   right? If you have lead dust and you're doing containment  
3                   measures, then you're getting at the source as discussing  
4                   before, noise is traveling and you have to look at where  
5                   that noise is going to impact, so you're looking at the  
6                   school and in the classroom and - - - but on the other side  
7                   they're looking at a containment policy. And in the noise,  
8                   they're looking at a mitigation policy that's on site at  
9                   the school, so you're kind of comparing two different risks  
10                  there and saying they did one thing here and one thing in  
11                  the other side, but they have to address each risk based on  
12                  what the perceived threat is, right?

13                  MR. SHAHABIAN: Absolutely. Absolutely. But  
14                  look at what the CEQR Manual requires, and that is for  
15                  hazardous materials, on page 12-14, to consider occupants  
16                  of adjacent properties who may be exposed to hazardous  
17                  materials, for example, contaminated soil or dust, may be  
18                  transported to adjacent site (indiscernible).

19                  JUDGE GARCIA: But let's say in a hypothetical  
20                  you are able to contain one hundred percent of the dust.  
21                  Do you then have to go to each site that's not this  
22                  building and say what would be the impact on that site?

23                  MR. SHAHABIAN: No, Your Honor. This is context  
24                  specific. And the agency has to explain its process. So  
25                  if the agency said in the record, we have one hundred



1 percent containment and therefore, we're not going to  
2 consider adjacent sites, that would be something a court  
3 could defer to. There is nothing like that in this final  
4 statement, and that is why there is a legal hard look error  
5 that if this court does not correct will turn this  
6 substantive requirements into - - - (indiscernible).

7 JUDGE GARCIA: Well, aren't they, in effect,  
8 saying the amount of dust that's going to escape the site  
9 is below the level, so wherever that's going from here,  
10 it's not going to rise to a level of a risk.

11 MR. SHAHABIAN: The levels only address soil and  
12 air quality; that is, ambient air in the Upper West side.  
13 But as the statement and the CEQR Manual notes, ingestion  
14 pathways, and as this court has noted in Vallone, the  
15 ingestion of lead dust in the primary risk exposure for  
16 children, particularly children thirty feet away.

17 JUDGE RIVERA: Yeah, yeah, but the - - - but the  
18 source is exactly what you've already pointed to, right?  
19 The - - - the - - - the actual site, what happens during  
20 excavation, that it gets dispersed. You break through. It  
21 gets dispersed. It gets tracked out on the trucks or on  
22 people's shoes or whatever. And that's - - - that's what  
23 the mitigation measures are exactly keyed to - - -

24 MR. SHAHABIAN: Right.

25 JUDGE RIVERA: - - - to address the potential for



1 escape.

2 MR. SHAHABIAN: And - - - and what I'm asking  
3 this court to do is not what Mr. Greenberg suggested and  
4 weigh all this evidence and come to its conclusions.

5 JUDGE RIVERA: Okay.

6 MR. SHAHABIAN: I'm asking you to enforce the  
7 hard look standard, that is, force the agency to explain  
8 these things on the record and say the ingestion pathway  
9 comes from the same site and based on existing studies and  
10 data, we believe it's - - -

11 JUDGE RIVERA: Well, isn't that obvious?

12 MR. SHAHABIAN: It's not obvious, Your Honor.

13 JUDGE RIVERA: How is that not obvious?

14 MR. SHAHABIAN: Because as this Court - - -

15 JUDGE RIVERA: If you're excavating in an area  
16 that - - - let's say for one moment, everyone agrees to  
17 have the certain potential - - - level of hazardous  
18 material that includes lead. Lead dust is, of course, a  
19 carcinogen and has other terrible impacts on children and  
20 adults. And that's what you're trying to avoid migrating  
21 off this site.

22 MR. SHAHABIAN: That's right, Your Honor. And  
23 there's nothing in the record that explains how dust will  
24 migrate to the school thirty feet away. It's not obvious,  
25 and it's not comparable to the (indiscernible) Ambient Air



1           Quality Standards that were actually adopted in the  
2           statement. And if I could just briefly address noise with  
3           - - - with Your Honor's indulgence.

4                       CHIEF JUDGE DIFIORE: Please.

5                       MR. SHAHABIAN: I would I would just note that  
6           counsel for the Department of Health stated that nothing in  
7           the record clued the Department into the fact that central  
8           air conditioning was needed here. I would, again, urge the  
9           Court to actually look at what was before the Department.  
10          We submitted three expert reports during the comment period  
11          that stated over and over that the only - - - that included  
12          calculations from the city mechanical code that said  
13          central air conditioning is what is necessary to provide  
14          adequate fresh air to thirty students in a small classroom.  
15          And - - - and so the fact that - - -

16                      JUDGE RIVERA: Doesn't it also have to be  
17          feasible? And there are some other reasons why central air  
18          seemed to not - - - that DOH chose not to pursue that as a  
19          mitigation measure.

20                      MR. SHAHABIAN: So feasibility is definitely part  
21          of the analysis. That analysis was not conducted here.  
22          And again, that is why there is a hard look failure. The  
23          only feasibility discussion was in the post-statement  
24          findings, which is what the appellate Division used to  
25          reverse Justice Lobis. That was a procedural violation. A

1 Department can't cure defective final statement by adding  
2 new conclusions to the post-statement - - -

3 JUDGE STEIN: Well, you (indiscernible) doesn't -  
4 - -

5 CHIEF JUDGE DIFIORE: Is that a timing issue?

6 JUDGE STEIN: I'm sorry.

7 CHIEF JUDGE DIFIORE: Was that a timing issue?  
8 Was that raised by you in a timely way?

9 MR. SHAHABIAN: So we raised air conditioning  
10 from the very first impact statement. As the court noted  
11 earlier, it's not the commenter's burden to prove - - -  
12 basically redo the analysis and explain how exactly it  
13 would work. At the third comment statement, in an effort  
14 to convince the agency this was an issue it had overlooked,  
15 we noted that it was feasible to install this.

16 Had the - - - if the Department decided it was  
17 time to address that issue, this court has rated - - -  
18 excuse me, reiterated in cases like Bronx Committee, that  
19 the proper procedural mechanism is to prepare a  
20 supplemental statement.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MR. SHAHABIAN: Thank you, Your Honor.

23 MR. LOW-BEER: So - - -

24 JUDGE STEIN: Can I just pick up from there,  
25 because as I - - - as I see it, as far as the air



1 conditioning was concerned, it - - - it was raised earlier  
2 on, it wasn't addressed, but am I not correct that the  
3 agency doesn't have to address every proposed mitigation  
4 measure?

5 MR. LOW-BEER: Yes, that's - - -

6 JUDGE STEIN: Okay.

7 MR. LOW-BEER: - - - that's correct.

8 JUDGE STEIN: And so then what happened was they  
9 didn't address it. It was raised after the FEIS, and then  
10 they did address it, right? I'm sa - - - you're not - - -  
11 you know what I'm talking about - - -

12 MR. LOW-BEER: Well, air conditioning isn't - - -  
13 if - - -

14 JUDGE STEIN: Go ahead. Never mind.

15 MR. LOW-BEER: So my overriding point, I think,  
16 is that this is - - - was not a good-faith investigation.  
17 And I'm not alleging there was bribery here, but I am  
18 alleging that this was biased and result-oriented and I  
19 think that jumps out from the page, and so you know, we're  
20 not - - - we believe the CEQR Manual was not followed, and  
21 it cannot simply be that if you cross all of the Ts and dot  
22 all of the Is, you know, go through the motions, that  
23 that's it automatically. I mean, in the First Department,  
24 that seems to be the case because as far as I can tell - -  
25 - although the city did cite one case in its brief maybe



1 that one of the Develop Don't Destroy Brooklyn cases where  
2 maybe they did invalidate for failure to, but - - - but - -  
3 -

4 JUDGE RIVERA: Well, counsel - - - counsel, let  
5 me ask you this.

6 MR. LOW-BEER: Yeah.

7 JUDGE RIVERA: Let's go with where I think you  
8 were going. So they follow all of the procedures. Now  
9 you're really talking about the substance. So you've got  
10 experts that say one thing, and you've got the public that  
11 prefers particular mitigation efforts and they have experts  
12 that say something else and they decide that other  
13 mitigation efforts address the concerns.

14 MR. LOW-BEER: Yes. So - - -

15 JUDGE RIVERA: Doesn't the case law say that  
16 that's it for us?

17 MR. LOW-BEER: Well, not necess - - -

18 JUDGE RIVERA: How are we - - - you're asking us  
19 now to be - - -

20 MR. LOW-BEER: I believe under - - -

21 JUDGE RIVERA: - - - the supervisors of the DOH.

22 MR. LOW-BEER: Well, DOH may be the premier  
23 health agency in the state, but nevertheless, sometimes  
24 there could be biases in government. I mean, I don't know.  
25 I was a government lawyer for years. I don't - - - but you



1 know, it does happen - - -

2 JUDGE RIVERA: No, no. Let's go - - - yes, I  
3 understand your point on that. I'm not talking about  
4 corruption or a particular conflicts. I'm not asking you  
5 about that. I'm talking - - - just you've got experts on  
6 one side. You've got experts on the other side.

7 MR. LOW-BEER: Right. But - - - but - - -

8 JUDGE RIVERA: Isn't that then for DOH, the  
9 agency, to decide which experts they find compelling and  
10 how to respond to whatever the experts raise before them?

11 MR. LOW-BEER: But - - - but this is not - - -  
12 this is a matter of common sense and blatant violation of  
13 the CEQR Manual. I mean, the most obvious one is - - - and  
14 I believe - - - I mean, Judge Fahey, I think you're correct  
15 that - - - I mean, the key thing is if you look at these  
16 soil borings, they took eight soil borings. The CEQR  
17 Manual says that to assess the hazards on the site, you  
18 look at the top two feet and the bottom two feet, and you -  
19 - - you analyze those and then you average.

20 But what they did was in addition from the same  
21 boring, so without adding any additional information, they  
22 took a mush of the top half and the bottom half, which I  
23 guess they're in more technical terms, you'd call a  
24 composited sample, but it's a mush and it dilutes anything  
25 that's in there. And they, themselves, said they didn't do

1 it, they wouldn't do it, they shouldn't do it, and yet they  
2 did it.

3 I mean, if you look at page 1058 of the record,  
4 that's where the phase two environmental site assessment of  
5 AKRF is. And there they said, "They distinguish between  
6 those samples that were" ana - - - "to be analyzed to guide  
7 proper waste disposal and the other soil samples which were  
8 to be analyzed to assist in the development of an  
9 appropriate procedures to prevent unacceptable exposure to  
10 site workers and the surrounding community".

11 So clearly, they took one set of samples for one  
12 purpose, another set for another purpose; and yet - - - and  
13 they weren't supposed to use the first set to assess the  
14 hazards, but when they found the results weren't bad - - -  
15 weren't low enough, they added them in. So if you look at  
16 - - - you know, they themselves said on that page, we  
17 didn't do that. And yet, if you look at the tables, it's  
18 table 3 of the phase - - - I think it's at page 1064, I  
19 believe, but anyway, it's table 3, it's right af - - -  
20 somewhere right after page 1058. There's a table with a  
21 thirty-eight samples and the waste characterization samples  
22 are in there and they added them in even though they said  
23 they weren't going to do it, so it doesn't take an expert  
24 to see that this is not in good faith. I mean, to say  
25 nothing of the DEC letter where they cite ten times where

1 the goal posts were so obviously moved. So I don't think  
2 the - - -

3 CHIEF JUDGE DIFIORE: We understand your point,  
4 sir.

5 MR. LOW-BEER: Okay. Thank you. I'm sorry.

6 CHIEF JUDGE DIFIORE: That's okay.

7 MR. LOW-BEER: I got a little carried away there.

8 (Court is adjourned)

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C E R T I F I C A T I O N

I, Gina Gattone, certify that the foregoing transcript of proceedings in the Court of Appeals of The Friends of P.S. 163, Inc. et al. v. Jewish Home Lifecare, and Daisy Wright, et al. v. New York State Department of Health, No. 128 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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