

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 52

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Index #: 100734/15

In the Matter of the Application of  
RESTAURANT ACTION ALLIANCE NYC,  
CECILIO ALBAYERO, JOSE CASTILLO,  
MAXMILIANO GONZALES, ANDRES JAVIER-  
MORALES, ARISMENDY JEREZ, TONY JUELA,  
RUPERTO MOROCHO, ASTRID PORTILLO,  
LUCIANO RAMOS, SERGIO SANCHEZ,  
ESMERALDA VALENCIA, PLASTICS RECYCLING  
INC., DART CONTAINER CORPORATION,  
PACTIV LLC, GENPAK LLC, COMMODORE  
PLASTICS LLC, and  
REYNOLDS CONSUMER PRODUCTS LLC,

DECISION and ORDER

*Petitioners,*

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

*against*

THE CITY OF NEW YORK; KATHRYN GARCIA,  
in her official capacity as Commissioner of the  
New York Department of Sanitation; the  
NEW YORK CITY DEPARTMENT OF  
SANITATION, a charter-mandated agency;  
and BILL DE BLASIO, in his official capacity  
as Mayor of the City of New York,

*Respondents.*

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Margaret A. Chan, J.

Respondents banned the use of “soft foam”, or expanded polystyrene foam (EPS), in New York City with the passage of Local Law 142. Petitioners are various New York City food businesses, manufacturer, recyclers, and purchasers of EPS products who joined together to challenge respondents’ determination to ban the use of EPS as arbitrary, capricious, irrational, and contrary to law and fact. Respondents opposed the petition and cross-moved to dismiss it. The Natural Resources Defense Council, Inc., a not-for-profit environmental corporation, submitted an amicus curiae Memorandum of Law (“Amicus Brief”) in support of respondents’ determination when its motion to intervene was denied by this court’s Order dated July 7, 2015.

## FACTS

EPS is commonly seen as “Styrofoam”<sup>1</sup> foodware: single service take-out clam-shell food containers, plates and coffee cups, egg cartons, and meat and poultry trays used by restaurants, fast food chains, supermarkets and grocery stores (Amicus Brief at 2; Pet’s Mastro Aff, Exh B at 2). EPS is also widely used as packaging material to insulate delicate or electronic items. They are a light-weight plastic comprised of 95% air and marked with a “No. 6” recycling code (Pet’s Mastro Aff, Exh B at 1-2).

In 2010, Local Law 35 (LL35) was passed to mandate recycling all rigid plastic food service packaging, also marked with a “No. 6” recycling code; EPS was excluded from this recycling requirement (16 RCNY §§ 1-08[a], 1-01). In 2013, then Mayor Michael Bloomberg made it a priority to ban the sale and use of single service EPS (Amicus Brief at 3), whereupon Local Law 142 (LL142) was introduced by a number of New York City Council Members in conjunction with Mayor Bloomberg (Resp’s McCamphill Aff, Exh E). The current Mayor of New York City, Bill DiBlasio, while a mayoral candidate, joined Mayor Bloomberg’s proposed ban and vowed to “get rid of” “Styrofoam and plastic bags” (Pet’s Mastro Aff, Exh D at 2; Exh E). Thus, it would appear that LL 142, together with LL35, would eliminate rigid and soft foam plastic from ending up in landfills. However, the City’s recycling vendor, Sims Municipal Recycling (also referred to as Sims Metal Management), by its general manager, Tom Outerbridge, was quoted in an article appearing in Crain’s<sup>2</sup>, that all of the rigid No. 6 plastic “[r]ight now is going to landfill” because Sims cannot sell it (Pet’s Mastro Aff, Exh I). Outerbridge stated that with the opening of the South Brooklyn facility in December 2013, he would “be able to produce straight, segregated loads of [No. 6] polystyrene products and [he is] told there will be some people who will buy it” (*id.*). Thus, as of 2013, although the recycling of all No. 6 rigid plastic foodware was required, it ended up in landfills along with the non-designated as recyclable No. 6 EPS. The City Council noted that the undesignated recyclable EPS comprised 0.65% of the refuse stream.

In November 2013, the City Council convened to address four bills that had the same goal “to improve recycling in the City” with different means – expanding the City’s recycling program to recycle EPS or banning EPS (Resp’s McCamphill Aff, Exh G at 6.15-21). Ultimately, the City Council introduced a bill “[t]o amend the administrative code of the city of New York, in relation to restrictions on the sale or use of certain expanded polystyrene items” (*id.* Exh C at 1). Thus, the City Council directed Commissioner Kathryn Garcia (the “Commissioner”) of the Department of Sanitation of New York (DSNY), to decide “whether EPS can be recycled in a manner that is environmentally responsible, economically practical,

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<sup>1</sup> “Styrofoam” is a registered trademark of the Dow Chemical Company for its extruded polystyrene and is commonly and often incorrectly used to refer to EPS (see Resp’s Memo of Law at 3 fn.7).

<sup>2</sup> Erik Enquist, The City’s Dirty Recycling Secret, Crain’s New York Business, Nov. 25, 2013 available at <http://www.craigslist.com/article/20131125/BLOGS04/131129927/the-city-s-dirty-recycling-secret>.

and safe for employees” (*id.*, ExhB at 5). The employees’ safety considerations are not at issue here and will not be discussed. The directive was to be met no later than January 1, 2015 (*id.*). If EPS was found to be non-recyclable, then on and after July 1, 2015, the ban would take effect. Respondents informed this court at oral arguments on the motion that while the effective date is July 1, 2015, no penalty would be imposed until January 2016.

The exact language of LL142 directed the Commissioner to:

“determine, after consulting with the department’s designated recycling contractor for metal, glass and plastic materials, manufacturers and recyclers of expanded polystyrene, and, in the commissioner’s discretion, any other person or group having expertise on expanded polystyrene, whether expanded single service articles can be recycled at the designated recycling processing facility at the South Brooklyn Marine Terminal in a manner that is environmentally effective, economically feasible, and safe for employees. . . . If the commissioner determines that expanded polystyrene single service articles can be recycled in such manner, the commissioner shall adopt and implement rules designating expanded polystyrene single service articles and, as appropriate, other expanded polystyrene products, as a recyclable material and require the source separation of such expanded polystyrene for department-managed recycling.”

(Resp’s McCamphill Aff, Exh A and Pet’s Mastro Aff, Exh. C, at 5, ¶ b).

In making her determination, the Commissioner and DSNY consulted with their contractor for metal, glass and plastic recycling – Sims Municipal Recycling (Sims or SMR); stakeholders – Dart, the largest EPS manufacturer, and Plastics Recycling Inc. (PRI), a recycler of polystyrene in Indianapolis, IN; the City of Los Angeles Sanitation Department, which recycles its EPS; two materials recovery facilities (MRF) in CA., Burrtec and Titus; and a recycled EPS manufacturer, NAPCO in Pomona, CA., as well as interested parties such as the New York League of Conservations Voters and the Natural Resources Defense Council (NRDC). The Commissioner also relied on a study prepared for NRDC by DSM Environmental Services, a Vermont-based consulting firm (Resp’s McCamphill Aff, Exh X). (The Commissioner’s Determination appears as Exhibit A in both Petitioner’s Affidavit by Randy Mastro in support of the Petition, and Respondents’ Affidavit by Amy McCamphill, and will be referred to hereinafter as “Determination”).

Dart and PRI have made proposals to garner support for designating EPS as recyclable. To this end, Dart has offered to purchase and install a state-of-the-art optical sorting machine with two conveyer belts – one to sort foam and rigid polystyrene, and the other for Sims' own discretionary use – and its installation worth \$500,000 at no cost to Sims or DSNY; train Sims' employees on its use, and cover the cost of employment of four additional employees, which is Dart's commitment of more than \$23M dollars for the next eight years, and PRI has agreed to purchase all the soft foam and rigid polystyrene bales from Sims for \$160.00 per ton. This price was guaranteed for at least five years at Sims' request (Pet's Mastro Aff, Exhs L, P, DD; Westerfield Aff, ¶ 6; Shaw Aff, ¶ 25; Resp's McCamphill Aff, Exh D). Dart also offered to recycle all of New York City's rigid polystyrene, thus saving New York City \$758,765 per year if all the soft and rigid polystyrene were diverted from landfills, plus generate \$2,875,360 in revenue for New York City through its purchase of the mixed polystyrene bales from Sims at \$160.00 per ton (Resp's McCamphill Aff, Exh D). Finally, Dart offered to pay Sims for the disposal of the mixed polystyrene bales during the program period, should the program fail (Determination at 2). The Commissioner outlined the items from Dart's offer that she considered as follows:

- "Purchase and installation of sorting equipment at Sims' South Brooklyn facility;
- Paying for PRI's expansion of its operations to clean and sort mixed polystyrene, including post-consumer EPS and rigid polystyrene from New York City;
- Purchase mixed polystyrene bales from Sims at a guaranteed price of five years for the PRI facility;
- Pay Sims for the disposal of the mixed bales if the program is unsuccessful at the end of the program period"

(Determination at 2).

On December 31, 2014, the Commissioner forwarded her determination to Mayor DeBlasio, Council Speaker Mark Viverito, and Council Member Reynoso, Chair of the Committee on Sanitation and Solid Waste Management (*see* Determination, cover page). The Commissioner found that "[EPS] recyclability fails on the basis of environmental effectiveness and economic feasibility, as defined in LL142" (*id.* at 1). Petitioners challenge the basis of her findings for environmental effectiveness and economic feasibility in arriving at this determination.

### Environmental Effectiveness

The Commissioner's determination on this issue began with its definition as set forth in LL142 –

“Environmentally effective means not having negative environmental consequences including, but not limited to, having the capability to be recycled into new and marketable products without a significant amount of material accepted for recycling being delivered to landfills or incinerators”

(*id.* at 5).

In her review, the Commissioner found EPS recyclability to fail the environmental effectiveness prong of her tripartite consideration because the collected post-consumer EPS would be dirty with food residues and other contaminants. Using a temporarily repurposed sorting and baling machine, DSNY's recycling contractor, Sims, reported that the optical sorters could not distinguish and sort the EPS from the rigid polystyrene, which resulted in a mixed polystyrene bale. While Sims asserts that it can improve its machine to recover 75% or more EPS, the Commissioner stated that more than half the EPS would end up in landfills until then. Further, Sims, which conducted an outreach for buyers, found no current market for mixed polystyrene bales. Moreover, the Commissioner found that mixed bales are devalued because EPS is considered contamination in other plastic commodity bales (*id.* at 5-6). Thus, the Commissioner's succinct conclusion on this issue is that no one wants to buy dirty food containers and that more than 50% of the EPS would end up in landfills, making recycling single-serve EPS recycling not environmentally efficient (*id.* at 7).

Petitioners challenge the conclusion, as well as the findings, as untrue. They point to Dart's offer made to DSNY to purchase a state-of-the-art optical sorter that ultimately would recover 90-95% of the EPS within weeks of delivery of the machine (Pet's Mastro Aff, Exhs N and P at 2). Dart's Corporate Director of Recycling Programs, Michael Westerfield, had informed the Commissioner by letter dated May 14, 2014 that Dart has equipment that can “clean and convert dirty food contaminated foam into a valuable recycled pellet [that] reduces the residue at Sims which reduces their landfill costs” (*id.* Exh P at 2). The recycling company, Plastic Recycling, Inc. (“PRI”), in an effort to assure the Commissioner of a viable market for recycled EPS, sent her a list of twenty-one (21) businesses with their monthly demand for such product, which ranged from 35,000 pounds to five million pounds per month (*id.* Exh M). Thus, petitioners' succinct conclusion on this issue is that there is a huge market hungry for dirty food containers and that only 5-10% of the EPS would end up in landfills making EPS recycling environmentally efficient.

### Economic Feasibility

The Commissioner's determination on the economic feasibility issue began with its definition as set forth in LL142 –

“Economically feasible” means cost effective based on consideration of factors including but not limited to, direct and avoided costs such as whether the material is capable of being collected by the Department in the same truck as source separated metal, glass, and plastic recyclable material, and shall include consideration of markets for recycled material”

(Determination at 7).

The review of the economic feasibility issue revisits the finding that there is no market for dirty EPS as discussed in the environmental effectiveness issue. To recycle EPS, the Commissioner posited that DSNY would have to purchase and install new sort lines at Sims’ South Brooklyn and Jersey City facilities to the tune of \$2.46 million with an additional baseline operating cost of \$25,000 to \$35,000, which would increase when the tonnage of collected EPS increases. Currently, the EPS collection amounts to 28,500 tons, which is about 0.8% of the City’s curbside waste. The Commissioner outlined three considerations for determining whether to add EPS to a recycling program:

- *“Demand:* There must be buyers for the commodity, and the demand must be shown to be relatively consistent over time as opposed to intermittent “spot market.”
- *Price:* The price offered for a commodity must be worth the expense of sorting the material and projected to cover the debt service of the capital investment.
- *Quantity:* Sufficient quantity from the residential waste stream is needed to support the effort”

(*id.* p 8).

As to demand, the Commissioner stated that buyers of recycled EPS “require a clean, homogeneous product, such as pre-consumer material” and that since Sims’ outreach did not find a market, there is no demand for post-consumer EPS (*id.*). The Commissioner questioned the existence of a market for post-consumer EPS after Dart’s proposed subsidized five-year program ends. Therefore, her forecast on the demand is dim.

As to price, on the positive side, the Commissioner found no added cost for trucking the soft foam EPS as they are so light in weight and that the city would save approximately \$400,000 annually if 40% less EPS went to landfills. The calculation was based on the average cost \$3.14M to dispose of 28,500 tons of EPS to landfills. Based on the Commissioner’s assessment that Sims can recover only 40% of EPS, the cost of processing this 40% for recycling would be \$857,000. Thus

the initial savings to the City to recycle EPS is roughly \$400,000. The capital cost to purchase and install new sort lines at Sims South Brooklyn and Jersey City facilities would be \$2.46M, with an added monthly base-line operating cost of \$25,000 to \$35,000 (*id.* at 7).

As to quantity, the Commissioner was concerned that the cost of recycling contaminated food containers would not justify its recycling because the contaminants would be heavier than the soft foam containers, thereby diminishing its value to the purchasers (*id.* at 6). There was also concern whether the proposed expanded PRI facility would be up for this first-in-kind large scale job because it could process 25% of the EPS from New York City (*id.* at 5).

The Commissioner added that, as in her consideration under the environmentally efficient prong of her analysis where she found no market for post-recycled EPS, and "the material is ultimately destined for disposal in a landfill, there is little justification for DSNY to ask the public to sort the material for recycling or to have [Sims] use resources to sort and bale it" (*id.* at 7). Based thereon as well as her analysis on the demand-price-quantity factors, the Commissioner's succinct conclusion is that because no one wants to buy dirty food containers, recycling post-consumer EPS is not economically feasible (*id.* at 8).

Petitioners counter the Commissioner's findings and conclusion through PRI's reports to Sims, DSNY, and the Commissioner showing a viable market, along with a list of twenty-one (21) buyers of post-consumer EPS, as discussed above. Petitioners referred to Sims and DSNY staffer's tour of NEPCO, a picture frame manufacturer in Pomona, California, to see first-hand "dirty" foam being washed and recycled into items such as picture frames. Petitioners included a report given to the Commissioner by the Foodservice Packaging Institute that was prepared by independent environmental economists from the Berkeley Research Group that confirmed successful recyclability of and an increasing demand for post-consumer EPS (Pet's Mastro Aff, Exh B). Thus, the petitioners' succinct conclusion is that there exists a hungry market for dirty food containers, which market will continue to grow, making recycling post-consumer EPS economically feasible.

## DISCUSSION

In a proceeding pursuant to CPLR Article 78, the scope of judicial review is limited to whether the underlying administrative action had a rational basis for its determination or was arbitrary and capricious (*see Matter of Pell v Board of Educ.*, 34 NY2d 222, 230-231 [1974]). "The arbitrary and capricious test chiefly relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*id.* at 231). Bearing in mind these precepts, judicial review cannot be based on "surmise

or speculation]” as to the respondent decision-maker’s conclusions, thus; the conclusions forming the determination should be based on adequately stated factual basis so a fair judicial review is possible (*Council of Trade Waste Assocs, Inc. v The City of New York*, 179 AD2d 413 [1<sup>st</sup> Dept 1992]). Deference is given to the agency in interpreting the regulations it administers because of its expertise in those matters, and its determination must be upheld as long as it is reasonable (*see Chin v New York City Bd. of Standards and Appeals*, 97 AD3d 485, 487 [1<sup>st</sup> Dept 2012]).

Whether EPS should be banned would likely and easily be answered “yes” by many environmentally-conscious New York City residents. However, the matter before this court is not what the answer should be but whether the determination by Commissioner Garcia of the DSNY, in response to the City Council’s mandate, had a rational basis or was arbitrary and capricious. The decision and determination is as follows:

The mandate to the Commissioner was to determine whether EPS should be designated as recyclable. The one undisputed short answer to whether EPS is recyclable is yes: single serve EPS is recyclable. The tougher question is whether dirty or post-consumer single-service EPS can be recycled in a manner that is environmentally effective and economically feasible so to be designated as recyclable.

The Commissioner’s conclusions that recycling post-consumer EPS was neither environmentally effective nor economically feasible are based on one finding – the lack of a sustaining market for recycled post-consumer EPS. This finding is based much on Sims’ reports, to wit: Sims’ temporarily repurposed optical sorting machine; Sims’ outreach to eight companies to assess whether there is a market; and Sims’ visits, along with a DSNY staffer, to various cities, plants and companies involved in recycling and purchasing recycled EPS, and turning it into sellable goods. The Commissioner’s considerations and findings are examined below.

Sims’ temporarily repurposed optical sorting machine was undisputedly ineffective, recovering only 39-45% EPS and rigid polystyrene. However, Sims claimed it could improve the machine’s recovery rate to 75% (Determination at 5). The Commissioner, nonetheless focused only on Sims’ immediate recovery of EPS of under 50%. Coupling this projected under achievement with her assessment of PRI’s “initial capture and clean 25% of the EPS material brought to the facility by NYC” (Determination at 2), a finding that recycling EPS is not environmentally efficient has a sound basis.

However, notably missing from the Commissioner’s consideration is that Dart’s state-of-the-art optical sorting machine can capture from at least 75% and up to 90-95% of EPS. Further, according to PRI, the Commissioner’s understanding of PRI’s ability to initially process 25% of the bales from Sims is “completely false and

without basis whatsoever” (Shaw Aff. ¶ 10). In response, respondents point to Dart’s June 12, 2013 letter to Sims, which stated of PRI, that “[i]nitially, it will be designed to process a capture rate of 25% . . . .” (Resp McCamphill Aff, Exh O at 2). Respondents argue that Dart never gave the Commissioner a recovery rate of 75% at the time of her determination (Resp Memo of Law at 33, fn182).

The number “75” as a percentage of the capture rate appears in many documents, and the submissions from both parties are voluminous. Respondents’ nit-picking of this three-page letter from their fifty-plus exhibits in their submission, along with petitioners’ fifty-plus exhibits, does nothing to support their point, especially when that letter speaks of a “worst case scenario” capture ratio of 69% (*id.*, Exh O at 1). Moreover, the letter was Dart’s proposal to purchase a machine for PRI to clean the material PRI buys from Sims, which Dart states would be “scalable to meet a 100% capture rate” (*id.*). Not only were these numbers ignored from that letter, respondents also ignored the 90-95% rate that was given in the DSM study – a study on which the Commissioner relied. The DSM study stated that “optical sorters are not 100 percent accurate, missing perhaps 2 to 5 percent of the material” (Resp McCamphill Aff, Exh X at 8). This representation is a far cry from the 25% recovery allotted by the Commissioner.

In any event, even if the Commissioner were to take the 25% capture rate as a given, it is for an initial period as she plainly stated. Apparently, an optical sorting machine cannot be simply dialed to immediately capture EPS at 100%. If this could be done, respondents’ declared recycling expert, Sims, would have done so with its own repurposed optical machine. However, this technical aspect of an optical sorting machine was not addressed by either party. While respondents argue that the Commissioner’s choice in rejecting Dart’s recovery projection and crediting Sims’ estimate of recovery at 39-45% is reasonable because of Sims’ years of experience recycling the City’s commingled MGP (Resp’s Memo of Law at 35), no explanation was given as to how expertise in recycling MGP – metal, glass, and plastic – qualifies Sims as an expert to fine-tune an optical sorter and find end-use market for recycling EPS as that has not been done before in the City of New York. Meanwhile, according to Sims, it had not found a market for rigid EPS that had been designated as recyclable in 2013. And undisputedly, there are markets for rigid EPS. Notably, PRI was not even mentioned in respondents’ consideration nominating Sims as an expert in recycling EPS despite the fact that PRI been in the business of recycling EPS since 1988.

Continuing with the cost analysis, the Commissioner calculated that “EPS currently makes up 0.8% of the City curbside waste” and costs \$3.14M to dispose of these 28,500 tons in landfills (Determination at 7). And taking her estimate of the captured EPS amount at 40%, the cost to recycle that amount would be \$857,000 and it would cost \$1.89M for the disposal of the residual EPS remaining in the waste stream (*id.* at 8). These figures based on the Commissioner’s assumption,

along with her assessment that the value of the light-weight EPS would decrease when they are cleared of heavy contaminants, do not bode well for designating EPS as recyclable. As the Commissioner concluded, given “[t]he quantity of EPS in a NYC recycling program, combined with an undetermined value for the material, once sorted and cleaned, does not justify the ongoing investment needed to accommodate EPS in the MGP program over time (*id.*). However, at bottom, there are 28,500 tons of EPS going to landfill. If, as the Commissioner calculated, the City can make \$400,000 from recycling 40% of 28,500 tons of EPS, then its revenue would increase when more than 40% is captured. Also, consequently, the cost to dispose of EPS in landfills decreases even if the cost of recycling it increases. Finally, the Commissioner did not include the fact that the bales can have both rigid and soft foam EPS, which Dart and PRI have promised to purchase from Sims in the five year plan. And, while Dart/PRI program is not in perpetuity, Dart’s offer also included paying Sims for the disposal of the mixed bales if the program is unsuccessful.

As for the Commissioner’s focus on January 1, 2015 as the start date for an environmentally efficient and economically feasible EPS recycling program, it is unknown why the recycling program should be in place at the same time her determination is to be submitted to the City Council (*id.* at 9). Notably, LL35 that required recycling of rigid polystyrene was passed in 2013 without the full implementation of the program as it was learned that the rigid polystyrene ended up in landfills due to a lack of buyers. Nowhere in LL142 was there a time constraint, except for her to make a determination by January 1, 2015. Nowhere in LL142 was there a condition that if an environmentally efficient and economically feasible EPS recycling program is not implemented on January 1, 2015, EPS cannot be designated recyclable. Thus, the self-imposed time constraint for the implementation of an EPS recycling program is beyond LL142’s mandate.

Another consideration the Commissioner made that went beyond LL142’s mandate was her factoring in Sim’s facility that is in Jersey City when only Sim’s South Brooklyn facility was specified in LL142. Her calculation that it would cost \$2.46M dollars, with an added monthly base-line operating cost of \$25,000 to \$35,000 (Determination at 7), was based on buying, installing, and operating an optical sorting machine and sorting lines in both facilities. While there is indication in Sims and the City’s agreement, that “[a] substantial portion of the recyclables that DSNY collects will be processed at [the South Brooklyn] facility, and it will belong to the City at the Contract’s termination” (Pet’s Dinnerstein Aff, Exh DDD), there is no indication as to what, if anything, from the New Jersey facility, belongs to the City of New York. Therefore, spending millions of dollars for a New Jersey facility that may not benefit the City of New York is irrational. The Commissioner was also concerned about storing the sorted bales in the Brooklyn facility until they are picked up by the processors, a problem posed in the DSM study. However, DSM

did not investigate Sims' other facilities in the Bronx and Queens rendering this portion of the DSM study insufficient to allow for an informed decision.

The next consideration is the market for post-consumer EPS, which the Commissioner viewed as scarce based on the fruitless findings from Sims' outreach to potential markets, and reports from Sims and a DSNY staffer's visit to MFR's – Burrtec and Titus; a manufacturer using recycled EPS – NEPCO; an EPS recycling demonstration project by Dart in Corona; and the Los Angeles Bureau of Sanitation's Recycling Division, all in California. The DSNY staffer, Bridget Anderson, reported that the operations were either too small in scale or too focused on clean EPS to be applicable as a model for DSNY (Ans, Anderson Aff, ¶¶ 8-14).

Countering the results from Sims' outreach efforts, petitioners presented the Commissioner with BRG's study, which produced a list of 78 processors, 28 end-users, and 26 joint processor/end-users of post-consumer EPS in the United States (Pet's Mastro Aff, Exh B, Attachment B). Petitioners' evidence far outnumbers Sims' result of 0 from its outreach to eight (8) end-use purchasers, and directly contradicts the facts relied upon by the Commissioner. The unexplained absence of the BRG study, along with PRI's own list of twenty-one (21) purchasers with their monthly demand, in the Commissioner's findings shows a conclusion reached arbitrarily and capriciously.

Further, while Anderson's report painted a rather languid picture of a post-consumer EPS market, the basis of her report is limited and small in scope. Indeed, part of her report was based on Dart's own demonstration project in Corona, CA, which, by its definition, is small in scope. Anderson reported that this facility processed 1000 tons of EPS per day. The demonstration showed how dirty EPS is cleared of contaminants, washed and dried, and then densified into ingots, which are given to NEPCO at no charge (Ans, Anderson Aff, ¶ 10). She repeats Dart's provision of EPS ingots to NEPCO at no cost in her observation at NEPCO (*id.* ¶ 12). What the Commissioner digested from Anderson's report on Dart's "small scale operation" is that "the resulting material is still very low in value – it is provided at no cost to NAPCO [sic], a picture frame and molding manufacturer in Pomona, CA. Even if there were buyers for the clean material, the facility is much too small to process the anticipated 11,400 tons per year of EPS in a NYC Program" (Determination at 6).

On the one hand, the Commissioner acknowledges that Dart's demonstration project was a small scale project. On the other hand, she attributes a fact not offered – that Dart would process New York City's EPS in this small scale demonstration facility. Dart is in the business of manufacturing EPS products, not recycling them. Nonetheless, recycling EPS products is evidently important to Dart for its manufacturing business. Thus, in its economic self-interest, Dart promotes the recycling of EPS. For the Commissioner to assume that Dart would process for

recycling 11,400 tons per year of EPS, she discounts and dismisses all the communications and negotiations between herself and Sims on one side, and Dart and PRI on the other side.

Further, the Commissioner's capsulization of Sims' and Anderson's observations in California that EPS recycling was "limited in scale [and] subsidized" prompted NEPCO's president, Tae Hwang, to respond that he had not spoken to any DSNY representatives and aver that "NEPCO pays and has always paid Dart for [their] expanded polystyrene" and that NEPCO processed about 6 million pounds of used EPS last year". He added that "there has been a shortage of used EPS for the last six months" and would "absolutely buy processed material from PRI" (Hwang Aff, ¶¶ 9-11). As this affidavit was not before the Commissioner when she made her determination, it is not part of the analysis. However, even without reference to the contradictions laid out by NEPCO's president, whether NEPCO gets the ingots from Dart's demonstration project at no cost is insignificant in that the amount therefrom is but a drop in the bucket when considering NEPCO's requirement of 800,000 pounds of recycled EPS per month. NEPCO's monthly requirement was presented to the Commissioner by PRI when it submitted a lists of end-use purchasers as evidence of the existence of a robust and sustainable market for recycled EPS material (Pet's Mastro Aff, Exh M). Thus, the Commissioner's view of EPS recycling as limited and subsidized is as skewed as the report upon which she relied. Even without the report, the Commissioner knew that the visit to Dart's Corona facility was to view a demonstration project and that Dart is not in the recycling business. The Commissioner should have known that, by its very definition, a demonstration project was to show that recycling EPS can be done, not that it will recycle all of New York City's EPS. Thus, the Commissioner's conclusion that recycling EPS is limited in scale and needs to be subsidized is arbitrary and capricious.

The Commissioner did consider the Dart/PRI joint program to buy Sims' mixed polystyrene bales, but was unmoved by their proposal. The Commissioner was hesitant about PRI's expansion of its facility in Indianapolis and Dart's promise to purchase contaminated mixed polystyrene bales from Sims for the next five years. Her ultimate concern was that Dart has not demonstrated that its program "would result in the establishment of a market that could be sustained over time" (Resp's Ans, Garcia Aff, ¶ 71). The Commissioner ultimately dispensed with the Dart/PRI program as it was not supported by a guarantee beyond five years.

The Commissioner's skepticism about the joint Dart/PRI program is arguably understandable if post-consumer EPS recycling was dependent on only Dart and PRI, an assumption evident in her consideration. The Commissioner, referring to Anderson's report, noted NEPCO's preference for "clean" or post-industrial EPS to drive her conclusion that while there is a market for EPS, it is for clean rather than

dirty EPS.<sup>3</sup> However, the Commissioner did not address the BRG study on the EPS market. In its discussion on EPS markets and prices, the study noted that the market for post-consumer EPS is on the rise because of the technological advances made in cleaning and processing of recycled post-consumer EPS. Further, because the price for clean EPS has increased due to growing market demand, processors/end-users are purchasing dirty EPS to keep costs down. Finally, the fact that PRI's facility was being expanded at the time of the Commissioner's consideration is not a negative factor without any facts or indications to the contrary. Neither Dart nor PRI appears to be flagging companies that will disappear after five years, and respondents do not contradict their representations regarding their growth and expansion.

The Commissioner sees the EPS recycling process as untested (*id.* at 8), which is true for DSNY and Sims, as New York City has had no experience in EPS recycling, having excluded it from the 2003 recycling requirement. There is also no experience in recycling rigid EPS since they have ended up in landfills for lack of buyers. However, despite the lack of experience, the Commissioner did not credit PRI's experience in this field. Also ignored was Burrtec's representation that its two MFRs sort approximately 10,000 pounds of EPS per month. Burrtec is the largest privately owned Solid Waste Collection and Processing Companies in California that partnered with Dart in 2009 on a pilot program to process soft foam cups, egg cartons, meat trays, etc., which it states has been successful (Pet's Mastro Aff, Exh AA). In 2013, when the Commissioner started to learn about the recyclability of EPS in New York City, "[PRI] had cleaned and processed 60 million pounds of used plastic, including both rigid and [EPS]" (Shaw Aff. ¶ 3), and Burrtec was processing 10,000 pounds of EPS per month. There is no reason shown why the Commissioner did not credit PRI's ability especially in light of the fact that "[it] had been processing used polystyrene and other plastics since 1988" (*id.* ¶ 2).

In sum, the Commissioner's recommendation against designating single-serve EPS as recyclable is based on her concern that there is not a viable and sustainable market for post-consumer recycled EPS and that the Dart/PRI proposal would peter out after five years. Absent a market, the Commissioner found, recycling post-consumer EPS would not be environmentally efficient and economically feasible. The Commissioner's concern is not justified given the abundant evidence showing a viable and growing market for not just clean EPS but post-consumer EPS material; that EPS recycling and the post-consumer EPS market is beyond the pilot program stages or still paddling in untested waters; and that Dart's financial investment of \$23M dollars to DSNY benefits the City of New York, even if it is a bigger benefit to Dart's self-interest. While "subsidized collection of [EPS] is not recycling" as argued by Cas Halloway, Deputy Mayor for Operations,

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<sup>3</sup> NEPCO's president, Tae Hwang, refuted the Commissioner's assumption of what NEPCO wants, but Hwang's affidavit is not part of this limited discussion as it was not before the Commissioner when she made her determination.

before the City Council (Resp's McCamphill Aff, Exh F at 26), it does speak to the economic feasibility prong that the Commissioner was charged to review.

The Commissioner, of course, has discretion to choose the evidence upon which she relies. However, in reaching the conclusion that there is no sustainable market for post-consumer EPS in both her environmentally efficient and economic feasibility analysis, the Commissioner did not clearly state the basis of her conclusions when the evidence contrary to her findings were clearly before her. While it is not for this court to weigh the desirability of the outcome in this matter, it is the court's function to assure that the agency has abided by the mandate as provided by the City Council in LL 142 (*see Akpan v Koch*, 152 AD2d 113, 118-119 [1st Dept 1990], *aff'd* 75 NY2d 561 [1990]). Based on the foregoing, the Commissioner's Determination must be annulled as arbitrary and capricious.

Accordingly, based on the foregoing, it is

ORDERED that the first and second causes of action are granted to the extent that the determination made pursuant to LL142 by Kathryn Garcia, as Commissioner of the New York City Department of Sanitation, is annulled and vacated as arbitrary and capricious; it is further

ORDERED that the third and fourth causes of action are denied as academic or moot; and it is further

ORDERED that the matter is remanded to the Commissioner of the New York City Department of Sanitation for reconsideration and determination consistent with this court's decision.

This constitutes the decision and order of the court.

Dated: September 21, 2015

  
Margaret A. Chan, J.S.C.