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BARBARA ROSEN,  
Senior Court Reporter

1           THE COURT: I think that the people are entitled  
2 to a decision, and so I am going to make the decision at  
3 this time. The decision I am going to read on the  
4 record. This can then be so-ordered by counsel, and I  
5 will so order the stipulation for purposes of appeal.

6           The DEC decision document made in May of 2014  
7 selecting alternative number two, cap and restore,  
8 cannot stand, as the DEC violated its own law, ECL  
9 section 27-1305, in not placing the Long Island Rail  
10 Road, the Yaphank site on the Registry and classifying  
11 it as one of five possible categories, and then, if  
12 classified as either one or two, requiring a remediation  
13 plan.

14           In choosing to utilize the Voluntary Cleanup  
15 Program, which was not authorized by the legislature and  
16 was effectively eliminated when the legislature  
17 established the Brownfield Cleanup Program, the DEC  
18 acted ultra vires that is beyond its authority.

19           I cite the Borrelli case and many of the cases  
20 that have been cited in papers, voluminous papers in the  
21 file.

22           The Respondents argue that this argument was  
23 raised by the Petitioner's reply affidavit, and  
24 therefore, should not be allowed, it is without merit.

25           Petitioner has consistently alleged in the

1 amended complaint, the DEC acted ultra vires by engaging  
2 in a Voluntary Cleanup Plan with the Long Island Rail  
3 Road.

4 The argument they did not place the site on the  
5 Superfund Registry, pursuant to Title 13, is implicitly  
6 included with the Petitioner's ultra vires arguments in  
7 the amended complaint.

8 Also, as stated in Gluck versus The New York  
9 City Transit Authority 118 A.D. 667, arguments raised  
10 for the first time in reply papers may be considered if  
11 the opposing side is given the opportunity to respond  
12 and submit papers in sur-reply, as was done here.

13 Accordingly, this Court will give the Petitioner  
14 an opportunity, in fact, I will grant your request to  
15 amend your Petition to request a remand back to the DEC,  
16 and I will direct that this action is remanded back to  
17 the DEC to comply with ECL Title 13, among other things  
18 and place this site on the Registry and then follow the  
19 law with remediation plan a, classify the inactive waste  
20 site as either one or two or whatever, within the one to  
21 five classification pursuant to 1305 of the  
22 Environmental Conservation Law, and then take the next  
23 appropriate steps, which could even include a Brownfield  
24 Cleanup Program, which the legislature enacted  
25 approximately one year after the DEC entered into its

1 VCP, which is utilized herein.

2

3 That is the Court's decision. I will so order  
4 it.

5 The causes of action four and five, there is no  
6 motion to dismiss them. They, I guess, will continue.  
7 I don't know what is going to happen with them, but  
8 there is no motion before me to be decided with respect  
9 to four and five, and this decision was made under  
10 motion sequence 003.

11 \* \* \*

12 (Discussion held off the record.)

13 \* \* \*

14

15 THE COURT: So, the decision document, the  
16 Court's decision today, will be annulled, and that's the  
17 ruling of the Court.

18 We will close the record at this point.

19

20 \* \* \*

21

22 SO ORDERED:

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HON. H. PATRICK LEIS, III

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I, Barbara Rosen, certify the foregoing to be a true and accurate transcription of the stenographic notes of this proceeding.

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Barbara Rosen  
Senior Court Reporter