
**Recommendations for the
New York State
Department of Environmental Conservation
Environmental Justice Program**

Prepared By
Environmental Justice Advisory Group
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PREAMBLE

This report sets forth recommendations for how environmental justice can be incorporated into permit review, State Environmental Quality Review Act procedures, and some components of the New York State Department of Environmental Conservation's (DEC) enforcement, public participation and grants programs. This report and public comment generated from this report will serve as the basis for future DEC policy related to environmental justice.

In 1998, various parties interested in environmental justice, including a number of environmental justice advocates and community representatives from around New York State, met with former DEC Commissioner Cahill to express their concern over environmental justice issues. Among those represented were residents from minority and low-income communities concerned about actual and potential adverse environmental impacts in and around their communities. Concerns raised by interested parties included, but were not limited to: the lack of meaningful public participation by minority or low-income communities in the permit process; the unavailability or inaccessibility to the public of certain information early in the permit process; and the failure of the permit process to include environmental justice concerns in the environmental impact assessment review. Other concerns that were raised related to the equitable distribution of green benefits to minority and low-income communities; lack of consistent, effective enforcement in all communities against violators of the Environmental Conservation Law; and issues related to environmental justice and Native Americans.

In response to the concerns raised by the parties interested in environmental justice, former Commissioner Cahill established the New York State Department of Environmental Conservation Environmental Justice Advisory Group (Advisory Group). The Advisory Group was asked to develop recommendations to incorporate environmental justice into the DEC permit process and recommendations for a strategic environmental justice plan.

In preparing this report, the Advisory Group received considerable input from: interested citizens through a series of public meetings; from DEC staff; and through the broad range of expertise and diverse view points of the Advisory Group members themselves. The Advisory Group served as a decision-making body for this report. It had responsibility to make decisions regarding various issues which came before it, including: the selection, characterization, and comparison of issues and solutions; the identification of priorities; and the selection of strategies, which are presented to Commissioner Crotty. When making decisions, the Advisory Group sought the most broad, inclusive and informed consensus possible. When a consensus was not reached, decisions were based on the will of the majority. Each Advisory Group member was given the opportunity to submit a supplemental letter addressing these or other comments regarding the report. The letters are contained in the appendix of this report.

Former Commissioner Cahill's initiative to establish the Advisory Group, and the confirmation and support of the Advisory Group's mission by Commissioner Crotty, demonstrates the importance the DEC places on addressing environmental justice concerns. Therefore, it is with great pleasure that the Advisory Group presents this report to Commissioner Crotty.

FOUNDATION FOR ENVIRONMENTAL JUSTICE POLICY DEVELOPMENT

Environmental Justice became a national issue in 1982 when approximately 500 demonstrators gathered in Warren County, North Carolina, to protest the siting of a polychlorinated biphenyl (PCB) landfill in a predominately African-American and low-income community. This protest led to several studies pertaining to environmental justice and two major environmental conferences, which further increased awareness of environmental justice issues. As a result of these studies, conferences and the fundamental questions raised by grassroots organizations concerning the fairness of environmental protection policies in the United States, government policymakers at multiple levels became sensitive to and involved in environmental justice matters.

In 1998, former Commissioner John P. Cahill met with environmental justice advocates to discuss environmental New York State issues from an environmental justice perspective. The meetings provided the DEC the opportunity to listen to the concerns of New York State residents living in minority or low-income communities and explore how DEC could address these concerns.

Subsequently, the DEC began incorporating environmental justice concepts into environmental decision making. On October 4, 1999, Commissioner Cahill formalized the DEC's efforts and announced the creation of a new program to address environmental justice concerns and ensure community participation in the state's environmental permitting process. Commissioner Cahill named an environmental justice coordinator to develop and oversee the DEC's Environmental Justice Program; coordinate efforts to develop and implement short-term and long-term environmental justice policy; and assist the Office of General Counsel with legal matters related to environmental justice. The coordinator also represents the DEC in its dealings with interested parties on environmental justice matters and chairs and directs the Environmental Justice Advisory Group. Two environmental analyst positions were added in the Division of Environmental Permits, one in Albany and one in New York City, to address environmental justice issues in the permitting process. Additional staff has also been added.

Also, in 1999, the DEC received a United States Environmental Protection Agency State and Tribal Environmental Justice Grant to assist in developing a comprehensive environmental justice program and policies. The grant addresses these elements: (1) formation of an environmental justice Advisory Group; (2) development of an environmental justice permit policy with guidelines for addressing environmental justice permitting issues; (3) enhancement of the DEC website; (4) conducting a series of public meetings throughout the State to identify environmental justice concerns; and (5) recommendations for a strategic environmental justice plan. The DEC supplements the grant with additional money and funds the Environmental Justice Program.

Pursuant to the United States Environmental Protection Agency State and Tribal Environmental Justice Grant, the Advisory Group was assembled and began meeting in January 2000. The Advisory Group met almost monthly and held several public meetings to gather information for this report. The public meetings were held in Syracuse, Buffalo, New York City, Albany and the Onondaga Nation and enabled the Advisory Group to listen to the concerns of minority and low-income communities as well as others affected by environmental issues from an environmental justice perspective. The public meetings were a valuable tool for gathering information and a positive learning experience for the Advisory Group, the DEC and the attendees as all groups learned to listen and work together to address environmental justice.

In March 2001, Erin M. Crotty succeeded John P. Cahill as Commissioner of the DEC. Commissioner Crotty's strong support of the Advisory Group and the DEC's Office of Environmental Justice ensures the continuation of DEC's work to achieve and maintain environmental justice with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies administered by the DEC.

THE NEW YORK STATE DEC ENVIRONMENTAL JUSTICE ADVISORY GROUP

The Advisory Group consists of 18 appointed members and six advisors, including federal, state and local environmental and public health officials, environmental justice advocates, environmentalists, an Indian Nation representative, business representatives, and an academician. Some members elected to name substitutes. See Appendix 1 of this report for a list of members, advisors and substitutes. Each member, advisor and substitute brought expertise in a particular area that contributed toward the development of the report and the recommendations contained herein. The professionalism and dedication of each member, advisor and substitute enabled the group to identify and discuss complex environmental justice concepts and devise the following recommendations to address environmental justice. Other individuals participated in the report development but were unable to continue throughout the entire development process. Their contributions are acknowledged.

ENVIRONMENTAL JUSTICE DEFINED

Environmental Justice is meant to ensure the fair treatment and meaningful involvement of all people regardless of race, color or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.

RECOMMENDED POLICY STATEMENT

DEC's mission, as stated in Section 1-0101 of the New York State Environmental Conservation Law, is to "conserve, improve, and protect its natural resources and environment, and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well being."

To the greatest extent practicable and permitted by law, the DEC should make achieving environmental justice part of its mission. It should ensure integration of environmental justice into its programs, policies, regulations, legislative proposals and activities and address, as appropriate, disproportionate adverse environmental impacts on minority populations or low-income populations. It should enhance the meaningful opportunity for all people of the state of New York, regardless of race, color or income, to participate in DEC decision making affecting the environment and enjoy proportionate funding and environmental benefits.

PURPOSE AND SCOPE

The recommendations contained in this report are intended to ensure that DEC's environmental permit process and other programs are open and responsive to environmental justice concerns. The recommendations are based on currently available information and resources. These recommendations should be reviewed regularly and revised as necessary in consideration of evolving environmental justice issues and programs and to reflect the best available environmental protection information and resources.

This report is advisory and is intended only to improve the management of the DEC and is not intended to, nor does it create, any right or benefit, substantive or procedural, enforceable at law or equity by a party against the state of New York, its agencies, its officers, or any person.

KEY POLICY RECOMMENDATIONS

Recommendations for Incorporating Environmental Justice Into the DEC Permit Process Generally

1. Permits Applicable Under these Recommendations

The environmental justice policy will apply to permits administered under Article 70 of the Environmental Conservation Law (ECL) and Title 6 of the New York Code of Rules and Regulations (NYCRR) Part 621. Any application for a new permit that is classified as a major project (see 6 NYCRR Part 621.4) from the programs identified below or an application for a major modification of an existing permit from the same programs should be subject to the environmental justice screening process. The programs which will be the subject of a review for environmental justice impact are:

- Air Pollution Control - 6 NYCRR Parts 201, 203 & 215
- Coastal Erosion Management - 6 NYCRR Part 505
- Freshwater Wetlands - 6 NYCRR Part 662 & 663
- Hazardous Waste Management Facilities - 6 NYCRR Part 373
- Liquified Natural Gas and Petroleum Gas Facilities - Title 15 of ECL (Article 23)

- Mined Land Reclamation - 6 NYCRR Parts 420 through 426
- Siting of Industrial Hazardous Waste Facilities - 6 NYCRR Part 361
- Solid Waste Management Facilities - 6 NYCRR Part 360
- State Pollutant Discharge Elimination System (SPDES) - 6 NYCRR Parts 750 through 758
- Tidal Wetlands - 6 NYCRR Part 661
- Transportation of Water by Vessel - Title 15 of ECL (Article 15)
- Use and Protection of Waters - 6 NYCRR Part 608
- Waste Transporter Permits - 6 NYCRR Part 364
- Water Quality Certifications - Section 401 of the Clean Water Act, 6 NYCRR Part 608
- Water Supply - 6 NYCRR Part 601 & 602
- Wild, Scenic & Recreational Rivers - 6 NYCRR Part 666

Permit renewals defined as the reissuance, recertification or extension of any permit for previously approved activities which will be continuing on the same site without material change are not covered by the general permit recommendations in this report but are addressed separately later in this report.

2. Educate DEC Staff and Permit Applicants on Environmental Justice

While the concept of environmental justice has been around for nearly two decades, many are unfamiliar with environmental justice concerns. As a first step, the DEC should develop a training curriculum to educate and familiarize staff with environmental justice issues facing minority, low-income and Native American communities. The training should provide fundamental environmental justice information, including background; terminology; issues; Acts & Authorities; tools which can be used to identify and address environmental justice concerns; and other information as appropriate. Additionally, such information should be made available on the DEC website as a reference tool. The training should be offered to designated staff in each of the DEC's divisions and offices. Environmental Justice training is critical to achieving environmental justice and can help to improve DEC operations through better understanding of environmental justice issues and concerns facing these communities.

The DEC should provide each permit applicant with fundamental information on environmental justice, including information on DEC policy and procedures related to permitting and environmental justice. The information should be given to applicants early in the permit application process, either at the pre application stage, if applicable, or during the application stage. The DEC should encourage applicants further to educate themselves on environmental justice generally and on specific environmental justice concerns, if any, in communities surrounding a proposed action.

3. Make Information More Widely Available to the Public, Including Minority or Low-income Communities

The DEC and other state agencies are required to make certain information available to the public pursuant to the Freedom of Information Law ("FOIL"). While the DEC complies with this law, the process for obtaining information pursuant to FOIL is not well understood and is often time-consuming. Furthermore, due to the volume of requests received by the DEC, the public may not receive requested information on a particular permit application with sufficient time to review it and participate in the permit process. In order to empower the public and enable all citizens to participate meaningfully in environmental decision making, the DEC should make all information available to the public, pursuant to FOIL, readily accessible, either upon receipt by the DEC or soon thereafter to ensure sufficient opportunity for public review. The DEC should use a variety of tools, including, but not limited, to the ones listed below, to make information available.

- (1) Written Public Notice - Written public notice should be used to distribute official announcements and information about agency decisions and project activity. Both the form and substance of such notices should be considered. The State's Uniform Procedures law and regulations require the DEC to publish a

detailed public notice of complete application in the Environmental Notice Bulletin and require the permit applicant to publish a notice of complete application in a newspaper for major projects. While these requirements are intended to provide the public with adequate information on a major project, it has not always been seen to be sufficient. Public notices containing key project information should be disseminated early in the permit process and utilized frequently to provide an opportunity for public input in the decision making process. In order to ensure that the public notices reach the intended audience, public notices should be written in plain language and translated into other languages, where demographic information indicates that a significant percentage of the population of the minority or low-income community speaks a language other than English. Public notices should be published in a conspicuous section of local newspapers including, where possible, community-based newspaper and newsletters.

The DEC should develop a list of local newspapers, community organizations, local libraries, churches and other entities identified by the public. Public notices should be distributed to these organizations regularly via mail, electronic mail or other such method.

- (2) Repositories - Repositories provide the public with readily accessible information about project activity. However, since repositories are resource-intensive, they may not be appropriate for all project actions. Where a proposed action may affect a minority or low-income community and where there is sufficient public interest, the DEC should encourage applicants to create an action-specific repository near the proposed action site to allow public review of information, including: studies, reports, meeting presentation materials, media releases and other information. The DEC and permit applicant should consult local communities to determine and publicize the location of the repository and the public should be notified of the location. Repositories may be standalone facilities or they may be located in public libraries, community board offices, DEC or other governmental offices, or other appropriate places in or near the affected communities. Repositories should be accessible by public transportation if available, and open to the public during day or evening hours.
- (3) Mailing lists - Mailing lists can be used to distribute information on hearings, public meetings, project proposals, workshops and other information to both broad and target audiences. They also ensure that information reaches the intended audience. The DEC and permit applicants should use Geographic Information Systems, such as the DEC Environmental Navigator, and other means to identify key parties interested in environmental justice, with a focus on identifying and reaching out to minority or low-income communities throughout New York State. Mailing lists including individuals, organizations and other interested parties should be maintained by the DEC and updated to ensure that critical information reaches interested parties.
- (4) DEC website - The DEC website at www.dec.state.ny.us enables the DEC to post information about its offices, programs and policies. The website, launched on April 4, 1997 with 300 pages, has grown to approximately eight thousand pages. In addition to general information, the DEC posts many of its publications on the web and continues to add information. The website also publishes DEC staff contact information enabling users to contact staff directly via E-mail to request information. While the DEC's effort to post information has been commendable, the DEC should greatly expand the amount of information available to the public on the website. In order to accomplish this quickly and effectively, the DEC should inventory the public information collected and maintained, then develop a plan to post as much information as practicable on the website. In order to further this recommendation, the Environmental Justice Advisory Group provided written support for DEC's grant application proposal to implement a web portal of records repositories that are frequently requested by the public, allowing immediate records access by the public.

Where appropriate, the DEC should require public document submission in electronic form. This would enable the DEC to readily place the information on its website.

In addition to the information maintained by the DEC on its website, permit applicants that have their own web sites should be encouraged to post environmental information related to their applications.

- (5) **Public Meetings** - Public meetings provide a forum for the exchange of information between agencies, permit applicants and interested persons. Where a proposed action may affect a minority or low-income community and where there is sufficient public interest, the DEC and the permit applicant should schedule public meetings to accommodate all interested parties affected by the proposed action, including minority or low-income community residents. Sufficient advanced notice of public meetings should be given. The meetings should be held at a location within the potentially affected community and accessible by public transportation; meetings should be held at various times throughout the day to accommodate the public, including the evening if suggested by the community. Whenever possible, the DEC should consult with local representatives prior to scheduling a public meeting. This should avoid scheduling conflicts and ensure that meeting logistics meet the needs of the intended audience. Translation services should be provided when necessary to enable the non-English speaking public to participate in the meeting. Public meetings should be structured to achieve the most effective exchange of information. While certain public meetings, such as public hearings are structured to allow and record comments from a large public audience, other meeting structures may include smaller group discussions and panel discussions.
- (6) **Workshops** - In order to promote meaningful public participation, the DEC should develop several workshops intended to educate minority or low-income communities in environmental law, policy and procedure, including grant opportunities, application procedures and the permit process. Development of the workshops should be a collaboration between DEC, other sponsors and representatives from minority or low-income communities. Such collaboration will promote a successful workshop which targets and reaches the minority or low-income community audience, and provides useful information to address environmental justice concerns.
- (7) **Toll Free Hotline** - Access to information is a critical component of environmental justice. In order to enable minority or low-income communities to access DEC's public information, the DEC should pilot a toll free environmental justice hotline for use in New York State. The hotline will enable minority and low-income communities to access the Office of Environmental Justice during business hours and avoid long distance charges. The DEC should pilot the hotline for a 6 month period to evaluate its usefulness. During the pilot period, DEC should extensively publicize the hotline.

4. Enhance Public Notice and Public Participation Procedures

State law and regulations require public notice and public participation at major milestones throughout the permitting process. Although these opportunities exist, such opportunities should be enhanced to ensure meaningful public participation by all people of the state of New York, including minority or low-income communities, which may be affected by a proposed action.

- (1) **Review and Enhance DEC Public Notice and Public Participation Procedures to Ensure More Meaningful and Effective Public Dialogue** - Early and regular public involvement is a critical element of an effective public participation program. The DEC should review its public notice and public participation procedures and enhance as appropriate to include early and regular public involvement throughout the permit process and enable meaningful participation by minority or low-income communities. DEC public participation procedures should include: effective mechanisms to disseminate

information to interested parties with a focus on minority or low-income communities; sufficient time for review of all application information for a proposed action and expanded opportunities for public comment. Currently, the Environmental Notice Bulletin is published and distributed electronically via the Internet. As a result of such distribution practices, the bulletin may fail to reach individuals potentially affected by a particular project. The Advisory Group recommends that the DEC identify key community organizations, religious organizations, libraries and other public places in where such critical information can be made available.

- (2) Issue Public Notice Upon Department Receipt of Permit Application - The DEC should notify the public upon receipt of permit applications.

The Uniform Procedures Act requires that the DEC and permit applicant publish a notice of complete application in the Environmental Notice Bulletin and local newspaper. However, the notice of complete application may occur long after the project is introduced to the Department. Therefore, the Advisory Group recommends that the DEC inform the public of a proposed project earlier in the permit review process. Specifically, the Advisory Group recommends that the DEC publish a notice of proposed action in the Environmental Notice Bulletin upon initial receipt of permit applications within the regulatory programs to be covered by this recommended environmental justice policy. Furthermore, the Advisory Group recommends that all appropriate application material be made available to the public at this time. This early notification will allow the public more time to review and evaluate available information.

- (3) Encourage Applicants to Conduct Meaningful and Effective Public Participation Programs - The DEC should encourage applicants to conduct meaningful and effective public participation programs that educate the public, gather information from the community and provide meaningful opportunities for the exchange of information. Public participation programs should begin early in the permit application process, giving the public the greatest opportunity to participate in decision making regarding projects in their community, and should continue throughout the permit review process. Permitted facilities should consider public outreach and informational exchange beyond the permit review process.

Although not required by regulation, the DEC should encourage applicants to use a variety of tools to exchange information with the public. Using various tools should enable the applicant to reach concerned parties, including minority or low-income community residents. Examples of such tools include introductory notices, project newsletters, presentations, facility tours, news conferences, information brochures, community interviews, focus groups, telephone contacts and hotlines, informal meetings, citizen advisory groups and workshops.

In order to identify effectively and resolve environmental justice concerns related to a proposed action, the DEC should encourage applicants to engage community representatives in dialogue, consensus-building and cooperative problem solving early in the permit approval process and throughout. The DEC should encourage applicants to demonstrate, in writing, whether they have identified environmental justice concerns related to a proposed action, and, if so, develop a written plan to address these concerns and implement the plan.

- (4) Provide Technical Assistance Grants - The Advisory Group recommends incorporating a Technical Assistance Grant (TAG) program into the DEC permitting process. The TAG program would provide grants to assist community groups to review, evaluate, and provide comments on action-specific information developed by the State and the applicant relating to the DEC permit application. The DEC should pursue funding mechanisms for the grants. Eligibility criteria should be established to include, and

give preference to, community groups. This proposed TAG program should not apply to any proceeding where funding for community participation is already provided (for example, Article X power plant applications).

5. Encourage Alternative Dispute Resolution to Resolve Conflicts During the Permit Process

The goal of alternative dispute resolution (ADR) is to assist parties in reaching a mutually acceptable decision or agreement. ADR requires the sharing of information, addressing serious disagreements, and reducing contentiousness. Further, it requires that the parties design the appropriate procedures for their deliberations with the goal of reaching an agreement. Not all disputes involving environmental justice issues are suitable candidates for ADR. However, where appropriate, this tool can help address and resolve complex environmental disputes.

In recent years, significant attention has been directed to using ADR procedures in place of traditional conflict resolution such as formal adjudicative hearings or litigation. ADR techniques including mediation, arbitration, settlement conferences, and neutral evaluation, and have been employed at both the state and federal level to address environmental issues. Beginning in 1996, the DEC implemented an environmental ADR program. The DEC Office of Hearings and Mediation Services offers mediation and other forms of ADR to resolve environmental disputes that involve a DEC permit, license, order, contract, or other matter pertaining to the authority and jurisdiction of DEC. Sometimes, however, instances arise where a dispute exists tangentially to a DEC action, for example, permits from DEC are required for a project but other governmental permits are the major focus of the dispute. Those cases are evaluated by the DEC and handled on a case-by-case basis. Where a dispute arises between a community and a regulated entity unrelated to a specific action under DEC authority, the parties may engage the mediation services of a private mediator, independent of the DEC.

The Advisory Group, as part of its consideration of procedural reforms to address environmental justice issues, evaluated the use of ADR. This evaluation arose, in part, from a concern that traditional methods of dispute resolution have not satisfactorily addressed environmental justice concerns. The Advisory Group views ADR as a means to raise and address environmental justice matters at the initial stages of the permitting process. Furthermore, when ADR is used at an early stage, it can reduce transaction costs and avoid delays caused by litigation and formal adjudication. If effectively employed, ADR will shift the focus of the decision making to the applicant and the community engaged in the ADR process, ultimately giving greater opportunity for public involvement.

ADR should be regarded as an option for applicants and communities to resolve issues privately before a neutral third party. ADR should be utilized only where appropriate and should not be considered a procedural mandate. Furthermore, those who are not interested in achieving consensus should not regard ADR as a mechanism to simply delay permit application review.

The Advisory Group offers the following recommendations with respect to ADR and the permit review process. The DEC should provide all applicants and interested members of the public with DEC ADR procedures and appropriate contacts to discuss the use of ADR and should maintain a list of all projects or permit applications utilizing ADR. DEC staff, including permit review staff and citizen participation specialists, should be instructed on the potential uses of ADR in the permitting process and encourage its use where appropriate.

The decision to engage in ADR should be made by the applicant. The ADR process should involve the applicant and appropriate public representatives, including one representative from the impacted community and one locally elected official or designated representative. Agreements finalized through the ADR process should be reduced to writing and be regarded as binding. All mitigation measures and environmental commitments, where appropriate, should be incorporated

as part of a facility or project permit. Measures outside the scope of a permit should be incorporated into private agreements, considered binding on the participating parties and enforceable by the participating partner.

Recommendations for Incorporating Environmental Justice into the State Environmental Quality Review Act (SEQR)

The goal of New York's State Environmental Quality Review Act (SEQR) is to avoid or minimize possible negative impacts on the environment from proposed actions. SEQR requires all state and local government agencies to consider environmental impacts together with social and economic factors during discretionary decision-making and balance these when deciding to approve or undertake an action. An action is subject to review under SEQR if any state or local agency has the authority to issue a discretionary permit, license or other type of approval for that action. SEQR also applies if an agency funds or directly undertakes a project, or adopts a resource management plan, rule or policy that affects the environment.

While SEQR provides a good framework for in-depth environmental analysis, the Advisory Group recommends enhancements to the DEC's procedural use of SEQR and to the regulations, that can help to ensure the fair treatment and meaningful involvement of all people in the DEC permit review process. The Advisory Group focused on improvements to the DEC permit review process. However, some identified enhancements require regulatory changes to SEQR, which if passed may affect other state and local agencies.

In order to ensure the fair treatment and meaningful involvement of all people with respect to the implementation of environmental laws, regulations and policies, environmental justice efforts focus on under-served communities, specifically minority or low-income communities. These communities may experience disproportionate adverse environmental impacts due to, among other things, proximity to various sources of pollution. Also, these communities may not participate in environmental decisions which affect their communities for various reasons including lack of resources.

The Advisory Group recommends that closer scrutiny be given to environmental decisions in minority or low-income communities. Early in the permit process the DEC should conduct a preliminary screen to identify any minority or low-income communities which may be impacted by a proposed action. The DEC and the permit applicant should reach out to identified minority or low-income communities and other interested persons and provide them with the opportunity to participate in the permit review process. The DEC should assess permit application requirements and expand the universe of information used in the permit approval process, as appropriate, to address environmental justice concerns. The DEC should also assess its permit review procedures to expand periods for public input, expand guidance on conducting environmental impact assessments and focus on achieving environmental justice goals. Specific recommendations for implementing the above-mentioned enhancements to the permit review process follow.

1. Conduct Preliminary Screen to Identify Any Minority or Low-income Community Which May be impacted by a Proposed Action

Before the DEC can determine whether significant, adverse environmental impacts disproportionately affect minority or low-income communities, these communities must be identified. The Advisory Group reviewed several methodologies and recommends that the DEC utilize the methodology employed by EPA Region 2 in its Interim Environmental Justice Policy (Interim Policy) section 2.2.2¹

¹Please note, the Advisory Group is not recommending that the DEC adopt the EPA Region 2 Interim Environmental Justice Policy in its entirety.

The Interim Policy uses U.S. Census Bureau demographic criteria and statistical analysis to compare the demographics of a community of concern to a statistical reference area. To facilitate the analysis, EPA Region 2 developed a Geographic Information System (GIS) application to evaluate the demographics of a community of concern and compare them to the statistically derived reference area. The GIS system can be used to draw the boundaries of a community of concern and calculate the percent minority and low-income individuals within those boundaries using U.S. Census Bureau block group² data. This approach relies on 1990 U.S. Census Bureau data until 2000 census data becomes available.

Provided are key definitions, a summary of the EPA Region 2 methodology for identifying minority or low-income communities and the percent thresholds which render a community of concern minority or low-income in New York State. The Advisory Group recommends that the DEC incorporate these definitions and methodologies into its permit review process into its guidance for conducting environmental justice reviews. The Advisory Group further recommends that the DEC incorporate the EPA Region 2 GIS application, or similar application, into its own computer system and make the application available to the public via the DEC website.

- (1) Community of Concern - In the context of assessing disproportionate adverse environmental impacts on a minority or low-income community, the community of concern should be defined as the area and population affected by environmental impacts related to the specific facility, source or project for which the permit application has been submitted.
- (2) Minority - 'Minority' includes Hispanics, African-Americans, Asian-Americans and Pacific Islanders and American Indians.
- (3) Low Income - 'Low Income' is defined using the U.S. Census Bureau definition of poverty. In order to assess poverty the U.S. Census Bureau uses a set of income thresholds that vary by family size and composition to determine who is poor. If a family's total income is less than that family's threshold, then that family, and every individual in it, is considered poor. These thresholds do not vary geographically and are adjusted yearly to account for inflation. For further information, including specific thresholds, please visit the U.S. Census bureau website at <http://www.census.gov/hhes/www/poverty.html>
- (4) Minority Community - In order to define a minority community, EPA Region 2 analyzed statewide census block group data for race and Hispanic origin populations to find a statewide statistical reference area. Block group data were analyzed using the cluster methodology statistical approach. EPA Region 2 found that the statewide statistical reference area was similar to that derived from using only urban area data, while the results using only rural area data were considerably lower.³ Consequently, minority data were evaluated separately for urban and rural areas in New York. The statistical reference area for an urban minority community in New York State was found to be 48.5% minority. The statistical reference area for a rural minority community in New York State was found to be 33.5% minority. Therefore, any community of concern with equal to or greater than 48.5% or 33.5% respectively is a minority community for the purposes of assessing disproportionate adverse environmental impacts. For further information on

²A unit for the census data reporting formed by a cluster of census blocks. Census block groups generally contain between 250 and 500 housing units.

³The following U.S. Census Bureau definitions for urban and rural were utilized. Urban - All territory, population, and housing units located in urbanized areas and in places of 2,500 or more inhabitants outside of urbanized areas. An urbanized area is a continuously built-up area with a population of 50,000 or more. Rural - Territory, population, and housing units that the Census Bureau does not classify as urban are classified as rural.

this methodology, please visit the EPA Region 2 website at <http://www.epa.gov/region02/community/ej/>

- (5) Low-Income Community - In order to define a low-income community, EPA Region 2 analyzed statewide census block group data to find a statewide statistical reference area. Since the poverty thresholds do not vary geographically, one statewide statistical reference area for a low-income community was used. The statewide statistical reference area for a low-income community in New York was 24.8% of residents below poverty level. Therefore, any community of concern with equal to or greater than a 24.8% low-income population is a low-income community for the purposes of assessing disproportionate adverse environmental impacts. For further information on this methodology, please visit the EPA Region 2 website at <http://www.epa.gov/region02/community/ej/>
- (6) Methodology for Conducting Preliminary Screen
 - (a) Define the Community of Concern - Using the EPA Region 2 GIS application, or similar application, the DEC should draw the boundaries of the community of concern. The boundaries should correspond to the area(s) and population(s) to be affected by environmental impacts related to the specific facility. If the environmental impacts related to the specific facility are not known, the DEC should estimate the impacts based upon its knowledge of similar facilities. The boundaries should include areas that may be significantly affected by any of the facility's likely impacts, such as air pollution, water pollution, traffic, visual impact, and secondary displacement. The boundaries should be refined, as necessary, when the environmental impacts related to the specific facility become known.
 - (b) Determine Whether the Community of Concern is a Minority or Low-income Community - Utilizing the EPA Region 2 GIS application, or similar application, the DEC should determine whether the community of concern is a minority or low-income community. If the community of concern is not a minority or low-income community, the review process may continue independent of the recommendations in this section. If the community of concern is a minority or low-income community, the remaining recommendations should be incorporated into the review process.

2. Determination of Significance

When the DEC conducts a SEQR review, it must determine whether a proposed action may or will not have a significant adverse impact on the environment. Type I and Unlisted actions require further review. Type I actions are listed in the SEQR regulations and carry the presumption that they are more likely than unlisted actions to require an environmental impact statement. Unlisted actions range from very minor activities to actions falling just below Type I thresholds. Type II actions have been predetermined to have no significant impact or are otherwise precluded from environmental review under SEQR. The determination of significance for Type I and Unlisted actions must be based on information provided by the project sponsor in an environmental assessment form, other supporting documents and comments from any involved agency and the public.

The Advisory Group recommends the following changes and enhancements to the SEQR process for assessing the significance of proposed projects.

- (1) Require a Full Environmental Assessment Form for Unlisted Actions Occurring in Minority or Low-income Communities - An Environmental Assessment Form (EAF) is designed to help the applicant and agencies determine whether a project or action may be significant. The EAF consists of 3 parts. Part 1

provides objective data and information about a given project and its site. Part 2 focuses on identifying the range and magnitude of possible impacts that may occur from a project or action. If any impact identified in Part 2 is identified as potentially large, then Part 3 is used to evaluate whether or not the impact is actually important. The project applicant completes Part 1 of the form and submits it to an involved agency together with any other applications that are required. When the lead agency is established, that agency is responsible for completing Part 2 of the EAF and, as needed, Part 3. There are two types of EAFs: a full EAF and a short EAF. The full EAF is required for all Type I actions and provides detailed information about the action, while the short EAF provides only a brief description of the action. A short EAF must, at a minimum, be completed for all Unlisted actions. However, an agency may require a full EAF if the short EAF will not provide sufficient information. The Advisory Group reviewed the EAFs and determined that the short EAF fails to provide sufficient information to enable the DEC to determine whether an identified minority or low-income community may be impacted by disproportionate adverse environmental impacts. Therefore, the Advisory Group recommends that a full EAF be required for all unlisted actions occurring in or likely to significantly affect a minority or low-income community.

- (2) **Enhance the Full Environmental Assessment Form to Require Additional Information** - As discussed above, the full EAF provides detailed information about a proposed action to help the applicant and agencies determine whether an action may be significant. This information includes a site description; project description; zoning and planning information; impacts related to land, water, air, historical and archeological resources; public health; community growth and character and other impacts. The Advisory Group recommends that the DEC review the full EAF to determine what additional information or additional examples should be provided to elicit information which can be used to make a significance determination and identify minority or low-income communities which may be impacted by disproportionate adverse environmental impacts. Such information may include a demographic analysis of the area surrounding the proposed action and information pertaining to the area to be serviced by the proposed action. The DEC should work closely with the New York State Department of Health to determine what, if any, existing site-related health data can be included in the full EAF to assess risk and impacts prior to making a significance determination. The DEC should pursue regulatory changes to revise the full EAF to include the additional information.
- (3) **Post the Environmental Assessment Form on the DEC website** - Meaningful involvement in environmental decision making requires that all interested parties have access to the information upon which the decisions are made. Therefore, the Advisory Group recommends that the DEC post EAFs on its website. Part 1 of the EAF, which is completed by the applicant, should be posted upon receipt by the DEC, or as soon thereafter as practicable. Part 2 and 3 of the EAF should be posted by the DEC in conjunction with the Notice of Complete Application.
- (4) **Coordinate Review for Unlisted Actions Involving More Than One Agency** - Coordinated review is required for all Type I actions and certain unlisted actions. The involved agency that initially receives an application for approval circulates to the other involved agencies the completed Part 1 of the full EAF and any other information supplied by the applicant, a lead agency is selected and that lead agency coordinates the SEQR review and makes the significance determination. The Advisory Group recommends that the DEC require coordinated review for all unlisted actions located in a minority or low-income community involving more than one agency.
- (5) **Require a Minimum Time Frame Prior to Making a Significance Determination** - Meaningful public involvement in environmental decision making is critical to achieving environmental justice. To that end,

the Advisory Group reviewed the permit process to assess whether public involvement could be enhanced. The Advisory Group recommends that the DEC pursue amendment to 6 NYCRR 621 to require a minimum time frame, from the date of initial public notice, for information gathering prior to making a significance determination. Based upon the prior recommendation by the Advisory Group that the DEC public notice permit actions upon receipt of the application, the minimum time frame should begin on the date of that public notice. The minimum time frame should be determined by the DEC, but should be no less than 30 days and no more than 45 days. During this time frame the DEC should invite the public to submit information relevant to the specific permit application.

- (6) Utilize DEC Environmental Navigator and Other Sources to Obtain Information Related to a Proposed Action - The Environmental Navigator provides a graphical resource for agency staff and the residents of New York to access information about various sites of interest across the State, including: Water Discharge Sites; Toxic Release Inventory; Air Emission Sources; Article X Facilities; Active Solid Waste Management Facilities; Superfund Sites. The Advisory Group recommends that the DEC, permit applicants and the public utilize this tool to obtain information about a proposed action site and surrounding community. The Advisory Group further recommends that the DEC continue to add information to the Environmental Navigator, including but not limited to demographic information and facility inspection dates. The Advisory Group recommends that the Environmental Navigator be enhanced to incorporate the EPA Region 2 GIS application discussed above, or similar application, to identify minority or low-income communities.
- (7) Consider All Relevant Information When Making Significance Determination - In the prior recommendations, the Advisory Group attempts to expand the universe of information utilized in making a significance determination. The purpose of expanding such information is to create a more detailed picture of the proposed action and the area and population surrounding the area. This detailed picture will better enable DEC staff to identify environmental impacts which may affect minority or low-income communities. The additional information suggested should be viewed as a starting point. The DEC should use its resources to gather any additional information which could assist it in making an accurate significance determination. Furthermore, DEC staff should consider, where practicable, visual information and information provided by community representatives and local officials to obtain and verify information related to the proposed action which may not be contained in the application material or DEC files. The DEC should consider all relevant information, including the additional information suggested by the Advisory Group and any other information when making a significance determination.

3. Assess Whether a Significant Adverse Environmental Impact has a Disproportionate Adverse environmental Impact on an Identified Minority or Low-income Community

- (1) Assessing Significant, Adverse and Disproportionate Environmental Impacts
 - (a) Significant, Adverse Impacts - Pursuant to 6 NYCRR 617.7 and using all relevant information gathered previously, the DEC should determine the significance of any Type I or Unlisted action. If, based upon all relevant information, the DEC determines that an action will not have a significant adverse environmental impact, no further environmental justice analysis is required. However, if the DEC determines that the action may include the potential for at least one significant adverse environmental impact, SEQRA requires an environmental impact statement be developed. The remaining recommendations should be incorporated into the review process.
 - (b) Disproportionate Impacts - Where the DEC determines that a proposed action may include the

potential for at least one significant adverse environmental impact, the Advisory Group recommends that the DEC determine whether any such impact on the environment has a disproportionate effect on any minority or low-income community. The Advisory Group recommends that this requirement be incorporated into regulation and that the DEC pursue amendment to 6 NYCRR 617.7 to include criteria that consider environmental justice. Specifically, add the following language at 6 NYCRR 617.7(c)(4): "If the lead agency determines that a proposed Type I or Unlisted action may have a significant adverse impact on the environment, pursuant to the criteria in this section, it should also determine whether any such impact on the environment has a disproportionate impact on any minority or low-income community."

(2) Where an Environmental Impact Statement is Required:

- (a) Require Scoping - Scoping is the process by which the issues to be addressed in the draft environmental impact statement are identified. While scoping is not required by 6 NYCRR Part 617, it is highly recommended for all draft EIS's. The Advisory Group recommends that the DEC require scoping for all proposed actions where DEC is the lead agency and the action receives a positive declaration. The Advisory Group further recommends that DEC train staff to recognize potential impacts on minority or low-income communities and require applicants to address those impacts, including cumulative impacts, in the environmental impact statements.
 - (i) Public Participation - Pursuant to 6 NYCRR 617.8, the scoping process must include an opportunity for public participation. Currently, the SEQR Cookbook: A Step-by-Step Discussion of the Basic SEQR Process (SEQR Cookbook), prepared by the DEC suggests that public participation be accomplished by a minimum 20-day period for public review of the draft scope. The Cookbook also suggests that public participation can be accomplished by meetings, exchanges of written material or other methods. The Advisory Group suggests that the DEC encourage the applicant to hold a public information meeting early in the public review period of the draft scope during which the DEC, applicant, and members of the public can discuss the project and the scoping process. DEC and the applicant should use the enhanced public participation tools discussed earlier in the report to identify all interested parties and invite them to review the draft scope. The SEQR Cookbook can be found at the DEC website at <http://www.dec.state.ny.us/website/dcs/seqr/cookbook1.PDF>
- (b) Preparation and Content of Environmental Impact Statement (EIS) - The components of an environmental impact statement are outlined in regulation at 6 NYCRR 617. These regulations require, among other things, that an EIS contain a description of the project; a description of the environmental setting; a statement and evaluation of the potential significant adverse environmental impacts; a description of mitigation measures; and a description and evaluation of reasonable alternatives. The Advisory Group recommends that the DEC revise guidance for preparing an EIS, including the SEQR Handbook, to include criteria for evaluating environmental impacts on minority or low-income communities and illustrative examples. Currently, the DEC SEQR staff are working on updates to the SEQR Handbook and invite public comment. Public comment may be made by visiting the DEC website at or by sending them to: NYSDEC, Division of Environmental Permits, Attn: Andrea Bergstrom, 625 Broadway, 4th Floor, Albany NY 12233-1750.

In an attempt to make permit application material easily accessible to the public, the Advisory Group recommends that the DEC require that, to the extent practicable, applicants submit all draft and final EIS in electronic, read only format. This will enable the DEC to make EISs readily available to the public by posting them on the DEC Website and responding to EIS FOIL requests via e-mail when appropriate. Special provision should be made for any documents which are incompatible with an electronic format, such as certain charts, maps or diagrams. The DEC should pursue amendment of the SEQR regulations to phase in a requirement that all EISs be submitted in electronic format.

- (c) Cumulative Impacts - The Advisory Group deliberated the issue of cumulative impacts with respect to environmental justice. However, in-depth deliberation of such a complex issue was not possible at this time given the group's sizable mandate to develop comprehensive recommendations for incorporating environmental justice issues into the DEC permit process. In its deliberation, the Advisory Group considered the 1998 Cumulative Impacts Working Group Report which attempted to resolve various legitimate competing interests in cumulative impact analysis in order to make it more workable and practical. Based upon this report and the other sources the Advisory Group makes the following suggestions.
 - (i) Encourage Comprehensive Planning in Local Government - Comprehensive planning and resource management techniques can be used by local municipal agencies to identify stressed resources including communities that are currently experiencing high levels of environmental burdens. The Advisory Group recommends that the DEC, through its role on the Quality Communities Task Force, explore the use of comprehensive planning to identify environmentally stressed communities and to assess ways to avoid or reduce the imposition of additional environmental stresses through land use planning and zoning.
 - (ii) Require Cumulative Impact Analyses - 6 NYCRR 617.9(b)(5)(iii)('a') requires that environmental impact statements include a statement and evaluation of cumulative impacts where applicable and significant. The Advisory Group recognizes that the DEC requires cumulative impact analyses, where applicable and significant, for any proposed action which may include the potential for at least one significant adverse environmental impact that may impact a minority or low-income community. The scope of a cumulative impact analysis should be discussed and further defined during the scoping process on a case by case basis.
- (d) Public Comment on the Environmental Impact Statement - The SEQR Regulations require that comments be received and considered by the lead agency for no less than 30 calendar days from the first filing and circulation of the notice of completion, or no less than 10 calendar days following a public hearing, whichever is later. Where necessary, additional extensions are provided for by the lead agency. The Advisory Group found that 30 days provides insufficient time for public review and comment on an EIS. Therefore, the Advisory Group recommends that the DEC require a minimum of 60 days public notice for all environmental impact statements when DEC is the lead agency and the action will occur in or is likely to significantly affect a minority or low-income community. The Advisory Group further recommends that the DEC pursue amendment of 6 NYCRR 617.9(a)(4)(iii) to require, pursuant to regulation, a minimum of 60 days public comment on the EIS from the first filing and circulation of the notice of completion.
- (e) Require a Public Hearing on Draft Environmental Impact Statement - After the lead agency

accepts the draft EIS, it must decide whether to hold a public hearing. A SEQR hearing on the draft EIS is not mandatory. However, the Advisory Group recommends that the DEC require a public hearing when DEC is the lead agency and the action will occur in a minority or low-income community. Notice of public hearing should be made using the Advisory Group recommendations for enhanced public notice and other means as appropriate to ensure that the notice reaches all interested parties.

- (3) Where a Potential Significant Adverse Environmental Impact Related to a Proposed Action exists, Determine Whether the Potential Significant Adverse Impact will have a Disproportionate Adverse Environmental Impact on an Identified Minority or Low-income Community
- (a) Definitions and Methodology - In order to assess whether a significant, adverse environmental impact has a disproportionate impact on a minority or low-income community, the Advisory Group defined several key terms for use in the context of DEC permitting. In addition to the concepts of “community of concern,” “minority community,” and “low-income community” discussed earlier in this report, these definitions include ‘Reference Community’ and ‘Disproportionate Impact.’ The Advisory Group recommends that the DEC incorporate these definitions and methodologies into its permit review process and into its guidance for conducting environmental justice reviews. Further, in conducting this disproportionate impact assessment, the applicant can employ the “community of concern” boundaries developed by the DEC in its preliminary screening process, or propose a modified “community of concern” based on further analysis of the potential environmental impacts of the project.
- (i) Reference Community - In the context of assessing disproportionate adverse environmental impacts on a minority or low-income community for a specific environmental permit, the definition or boundaries of the "reference community" should be based on the nature of the project, the area or population to be served by project, and the feasible location/siting options. For example, in the case of a permit application for a solid waste management facility that will serve and be located within a single municipality, the reference community should generally be the municipality being served. A facility that will serve regional or statewide market or need would use region or state as reference community.
- (ii) Disproportionate Adverse Environmental Impact - The assessment of the possible disproportionate impacts should address the categories of environmental impacts (e.g., air emissions) that would result from approval of the specific facility, source or project for which the permit application has been submitted. The determination of whether the net effect is disproportionate is based on comparison of the community of concern and the reference community. There is no generally accepted definition of "disproportionate," but there seems to be an acceptance that the difference must be significant on either a statistical or absolute basis. In the absence of clear methodology, disproportionate impacts will be determined on a case-by-case basis.
- (b) If Disparity Exists, Evaluate Mitigation Measures to Determine Whether they Mitigate Significant Adverse Environmental Impacts on an Identified Minority or Low-income Community
- (i) Require Mitigation of Disparate Environmental Impacts on Minority or Low-income Community - If a significant, adverse and disproportionate environmental impact on a

minority or low-income community is identified, and mitigation measures are required the mitigation measures should directly mitigate the environmental impacts on that community.

- (ii) If Mitigation Measures Will Not Alleviate Disparity, Determine Whether Sufficient Justification Exists to Proceed with Proposed Action - The determination of what constitutes acceptable justification will be based on the facts of the case, including the environmental impacts, public health or environmental benefits, legitimate and necessary economic development interests and whether a less discriminatory alternative exists.

- (4) Issuance of Final Decision - Prior to final decision making, each involved agency must make a written finding statement certifying that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable. The Advisory Group recommends that the DEC pursue amendment of SEQRA's existing decision-making provisions, found at 6 NYCRR Part 617.11 (d), to explicitly require consideration of available alternatives and practicable mitigation measures for all significant and adverse impacts on the environment, including those that have a disproportionate impact on minority or low-income communities. Specifically, amend the language at 617.11(d)(5) to read: "certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes SIGNIFICANT adverse environmental impacts, INCLUDING ANY SIGNIFICANT ADVERSE ENVIRONMENTAL IMPACTS THAT DISPROPORTIONATELY IMPACT MINORITY OR LOW INCOME COMMUNITIES, to the maximum extent practicable, and that SIGNIFICANT adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.

4. Traffic Generating Facilities

Cars, trucks, and buses, are all considered mobile sources of air pollution. Under the federal Clean Air Act of 1990, New York State is required to take a comprehensive approach to reducing air pollution from mobile sources. The Advisory Group recognizes that air pollution from mobile sources contributes greatly to air degradation in minority or low-income communities. While, the Advisory Group acknowledges that vehicle emission control is, for the most part, best handled by programs outside of the permit process, the following suggestion is offered with respect to parking lots and other traffic generating facilities.

Type I actions are those actions which are presumed to have a significant adverse environmental impact and may require an environmental impact statement. Currently, 6 NYCRR 617.4 provides that activities, other than construction of residential facilities, which meet or exceed the parking threshold of 1,000 vehicles, should be considered a Type I action. The Advisory Group concluded that parking lots with less than 1,000 vehicles may contribute significantly to air pollution, especially in densely populated areas which may have several such parking lots within a geographically small area. The Advisory Group recommends that this threshold be reduced. The DEC should review parking thresholds established by local governments, such as New York City, to identify appropriate thresholds and pursue amendment to 6 NYCRR 617.4.

5. Permit Renewals

Most of the recommendations in this report address environmental justice in permitting through new permit

applications or applications for major modifications. It is within these categories of permitting that the greatest opportunity to achieve the goals of environmental justice exists, such as outreach, disproportionate adverse environmental impacts assessments and analysis of alternatives.

The Advisory Group reviewed the DEC permit renewal procedures to determine whether environmental justice considerations could be implemented. The Advisory Group recommends the following approach. First, the Advisory Group reviewed the process for handling renewal applications and recognizes that pursuant to 6NYCRR 621.13(e) and 6NYCRR 621.14(a) respectively, the Department can treat a permit renewal application as a new application and can modify, suspend or revoke an existing permit. Specifically, to treat a permit renewal application as a new permit application the DEC must determine that: (1) the application involves a material change in existing permit conditions or in the scope of the permitted actions; (2) there is newly discovered material information or there has been a material change in environmental conditions, relevant technology or applicable law or regulations since the issuance of the existing permit; (3) an opportunity for public comment and/or hearing is required by law or is deemed necessary by the department; or, (4) the renewal application is not timely or sufficient. The grounds to modify, suspend or revoke a permit include: (1) materially false or inaccurate statements in the permit application or supporting papers; (2) failure by the permittee to comply with any terms or conditions of the permit; (3) exceeding the scope of the project as described in the permit application; (4) newly discovered material information or a material change in environmental conditions, relevant technology or applicable law or regulations since the issuance of the existing permit; or, (5) noncompliance with previously issued permit conditions, orders of the commissioner, any provisions of the Environmental Conservation Law or regulations of the department related to the permitted activity. By being aware of these regulatory provisions, the public can raise substantive and significant concerns regarding permits, in general. As discussed earlier in this report, the Advisory Group recommends public notification of all permit applications received by the DEC within the regulatory programs to be covered by this recommended environmental justice policy. This recommendation includes permit applications for renewals and minor modifications. Such noticing informs the public of these renewals and is a crucial step in addressing problematic facilities.

The Advisory Group's recommendation for dealing with facilities that have a record of significant noncompliance requires increased attention of DEC permitting and enforcement staff, and greater coordination between DEC staff and the concerned public. The Advisory Group recommends that the DEC strengthen the role of the regional enforcement coordinator in each DEC regional office. The regional enforcement coordinator should maintain open lines of communication with the public, the DEC regional director, the DEC Division of Environmental Enforcement, the DEC Division of Environmental Permits and the DEC Office of Environmental Justice with respect to enforcement information. The Advisory Group recommends greater interaction between the regional enforcement coordinators and the permit writers, particularly at the time of permit renewals. The regional enforcement coordinators should track permit renewal timing and provide permits staff with relevant enforcement information. The public should be made aware of the enforcement coordinators' role as a source of information on inspections, mitigation commitments, environmental benefit projects and general enforcement information.

Additional Recommendations for Strategic Environmental Justice Program Plan

1. Address Native American Environmental Justice Issues

The Advisory Group recognized that its recommended permitting policy does not fully address the concerns raised by the Indian Nations located within New York's boundaries. The Indian Nations cannot be treated as one racial or ethnic minority or socioeconomic group. Each individual nation is unique, with its own culture, language, land base, government and history. Their sovereignty is a well-established principle under United States and International law. The Indian Nations are governments and the relationship between them and the state should be as "government-to-government." Consultation between the state and Indian Nation governments should be a collaborative

process. The most effective way the state or an agency like the DEC can remedy issues that exist with the Indian Nations is to focus on and improve the government-to-government relationship with the nations.

Representatives of the Haudenosaunee Confederacy met with the Advisory Group on August 24, 2000 at the Onondaga Nation to discuss a wide range of environmental justice related issues in New York State. At the meeting, each nation listed its concerns related to environmental justice and recommendations for dealing with them. Most involved the failure of the Department or the state to properly contact and consult a nation on matters affecting the nation. The nations also expressed that they expected it to be understood that their geographic scope of concern extends beyond the boundaries of any reservation or territory they live on and includes the watersheds and air-sheds of these communities and their land claim areas.

In recognition of the sovereign, self-governing status of the many Native American communities in the state, the Advisory Group makes the following recommendations to the Department, as well as other agencies of the state, for interacting with the Indian Nations:

- (1) The Department, in cooperation with the Indian Nations, should develop an Indian policy statement to reflect the State's government-to-government relationship with the nations.
- (2) The Commissioner should meet yearly with Indian Nation leadership to address environmental justice issues.
- (3) The Department should establish a cultural awareness training program for its employees.
- (4) The Department should develop agency specific contact and consultation guidelines for interaction with the Indian Nations.
- (5) The DEC should support the State taking immediate steps to evaluate laws regarding the excavation, disinterment, removal, alteration, impairment, or disturbance of human remains, associated funerary objects or other cultural items at Native American burial sites and strengthen, if necessary.
- (6) The Department, the State Historic Preservation Office and the State Museum should establish protocols for State agencies to share archaeological information of importance, including maps and site files, with individuals and organizations designated by the Indian Nations.

2. Continue Environmental Justice Advisory Group to Advise the DEC on Policy Implementation

The Environmental Justice Advisory Group served as a decision-making body for this report. It had the responsibility to make decisions regarding various issues which came before it, including: the selection, characterization, and comparison of issues and solutions; the identification of priorities; and the selection of strategies, which are presented to the Commissioner of the DEC in this report.

The Advisory Group's role was crucial to the development of the DEC Environmental Justice Program. The members performed critical information gathering and deliberation which will enable the DEC Commissioner, who serves as the primary decision-maker for this project, to formulate environmental justice policy.

Recognizing that this report is only the first step toward developing environmental justice policy in New York and recognizing that environmental justice issues will evolve as research and new programs provide greater insight, the Advisory Group recommends that the DEC establish a permanent Environmental Justice Advisory Group to regularly

review and recommend enhancements to DEC environmental justice policy. The Advisory Group should also serve to monitor the implementation of the DEC environmental justice policy. The Advisory Group should consist of environmental justice advocates, regulated community representatives and state and local government officials. The DEC should, if possible, retain some of the existing Advisory Group members for historical perspective and consistency.

3. Assess Distribution of Green Environmental Benefits to All Residents of New York State, Including Minority or Low-income Communities

New York State has numerous grant and loan programs for environmental activities (such as the Clean Water/Clean Air Bond Act and the Environmental Protection Fund), and provides State funds for clean up of contaminated sites through the State Superfund Program. As a matter of policy, funds from these programs should be allocated as equitably as possible, taking into account statutory requirements and legislative intent. DEC should implement its programs to ensure that similar needs are similarly addressed.

DEC should post information on its website which includes the name of each recipient, by DEC region and County, that has received state environmental monies from the Clean Water/Clean Air Bond Act and the Environmental Protection Fund. The DEC should assess how such funds are being spent on a regional basis to consider whether revisions to funding allocations would be appropriate.

4. Assess DEC Enforcement Efforts with regard to Environmental Justice Issues

The Advisory Group recognizes that effective and equitable enforcement is an essential component in ensuring compliance with environmental laws and regulation. During the hearings and meetings held by the Advisory Group, minority and low-income representatives expressed significant concerns that inadequate attention and resources were being directed to environmental enforcement in their communities. The following recommendations are being submitted to address enforcement concerns.

- (1) The DEC should evaluate its environmental enforcement program to ensure that enforcement resources are equitably distributed to all communities in New York, including minority or low-income communities.
- (2) The DEC should review its Order on Consent Enforcement Policy and revise it, if necessary, to ensure that consent orders are limited to essential compliance issues. A consent order should not obviate the statutory or regulatory applicability of SEQRA to a permit action related to the construction or expansion of a facility.
- (3) The DEC should compile all final executed consent orders in a central repository, post these consent orders on the DEC website and maintain an on-line searchable database of consent orders. This would enable the public to monitor compliance in their community. This recommendation pertains to current and future consent orders and does not include previously executed consent orders. The purpose of this limitation pertains to work load and resource issues related to this recommendation and is not meant to prohibit access to previously executed consent orders. Previously executed orders remain accessible via FOIL.
- (4) The DEC should evaluate program inspection reports and standardize these reports throughout the DEC.
- (5) DEC Enforcement staff should provide facility compliance history to other DEC staff for use in environmental decision making. In particular, enforcement staff should provide such information to DEC Division of Environmental Permit staff for use in the permit review process.

5. Evaluate and Address Activities and Agencies exempt from SEQR Review

New York State law provides exemption from the SEQR for certain projects approved and/ or implemented by various agencies including the Metropolitan Transportation Authority, the New York Power Authority and the Long Island Power Authority. Projects governed by other state citing criteria, such as power plants, of a specified capacity, are also

exempt from SEQR review.

The Advisory Group recommends that the DEC ensure facilities exempted from SEQR review by statute or regulation, but requiring permits from DEC, are subject to an environmental justice analysis.

6. Review the DEC Organizational Structure and Staffing to Ensure Success of the Office of Environmental Justice and Enhance Consideration of Environmental Justice Issues.

Enhance the DEC Office of Environmental Justice to allow for knowledgeable expertise on a variety of issues and to assist regional implementation of environmental justice policy. The Office of Environmental Justice will be required to address issues relative to environmental justice policy implementation, as such additional staffing should include individuals with socioeconomic, grant development and a public participation expertise. Personnel with socioeconomic expertise will allow the DEC Office of Environmental Justice and the regional offices of the DEC to assess impacts consistent with SEQR and allow for a balance of social, economic and environmental factors in decision making.

DEC Office of Environmental Justice can facilitate open dialogues with community groups by offering the expertise of a Grant Specialist (GS). The grant specialist will have the opportunity to provide community groups with access to networks within and outside the DEC that offer environmental enhancements upon application. The GS will be able to assist the DEC in establishing an inventory of existing grant opportunities available, monitor the distribution of funds and provide assistance on trend analysis relative to grant offerings and allocations in minority and low-income communities.

The DEC Office of Environmental Justice goal to develop and implement environmental justice policy requires increased community interaction in DEC's decision making process. Use of a Public Participation Specialist will assist in the development of enhanced outreach opportunities. The focus of this expertise within DEC's Office of Environmental Justice will allow for alternative approaches to reaching communities disenfranchised, develop non-traditional lines of communication, assess and evaluate reactions to DEC actions and develop further discussion as well as provide assistance on issues specific to environmental justice.

It is also recommended that regionally the functions of the DEC Office of Environmental Justice be enhanced to allow for local assessment of environmental justice policy, disseminate information relative to DEC actions and environmental justice, and assist communities in obtaining information relative to issues of environmental justice. The regional contacts will provide assistance not only to the DEC Office of Environmental Justice and community groups, but also provide support to program areas, particularly the DEC Division of Environmental Permits in disseminating information relative to enforcement activities and facility compliance.

7. Translation Policy

In order to provide meaningful public participation opportunities and communicate effectively with members of the public who do not speak English fluently; the DEC should implement a translation policy. The policy should identify documents subject to translation; identify procedures for translation by the DEC and regulated entities during the permit review process and other relevant areas; and arrange for interpretation services for certain meetings or conferences.

8. Require State and Local Government Agencies to address Environmental Justice Issues

In 1994, former President Clinton issued Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, to focus federal attention on the environmental and human health conditions of minority and low-income populations with the goal of achieving environmental protection for all

communities. The Order directs federal agencies to identify and address disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations. On August 9, 2001, EPA Administrator Whitman reaffirmed EPA's commitment to the issue of environmental justice and its integration into all programs, policies, and activities, consistent with existing environmental laws and their implementing regulations.

The executive order is a federal directive that does not apply to the States. Although the Civil Rights Act of 1964 prohibits unlawful discrimination by recipients of federal funding, such as state and local agencies, there is no legal requirement that the state and local agencies address environmental justice issues. Some states, including California, have implemented legislation that gives broad directives to both their Office of Research and Planning and California EPA mandating coordination with other agencies to address environmental justice in a comprehensive manner. Moreover, the statute, issued in 1999, directs California EPA to integrate environmental justice into its mission. Subsequent legislation addresses the integration of the issue at the County and Municipal level. Governor Pataki and the DEC Commissioner have taken strong steps in New York to voluntarily address environmental justice issues at the DEC. However, environmental justice problems transcend traditional departmental lines and may require collaboration among agencies to ensure effective comprehensive solutions. Therefore, the Advisory Group recommends that the DEC encourage legislation or an executive order which directs the DEC and other relevant state and local agencies to address environmental justice and provide resources to fund these efforts. The Advisory Group further recommends that the recommendations in this report be made applicable to DEC and other relevant state and local agencies, as appropriate, through statutory or regulatory amendment.

APPENDIX 1

LIST OF ADVISORY GROUP MEMBERS, SUBSTITUTES AND ADVISORS

Members: (Member substitute)

- Louis A. Alexander, Esq., Bond, Schoeneck & King, LLP
- Greg Belcamino, Deputy Director, Mayor's Office of Environmental Coordination
(Jonathan Dickinson, Mayor's Office of Environmental Coordination)
- Sue Briggum, Director of Government Affairs, Waste Management, Inc.
- Monica Abreu Conley, Environmental Justice Coordinator, NYSDEC, Advisory Group Chair
- Edward Doherty, Commissioner, Environmental Services, City of Rochester
(Jerdine Johnson, Environmental Services, City of Rochester)
- Paul J. Elston, Chair, New York League of Conservation Voters
(Rodney Davis, New York League of Conservation Voters)
- Diana Hinchcliff, President, Alliance of Chemical Industries of New York State
- Aaron Mair, Chair, Arbor Hill Environmental Justice Corp.
(Peter Sheehan, Executive Director, W. Haywood Burns Environmental Education Center)
- Jack Nasca, Division of Environmental Permits, NYSDEC
(Michelle Moore, Environmental Analyst 3, NYSDEC Region 2)
- David Paget, Esq., Sive Paget & Reisel, PC
- Kenneth J. Pokalsky, Director, Environmental Programs, The New York State Business Council
(Diana Gianakos, The New York State Business Council)
- Louches J. H. Powell, Jr.
- Norma Ramos, Esq., Justicia Ambiental Latina
(Carlos Padilla, South Bronx Clean Air Coalition)
- James Ransom, Haudenosanne Environmental Task Force
- James Shaw, Environmental Manager, Alcoa
(Dennis Krause, Alcoa)
- Peggy Shepard, Executive Director, West Harlem Environmental Action
(Cecil Corbin-Mark, Program Director, West Harlem Environmental Action)
- Beverly McQueary Smith, Esq., Touro Law School
- Ronald Tramontano, Director, Center for Environmental Health, NYSDOH
(G. Anders Carlson, Director, Bureau of Environmental Exposure Investigation, NYSDOH)

Advisors:

- Terry Wesley, Environmental Justice Coordinator, USEPA Region 2
- Richard Yue, Environmental Engineer, Division of Environmental Planning and Protection, USEPA Reg. 2
- Victor Gallo, Esq., Chief, Bureau of Natural Resources and Waste, Division of Legal Affairs, NYSDEC
- Lisa Wilkinson, Esq., Chief, Bureau of Air and Energy, Division of Legal Affairs, NYSDEC
- Jeff Gregg, Environmental Analyst 2, Division of Permits, NYSDEC
- Michelle Moore, Environmental Analyst 3, NYSDEC Region 2

APPENDIX 2

ENVIRONMENTAL JUSTICE ADVISORY GROUP SUPPLEMENTAL LETTERS

**Arbor Hill Environmental Justice
Justicia Ambiental Latina
New York League of Conservation Voters
Touro Law School
West Harlem Environmental Action**

December 26, 2001

Monica L. Abreu Conley, Esq.
Environmental Justice Coordinator
Office of Environmental Justice, 14th Floor
New York State Department of
Environmental Conservation
625 Broadway
Albany, New York 12233-1500

Re: DEC Environmental Justice Policy

Dear Monica:

The report of the Environmental Justice Advisory Group contains a large number of constructive recommendations, and we do not disagree with any of them. However, we do not believe that it goes far enough to ensure that minority and low-income communities will be protected from environmental hazards and will be able to participate fully in the decisions that affect their environmental futures. Thus we file this letter listing those items that were not included but, we believe, should have been.

1. Jurisdictional Reach of Recommendations

The report is appropriately focused on actions of the DEC. However, we do not believe that it should stop there. The environmental review processes of other state agencies and of municipalities can also have important environmental justice implications, and those entities should also be covered.

Toward that end, DEC's SEQRA regulations, 6 NYCRR Part 617, should be amended to ensure that the procedures recommended in the report are followed whether or not DEC is the SEQRA lead agency. Moreover, to cover those instances where DEC is an involved agency but not necessarily the SEQRA lead agency, DEC should amend its Part 618 regulations (which govern DEC's internal SEQRA processes) to provide that where DEC is an involved agency and there are other involved agencies, DEC should not consent to any other

involved agency becoming the lead agency if a) a facility is within or may significantly affect a minority or low-income community and b) the facility has the potential for at least one significant adverse environmental impact, unless the other involved agency commits to requiring an EIS.

The policy should also make explicit what is implicit in our discussions: that the environmental justice policy would apply to applications administered under Articles VII (energy transmission lines) and X (electric generating plants) of the Public Service Law.

2. Cumulative Impacts

Cumulative impact analysis undertaken under SEQRA should include not only (as recommended in the report) the effects of the action itself and the effects of other actions, which taken together substantially increase or accelerate an effect on the same aspect of the environment, but also those that affect different aspects that taken together contribute to health or environmental stress. The other activities reflected in the study should include not only existing facilities and other proposed actions which have received a positive declaration and for which an EIS is being prepared and those actions similarly situated in the Public Service Law Article X Siting of Major Electric Generating Facilities process, but also actions where a preapplication meeting has been held, a permit application has been filed with any governmental agency, construction or operations have begun without a permit, or there are other indicia of substantial efforts to advance a proposal.

3. Technical Assistance Grants

It is not enough for DEC to pursue funding mechanisms for technical assistance grants (TAG grants). DEC should require that applicants provide the funds for TAG grants in amounts sufficient for community-based groups to hire qualified technical experts to meaningfully participate in the permitting process. One mechanism that has been shown to work is the requirement under Public Service Law Article X that applicants place funds in escrow to be used by approved community groups. The amount required should be keyed to the size and cost of the project. Eligibility criteria should give preference to community groups particularly including any well-established environmental justice groups based in the impacted low-income or minority community. TAGs should be available for projects that are the subject of EISs or their functional equivalent.

Information on the availability of TAG grants should be conspicuously posted on the DEC website and should be prominently displayed in the permit application materials disseminated to the community pursuant to the requirements set forth in the Policy. Mailing of information on the availability of such grants to interested parties should be required.

4. Availability of Public Information

The policy encourages DEC to encourage public document submission in electronic form so that DEC can readily place the information on its website. This should be made more specific. The policy should call upon DEC to require that the following documents, at a

minimum, be submitted in electronic form: all environmental assessment forms, draft and final environmental impact statements, and draft and final permit applications for major projects. DEC should post all of these documents on its website as soon as they are submitted, and not await a declaration that the application is complete. DEC should also post on its website documents that it prepares, including at a minimum: determinations of significance, scoping statements, draft and final permits, consent orders, and SEQRA findings statements. DEC should amend its regulations to require that, when other agencies are the SEQRA lead agency, such documents also be submitted to DEC in electronic form for posting on the DEC website. It may also be acceptable to have these documents posted on the web sites of other agencies and of applicants, with links from the DEC web site, provided there are assurances that these materials will remain on line.

One of DEC's major mechanisms for informing the public about applications and hearings is the Environmental Notice Bulletin (ENB). Few people read the ENB or systematically look at community bulletin boards. Copies of ENB notices should be sent to mailing lists of interested organizations and individuals.

To further ensure that affected communities are aware of public participation opportunities, the Office of Environmental Justice should be provided with the permit applications and public notices for all projects in low-income or minority communities.

Deadlines for public comment and public participation should be made contingent on agency compliance with the Freedom of Information Law. A community group seeking to participate in the permit process may be hampered by the inability to access governmental records in a timely manner.

Raw data, underlying assumptions, and methodologies utilized in the preparation of the EIS and the associated permit applications should be made available to the public. Under current practice, it is often possible for applicants to conceal this crucial information, and thus make it impossible for citizens to understand the basis for important projections in EISs (such as anticipated project impacts on air and water quality) and, if appropriate, to test or challenge those projections. Applicants should also not be able to hide behind the argument (utilized in the past by some) that the data, computer programs, computer access keys, or other information needed to assess the projections are proprietary with consulting firms that prepared the EIS; no EIS should be accepted if it is based on information that cannot be disclosed to the public.

5. Major vs. Minor Projects

The proposed policy affords certain procedural and substantive protections with respect to projects that are classified as "Major" under the Uniform Procedures Act, but not projects that are classified as "Minor". There are a few kinds of projects that raise particular environmental justice concerns, and that may nonetheless be "Minor". Two examples are bus garages and some waste transfer stations. We recommend that a list of such types of projects be promulgated (including at a minimum bus garages and waste transfer stations), and that any

projects on that list be treated as “Major” projects if they are proposed for environmental justice communities.

6. Permit renewals

A permit holder’s compliance and enforcement record should be made part of the application for renewal. Renewals should be denied if this record shows sufficiently serious problems. Outstanding compliance problems that do not rise to the level of warranting denial should be a basis for delaying renewals until they have been resolved.

7. Environmental Health Mapping

For all proposed actions that will be the subject of an EIS, except for those that very clearly cannot have a health impact on a specified geographic area, the state and county or city health departments should be actively involved in the SEQRA process, and should assist in the preparation of community health profiles for the affected area(s), to serve as a baseline for the study of the proposed action’s possible impacts. These profiles should utilize any existing data generated by cancer and asthma incidence mapping and other studies.

It is imperative that the Department of Health, in cooperation with DEC, continue the process of gathering data in environmental justice areas regarding health outcomes, pollution loading, socioeconomic indicators, and other related data. These data should be used to draw correlations between these health, environmental and economic factors to detect trends among race/demographics/income, the physical environment, and the health of the environmental justice communities, and to relate those to permitted or proposed facilities within those communities. It is only through such analysis that meaningful statewide definitions of impacted environmental justice communities can be undertaken.

8. SEQRA Procedures

The Part 617 regulations should be amended to make a scoping process that is open to the public mandatory for all environmental impact statements; NEPA contains similar provisions.

An additional Type I threshold should be added for facilities that generate more than a certain number of vehicular trips per day.

9. Consent Orders

Many enforcement actions culminate in consent orders. In keeping with federal practice, all non-emergency consent orders should be submitted to a public notice and comment procedure before execution. Additionally, copies of current and proposed consent orders should be mailed by DEC to community groups situated in any community which is or may be impacted by the activities required or allowed under the consent order.

10. New SEQRA Guidance

The SEQR Handbook should be revised to clarify, expand and update the guidelines for consideration of:

- cumulative impacts (providing approved methodologies designed to ensure that SEQRA review and its functional equivalent considers the cumulative impact of a proposed project with other existing and proposed projects, whether or not the other projects are from the same sponsor or otherwise have common origins with the subject project)
- employment effects (explaining how EISs should analyze the direct and indirect effect of projects on employment, and the likely locations and skill levels involved in those employment impacts)
- secondary displacement (providing methodologies for examining whether and how a proposed project could affect neighborhood economic and social conditions in a way that could displace existing residences, businesses and community facilities, and what is likely to replace them)
- the need for facilities (requiring a sufficient level of detail to allow the EIS reader to understand the economic and social need for the facility, and where appropriate any methods that might be employed to reduce or eliminate that need, such as energy conservation, recycling, waste reduction, mass transit alternatives to automobiles, and the like)
- whether the facility could lead to the closure of other facilities (including the environmental and economic benefits and costs of such closure)

11. Hiring

DEC's sensitivity to the special concerns of environmental justice communities will be enhanced if the ethnic diversity of the decision-makers reflects that of the state as a whole. DEC should continue its efforts to recruit, hire, retain and promote qualified minority individuals for responsible positions at all levels of the agency, both in the Albany headquarters and in the regional offices. Special recruitment efforts should be undertaken at colleges, universities, and technical and professional schools from which DEC draws personnel and which have significant numbers of minority students. Organizations of minority professionals should also be consulted in this process. Additionally, we strongly recommend that DEC pursue hiring strategies that are designed to increase the representation of people of color at all levels, including executive.

12. Governor's Executive Order

Governor Pataki should issue a New York State Executive Order on Environmental Justice with a goal of establishing a comprehensive environmental justice policy. It should be binding on all state agencies, and also (to the extent legally permissible) should be transmitted as policy guidance to all gubernatorial appointees to non-state agencies. The guidance should have these provisions:

1. A declaration of state policy that minority and low-income individuals and communities should not be disproportionately exposed to environmental hazards.
2. A declaration of state policy that minority and low-income individuals and communities should be able to participate fully in the decisions that affect the quality of their environment.
3. A declaration that all state agencies, when considering the environmental impacts of actions in minority or low-income communities, should fully consider cumulative impacts and sensitive subpopulations.
4. A declaration that all state programs of financial assistance in the environmental area should strive to equitably distribute funds so that minority and low-income communities get a fair share.
5. A requirement that all pertinent state agencies designate an environmental justice coordinator within six months of issuance of the Executive Order, and prepare an action plan to implement this policy within twelve months of issuance of the Executive Order. These coordinators should work together as an Interagency Environmental Justice Working Group to help formulate uniform guidance, serve as a clearinghouse for information, coordinate data collection, issue annual reports on each state agency's progress in implementing the Executive Order, and undertake other appropriate functions.
6. A mandate for agencies to provide workshops and written materials in environmental justice and in the modes by which environmental hazards may affect minority and low-income communities. This training shall be required for appropriate personnel in state agencies with environmental responsibilities. Each such agency shall develop an environmental justice training plan which would define the staff for which the training would be required.

13. Enforcement Record

The applicant's enforcement record should be thoroughly described in all applications for new permits, permit renewals and minor permit modifications. The applicant should be required to certify as to the accuracy and completeness of the enforcement record it is submitting, and DEC should verify those portions that apply to enforcement actions within its jurisdiction. Applications for permit renewals and minor permit modifications should also include a certification that all mitigation commitments contained in the permits and

accompanying SEQRA findings statements have been fulfilled; permits should not be renewed or modified unless such mitigation commitments have been fulfilled or, after public notice and comment, waived or modified.

DEC's web site should post the dates of each inspection that was performed on the premises of each regulated facility in the five years before this system is instituted, and new inspections should be posted as they occur. By use of the geographic locator, citizens will be able to track the diligence with which DEC has ensured the compliance status of each facility in their area. Utilizing this geographic locator and the compilation of inspection reports in the document repositories, DEC should undertake a study to compare the levels of enforcement activity in EJ areas with those in non-EJ areas. This would involve devising methods to quantify enforcement activities and results (e.g., number of inspections conducted, violations issued, and penalties assessed) to validly compare indicators for comparable facilities located in different geographic areas.

14. Grandfathered Facilities

DEC should undertake a review of every major facility that was exempted from SEQR review because of its "grandfather" status or because it was built or substantially modified under a consent order. This review should identify any facilities that may pose a threat to public health or the environment. Procedures and schedules should be established to shut down any facilities so identified, or to upgrade their equipment or practices so as to eliminate or abate those threats. This may involve establishing amortization periods (such as those often used in taking down highway billboards) to allow facilities to be shut down without subjecting the state to successful takings claims. DEC should periodically report back to the Environmental Justice Advisory Group as to the progress of this work.

15. Plan Implementation

A regional environmental justice advisory committee should be established within each DEC region to assist the DEC regional director and staff, as well as the regulated community and the public, in addressing environmental justice concerns, and to monitor the implementation of this Policy on a regional basis.

DEC's Office of Environmental Justice should annually prepare a report assessing the progress being made in implementing the Policy and in achieving the goal of ensuring fair and equal treatment regardless of race, color, national origin or economic status. This report should be posted on the DEC website and transmitted to the Governor's office, the State Legislature, members of the Environmental Justice Advisory Group, and other community-based environmental and environmental justice groups.

16. Mitigation Commitment Database

A data base should be compiled, and made available on-line, of all mitigation commitments embodied in the permits and/or SEQRA findings for facilities with DEC permits. A system should be established to monitor facility compliance with these commitments.

17. Citizen Suits

Most of the federal environmental statutes have citizen suit provisions that allow citizens to go to court to enforce the law. Such provisions should be added to the Environmental Conservation Law, so that residents of communities affected by environmental hazards will have legal recourse.¹

Sincerely,

Paul J. Elston
Chairman
New York League of Conservation Voters

Aaron Mair
President
Arbor Hill Environmental Justice Corp.

Norma Ramos
Justicia Ambiental Latina

Peggy Shepard
Executive Director
West Harlem Environmental Action

Beverly McQueary Smith
Professor of Law
Touro College: Jacob D. Fuchsberg Law Center

[All signatures on file]

¹ Paul Elston does not join in this recommendation.

December 27, 2001

Monica Abreu Conley, Esq.
Environmental Justice Coordinator
Office of Environmental Justice
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233-1500

Re: *Supplemental Submission to the Report of the Environmental Justice Advisory Group to the New York State Department of Environmental Conservation ("DEC")*

Dear Ms. Conley:

I have appreciated the opportunity to participate as a member of the DEC Environmental Justice Advisory Group (the "Advisory Group") in its review of environmental justice issues. I would also like to compliment the DEC on undertaking this initiative and the dedicated efforts of its personnel during this process.

The Advisory Group's report, which will be submitted to DEC Commissioner Erin M. Crotty, sets forth a number of recommendations that should help advance the consideration of environmental justice in the DEC's permitting process. As you know, I have joined in the supplemental comments of Sue Briggum, Diana M. Hinchcliff, Kenneth J. Pokalsky, and James Shaw, which address various issues relative to the report.

I am submitting these additional comments as I disagree with the report's recommendation to modify two existing regulatory time periods that apply to the environmental review of actions pursuant to the State Environmental Quality Review Act ("SEQRA").

Time Period Recommendations

The Advisory Group report recognizes that SEQRA offers an effective framework for considering environmental justice concerns. The use of SEQRA to address environmental justice issues has also been recognized in decisions of the DEC's Office of Hearings and Mediation Services. See, e.g., In re American Marine Rail, LLC (ALJ Rulings on Issues and Party Status and Environmental Significance), August 25, 2000; In re Town of Brookhaven (ALJ Issues Rulings), April 26, 1995.

The Advisory Group report recommends two regulatory changes that would affect time periods in the environmental review of an action. Specifically, the Advisory Group proposes to: (a) extend the

public comment period on a draft environmental impact statement ("EIS"); and (b) delay the period during which the DEC can make a SEQRA determination of significance.

I do not support these two recommendations at this time. I believe that there is merit to evaluating the timeframes that apply to the environmental review of an action, but that this should be through a comprehensive review of all the SEQRA time periods and their interrelationship with the timeframes that apply to the DEC's consideration of environmental permit applications (Uniform Procedures, 6 NYCRR Part 621). Instituting the two recommended changes, absent such a review, may not result in improvements in the process and may lead to unintended procedural complications.

My comments on each of the two recommendations follow.¹

(a) Comment Period on a Draft Environmental Impact Statement

The Advisory Group addressed the time period during which the public may review and comment on a draft EIS and stated, in part:

“The Advisory Group found that 30 days provides insufficient time for public review and comment on an EIS. Therefore, the Advisory Group recommends that the DEC require a minimum of 60 days public notice for all environmental impact statements when DEC is the lead agency and the action will occur in or is likely to significantly affect a minority or low-income community. The Advisory Group further recommends that the DEC pursue amendment of 6 NYCRR 617.9(a)(4)(iii) to require, pursuant to regulation, a minimum of 60 days public comment on the EIS from the first filing and circulation of the notice of completion.”

The current SEQRA regulations require that comments on a draft EIS, where a public hearing has been scheduled, will be received and considered by the lead agency “for no less than 30 calendar days from the first filing and circulation of the notice of completion, or no less than 10 calendar days following a public hearing at which the environmental impacts of the proposed action are considered, whichever is later”. 6 NYCRR § 617.9(a)(4)(iii). Where there is no public hearing scheduled, the minimum public comment period on a draft EIS is 30 days – the comment period begins with the first filing and circulation of the notice of completion. *Id.* § 617.9(a)(3). However, the lead agency conducting the SEQRA review has the authority to extend the time period as appropriate.

Whether the current minimum of 30 days provides sufficient time for the public to comment on a draft EIS depends upon the type of project. Particularly here, where the intent is to amend the SEQRA regulations that apply to permits, funding and approvals of other State and local agencies as well as the DEC, a wide range of projects would be affected.

¹ The views that I have expressed in the supplemental views are mine alone and have not been endorsed by, nor do they necessarily reflect, the position of the law firm or any other organization of which I am a member.

In fact, during the last major revision of the SEQRA regulations in 1995, the DEC specifically addressed this issue. Among the public comments listed in the 1995 Final Generic Environmental Impact Statement on the proposed amendments to the SEQRA regulations was the following: “The minimum time period for public review of a draft EIS should be 60 days.” The DEC responded as follows – “The Department feels that the current 30 day minimum public comment period is adequate. Lead agencies have the discretion to provide additional time when circumstances warrant.”

I believe that the current regulations, which give a lead agency the authority to exercise its judgment on appropriate extensions to the public comment period, have not been shown to be inadequate.

(b) Timeframe for a Significance Determination

The Advisory Group report is recommending that the DEC be precluded from issuing a determination of significance for a certain period of time. Specifically, the report states:

"[T]he DEC [should] pursue amendment to 6 NYCRR 621 to require a minimum time frame, from the date of initial public notice, for information gathering prior to making a significance determination. . . . The minimum time frame should be determined by the DEC, but should be no less than 30 days and no more than 45 days. During this time frame the DEC should invite the public to submit information relevant to the specific permit application."

Currently, the SEQRA regulations that govern the determination of significance of an action, and which apply to the DEC, provide that:

-- where more than one agency is involved in a project and the project is subject to coordinated review, a lead agency must determine the significance of an action within 20 calendar days of its establishment as lead agency or within 20 calendar days of its receipt of all information it may reasonably need to make the determination of significance, whichever occurs later. 6 NYCRR § 617.6(b)(3)(ii).

-- where a single agency is involved or there is uncoordinated review, an agency must determine the significance of the action within 20 calendar days of its receipt of an application, an environmental assessment form, or any additional information reasonably necessary to make that determination, whichever is later. *Id.* § 617.6(b)(1)(ii). If an agency is directly undertaking the action, it must determine the significance of the action as early as possible in the design or formulation of the action. *Id.* § 617.6(b)(1)(i).

At this time I do not support restricting the DEC’s authority to issue a determination of significance. Establishing a "waiting period" with respect to the issuance of a determination of significance is unnecessary where the applicant is committed to preparing an EIS or where the DEC has indicated to the applicant that it will be issuing a positive declaration and an EIS will be required. Also, it is unclear how this proposed "waiting period" would apply to those projects

or actions where another agency is serving as lead agency and is responsible for issuing the determination of significance, but the action includes DEC permit applications. Moreover, the existing regulations allow additional time for a determination of significance where further information is needed.

The Advisory Group recommendation also talks of inviting the public to submit information relevant to the permit application during this “waiting period”. With respect to DEC permits, the regulations already provide an opportunity for the public to comment on an application for a major project. See 6 NYCRR § 621.6. Moreover, in the event that the DEC determines that a negative declaration it has issued is not appropriate, the regulations provide that the negative declaration can be amended or rescinded See id. § 617.7(e) & (f), respectively.

There are further opportunities for the public to challenge a negative declaration, if it believes that the DEC has improperly issued a negative declaration. For those permit applications that are subject to a DEC administrative hearing, challenges can be raised at the issues conference (as was done in the American Marine Rail proceeding). Litigation also provides an opportunity to challenge an agency’s issuance of a negative declaration.

Conclusion

I would respectfully submit that the recommendations to change the time period with respect to the public comment period on a draft EIS and to impose a delay period on the DEC’s determination of significance, not be implemented at this time.

In contrast to making piecemeal changes, I believe that it would be preferable to task designated DEC personnel from the Division of Environmental Permits, the Office of Environmental Justice, and the DEC regional offices, together with representatives of the DEC's Office of Hearings and Mediation Services, to undertake a comprehensive review of all the relevant SEQRA and DEC permit application (Uniform Procedures) timeframes. Such a review should consider the views of environmental justice advocates, applicants, the general public, and local and state agencies, among others, in considering the extent to which any changes to the SEQRA and the DEC’s Uniform Procedures timeframes are merited.

Thank you for this opportunity to submit additional comments.

Very truly yours,

Louis A. Alexander

December 26, 2001

Ms. Monica Abreu Conley
Environmental Justice Coordinator
New York State Department of
Environmental Conservation
625 Broadway
Albany, New York 12233

Dear Ms. Conley:

These comments are being submitted jointly by the four business representatives on the Department's Environmental Justice Advisory Committee (EJAC).

We appreciated the opportunity to serve on this panel, and to help develop recommendations for addressing environmental justice concerns through the Department's permit review process.

Importantly, we all support the basic approach set forth in the EJAC's final report that has been prepared for submission to DEC Commissioner Erin Crotty. We believe it represents a balanced approach to assessing environmental justice issues, and reflects the interests and concerns raised by environmental justice advocates as well as those concerns raised by the regulated community.

We also believe that if these recommendations are implemented they will represent the most comprehensive state-level environmental justice program yet adopted in the U.S.

Even so, we feel compelled to raise several significant concerns regarding the final report. It is important to note that, while the report is intended to reflect the

recommendations of the EJAC, it was drafted by DEC staff. While individual members of the EJAC had the opportunity to comment on several drafts of the report, we were not able to resolve every issue of concern to us. Moreover, the division of the EJAC members into small discussion groups during the latter stages of its deliberations fragmented our dialogue and made it difficult to discern where a meaningful consensus actually was achieved.

Our concerns fall into several categories:

- In several instances, the report fails to accurately reflect the agreements reached during the EJAC process
- In certain instances, we believe the report text does not adequately represent or explain key issues and recommendations. It also fails to discuss concerns raised by EJAC members with respect to issues addressed in the report.
- The final report does not include a summary of the core recommendations that will constitute the state's environmental justice permitting policy. In our view, the report will not convey a clear understanding of the analytic approach proposed by the EJAC.
- We also were compelled to address several issues that were not adequately addressed during the EJAC effort.

While we generally support the consensus recommendations included in the final EJAC report, the following provides a discussion of our most significant concerns regarding the final text.

1. Discussion of Business Concerns – The recommendations in this report reflect input received from the various constituencies that served on the EJAC, including minority communities, environmental groups, municipalities and business. Therefore, we believed it was important that the final report also include a brief discussion of the issues and concerns raised by the business community during the EJAC process.

From the outset of our participation on the EJAC, we have supported many of the policy goals that have been set forth in environmental justice policies adopted by other jurisdictions, and in the discussions of our Advisory Group meetings. In May 2000, at one of the initial EJAC meetings, we made an extensive presentation on the business community's perspective on

environmental justice issues. In summary, we emphasized that the development and implementation of any regulatory program must consider the larger context of business activity and the state's economy. The business sector provides employment opportunities, financial support for community activities, and other local benefits. To provide these economic benefits, the business sector needs timely and reliable action on permit applications and confidence that investments will be viable for the projected life of the project.

We pointed out that economic growth is an integral tool for achieving environmental justice. The jobs that businesses provide are critical to our state and its citizens, and are essential to providing prosperity for our state's minority and low-income communities.

We also discussed our significant concerns regarding the potential impact of an EJ program on existing facilities, permit renewals and the overall impact on business opportunities. Because of these concerns, we believe that any environmental justice guidance implemented by the DEC must be well-defined, workable and not create undue delays in the permitting process or negatively impact the ability of New York business to be competitive. For example, it must be ensured that environmental justice-related requirements will not adversely impact brownfield development which is critical to reinvigorating the urban areas of our State, will not adversely impact the status of urban business facilities that are in full compliance and offer employment opportunities to urban residents, and will not adversely impact the ability to attract new and expanded business development throughout the State.

2. Technical Assistance Grants (TAGs) – During the EJAC's discussions of technical assistance grants, we made clear that our support for a TAG program was contingent on an agreement that any such grants be funded by the state, rather than the permit applicant. We felt that this was a consensus item, and that the final draft report should reflect this important qualification. Instead, we are disappointed that the final draft provides an unqualified endorsement of such grants, with the recommendation that the DEC should pursue funding for this grant program. The business members of the EJAC only support the creation of a technical assistance grants' program if it is state funded, rather than an additional cost imposed on the applicant.

In addition, we recognize that there was little discussion and no consensus on the specific criteria and/or procedures required to implement a TAG program. Therefore, we would like to offer several comments on that point. In terms of eligibility criteria, we recommend that grants be made available to groups that are composed of citizens that are directly affected by a proposed project,

including citizen groups and municipalities. Further, we do not support giving *preference* to community groups (nor do we believe this recommendation was a consensus item.) The determination of what group (community group, municipality, etc.) should receive funds should depend upon the matter at issue, and all eligible groups should have *equal* potential access to grants.

3. Need for Legislative Changes – For several reasons, we were very circumspect with regard to recommendations involving legislative actions. First, the EJAC was asked by the DEC Commissioner to recommend policies that fell within the DEC’s current jurisdiction. Second, it is our experience that program reforms happen more quickly and efficiently when they can be implemented under existing statutory authority.

During the EJAC’s deliberations, we tried to specify which recommendations could be implemented under existing statutory authority, and which may need legislative action. In most instances, these assessments are accurately reflected in the final report.

The EJAC determined that most of its recommendations can be implemented without statutory changes. The two exceptions requiring legislative action are: the creation and funding of a technical assistance grants program; and the extension of SEQR-based review requirements to certain agencies (i.e., MTA, NYPA and LIPA) that are currently exempt from the State Environmental Quality Review Act (SEQRA). In all other cases, we believe that the recommendations included in the final report are within the DEC’s current legislative authority.

Unfortunately, the final EJAC report contains two references to statutory changes that we believe are inconsistent with the EJAC’s recommendations. These provisions suggest a broader legislative role in implementing our proposals than was agreed to by the EJAC . The EJAC did not endorse broad environmental justice legislation. Nor was there any demonstration of the need for such broad legislation during the EJAC process.

First, in the section entitled “Recommended Policy Statement,” a last-minute change to the text states that environmental justice should be integrated into DEC regulations and legislative proposals. We strongly object to this new language, as it is inconsistent with the EJAC’s consensus position. If the EJAC’s recommendations regarding EJ policy and SEQR regulatory amendments are adopted, it is unclear why there is a need for any additional measures to integrate EJ into DEC regulation or legislative proposals. To us, this new language suggests an approach whereby each new DEC program or proposal would contain additional, specific EJ

requirements. Such an outcome is clearly at odds with the consensus position reached by the EJAC.

Second, the final paragraph of the report says that the EJAC recommended that the DEC “encourage legislation or an executive order which directs the DEC and other . . . state and local agencies to address environmental justice . . .” It goes on to say that “The Advisory Group further recommends that the recommendations in this report be made applicable to DEC and other . . . state and local agencies, as appropriate, through statutory or regulatory amendment.”

Again, considering the EJAC’s consensus regarding amendments to the DEC’s SEQR regulation, and statutory changes to require that specific entities currently exempted from SEQR be required to conduct EJ assessments, the need for additional legislative changes is unclear.

4. Focus on Core Recommendations – The original charge to the EJAC was to make recommendations on how environmental justice concerns can be addressed through the DEC’s permitting programs. We believe that greater emphasis should have been placed on the EJAC’s core recommendations to address environmental justice concerns as part of the state’s permit review process. To do so, the report should include a summary section that highlights the EJAC’s most significant recommendations. From our perspective, these include:

- Public notice at the time of the receipt of a permit application by the DEC, rather than at the time of DEC’s completeness determination.
- Enhanced efforts to distribute information on proposed projects in minority and low income communities. This recognized the limited accessibility of existing notice requirements, which depend on the Environmental Notice Bulletin and newspaper publications. We agreed that the DEC should work with minority and low income communities to identify more effective methods to inform interested members of the public about proposed projects.
- Our proposal that the DEC’s SEQRA regulations be amended to require an assessment of whether any of the significant, adverse environmental impacts identified as part of an environmental impact statement (EIS) may have a disproportionate impact on minority and low income communities.

- Our proposal that DEC's SEQRA regulations be amended to require that governmental decisions attempt to balance a wide range of environmental, economic and social goals, including the goal of avoiding or mitigating any disproportionate environmental impacts identified as part of the EIS.

5. Effective Date of EJ Requirements – The EJAC never discussed the effective date of new procedural requirements included in our proposed EJ policy. However, this issue is at least partially addressed by existing statute. The Environmental Conservation Law (Section 3-0301.2(a)) already provides that new environmental standards and criteria cannot take effect until at least 30 days after their filing with the Secretary of State for publication in the *State Register*. The ECL (Section 3-0301.2(z)) also provides that new or amended DEC guidance documents cannot take effect until at least 30 days after their publication in the *Environmental Notice Bulletin*.

These legislative requirements reflect the concerns raised by the regulated community regarding the need to be made aware of new regulatory obligations in advance so it can plan accordingly.

Considering existing statutory provisions, the current economic climate, and other factors, we recommend that any new EJ requirement that apply to permit applications filed with the DEC become effective only after a minimum 30 day public notice period, and only apply to applications received by the DEC after that effective date. Importantly, we are strongly opposed to the retroactive application of new standards to permit applications already received by the DEC.

6. Program Applicability – Early in our deliberations, the DEC proposed for our evaluation a list of permit programs to which our recommended EJ policies would apply. Our discussions were framed by that list, and we often considered implementation issues based on this list of specific permit programs.

At the end of the final EJAC meeting, there was a proposal to extend the applicability of our proposed EJ policy to other permit programs. While there was some discussion on this point, no consensus was reached by the EJAC. Even so, the draft final report included these additional permit programs.

Our understanding was that the EJ permit policy would focus initially on the major environmental quality/pollution control permit programs (e.g., those regulating air emissions, wastewater discharges, and solid and hazardous waste

management facilities). The late additions mostly involve natural resource-related permits, including: coastal erosion management; freshwater wetlands; tidal wetlands; transportation of water by vessel; use and protection of waters; waste transporter permits; water quality certifications; water supply; and wild, scenic and recreational rivers.

These last minute additions to the list of applicable programs are different in kind than those discussed earlier by the EJAC, and posed many implementation issues that we had no chance to consider. For example, we question how our proposed EJ policy would apply to waste transporter permits, since such permits do not regulate the location of the regulated activity. Specifically, it is unclear how a disproportionate impact assessment based on a geographic area of concern would be applied to a transporter permit. Would the requirements apply based on the location of the owner's business, or its transit route? Would it matter if the truck spent some of its time in a community of concern? These issues were never discussed by the EJAC. Without the opportunity to discuss the appropriateness of extending our proposed EJ policy to additional permit programs, we cannot agree to their inclusion in the final report.

7. Protection of Trade Secrets – While we support the use of the DEC web site and other electronic means for disseminating publicly available information, the growing use of these tools greatly increases our concern about the protection of confidential information that is submitted as part of permit applications or other mandated material. The report should reference existing DEC provisions (6 NYCRR Part 616.7) regarding the protection of trade secrets and proprietary information, and include the recommendation that the DEC emphasize the protection of trade secrets as part of its efforts to enhance public access to DEC information.

In addition, we believe that the DEC must not only ensure that trade secrets are kept confidential, but it also needs to balance the community's need for information with the need to ensure public safety. Recent events remind us that every aspect of each community's health and safety must be evaluated to avoid unanticipated adverse consequences – and those adverse consequences are more unusual and dangerous than had ever been imagined.

8. Preconstruction Review – The EJAC discussed inclusion of Part 231-2, the state's new source review process, on the list of permit programs subject to our recommended EJ policy. However, Part 231 does not appear in the final report. We believe that its omission from the final report is intentional, based on the fact that the substantive provisions of Part 231-2 are incorporated into

a Part 201 permit, and Part 201 is already covered by our proposed EJ policy.

Likewise, the EJAC discussed the applicability of our EJ recommendations to other preconstruction review requirements (e.g., the PSD program) that are addressed in Part 201 permits, but are not delegated to DEC nor specifically reflected in DEC regulations. While PSD may be covered to the extent that emission control requirements will be included in Part 201 permits, the issue is complicated given EPA's directive requiring an EJ assessment as part of the PSD review process. To help address this issue, we recommend that the DEC urge the EPA to recognize formal state-level EJ assessments as satisfying federal EJ requirements.

9. Permit Renewals – The business members of the EJAC have significant concerns regarding the section on permit renewals included in the final report. It was always our intent to exclude from the EJ permit policy any permit renewals that are not otherwise considered to be new applications or major modifications. The issue of renewals is of *crucial concern* to us, and we continue to support the initial EJAC agreement to (i) focus its EJ recommendations on new applications and major modifications, and (ii) generally exempt renewals from EJ assessments.

We believe the exemption of permit renewals is fully consistent with the concept of environmental justice, which is based on the premise that the issuance of permits and the siting of facilities are at least partially influenced by the demographics of the affected community. To extend this rationale to permit renewals, the assessment would need to look at the demographics of the facility at the time the permit was originally issued, not the current demographics. To do otherwise would be to subject facilities to additional regulatory requirements based on the changing demographics of the community in which it has already located.

10. Role of Public Participation – In a number of instances, the report says that the EJAC recommendations are intended to promote the “meaningful participation in environmental decision-making.” We believe that this and similar phrases are misleading, and in our comments on the draft report, we recommended amendments that referred instead to “meaningful and timely input into environmental decision-making.” We feel that the report suggests a more active role in making regulatory decisions by members of the EJ community than was the intent of the EJAC. With limited exceptions (e.g., administrative adjudication or judicial review), decisions on permit applications are made by the DEC, and the input of EJ communities and other

members of the interested public is provided through public comment periods and other procedural requirements.

11. Impact of “Preliminary Screening” – The report describes a process for conducting a “preliminary screening” of permit applications as part of the EJ assessment process. Unfortunately, this section of the report neglects to say why this screening is done, and how its findings affect the subsequent EJ assessment process.

The preliminary screening will be used to determine whether a full environmental assessment form (EAF) should be used for an unlisted project, and whether an unlisted project will be subject to coordinated review. While these provisions are mentioned later in the report, we think it would be useful to mention them at this point in the report.

We also believe that the report should discuss the impact of the DEC’s preliminary screening on the requirement to consider disproportionate impacts as part of our proposed SEQR amendments. If the DEC’s screening determines that the project will not affect a minority or low income community, it obviates the need to do a disproportionate impact assessment under SEQR, unless new information has been developed that significantly changes the DEC’s initial definition of the affected community.

12. Demographic Data in EAF – The report includes a recommendation that demographic information be part of the environmental assessment form. We disagree with this recommendation on its merits, and believe that this recommendation is inconsistent with the EJAC consensus. At this point in the environmental assessment process, the preliminary screening has already determined whether the community of concern is either a minority or low income community. It is unclear why additional demographic data would be collected as part of the EAF process, which is intended to assess the potential environmental impacts of proposed projects.

13. Comprehensive Planning – One of the significant recommendations of the EJAC Advisory Group relates to comprehensive planning. As stated in the report, “[t]he Advisory Group recommends that the DEC, through its role on the Quality Communities Task Force, explore the use of comprehensive planning to identify environmentally stressed communities and to assess ways to avoid or reduce the imposition of additional environmental stresses through land use planning and zoning.”

In the public hearings conducted by the Advisory Group in Syracuse, Buffalo, Albany and New York City, it was clear to us that many environmental justice concerns relate to local zoning. As neighborhoods change over time, there are often circumstances where facilities which are fully compliant with local zoning laws and have been at a location for years now confront new demands due to changing demographics or residential development. The rights and concerns of such facilities must not be ignored in the process.

The public hearings conducted by the EJAC underscored how many of the environmental justice concerns related to municipal and other public-related projects – for example, upgrading municipal infrastructure (such as sewer treatment plants), solid waste transfer stations that are sited and operated to address public needs in solid waste disposal, highway and bridge development and construction, and municipal transportation networks (such as the location of garages for municipal bus systems).

In many respects, such environmental justice concerns are best considered at a local level. The development of comprehensive local plans by municipalities giving due consideration to existing zoning requirements and local social, economic and environmental issues, can offer the best opportunity for addressing environmental justice issues in the context of community needs.

14. Defining Communities of Concern – The EJAC recommends that the DEC, by using the EPA Region 2 GIS application or another similar application, draw the boundaries of the community of concern – that is, the area and population affected by environmental impacts related to a specific facility, source or project for which a permit application has been submitted. The boundaries are to include the area where the project will be located as well as areas that may be significantly affected by any of the facility, source or project's likely impacts, such as air pollution, water pollution, traffic, visual impact and secondary displacement.

We believe that the applicant, rather than the DEC, should define the boundaries of its project's community of concern as part of its permit application. An applicant will likely be more familiar with the local area, the type and extent of any potential impacts from the proposed action, and the scope of mitigation measures that are critical to determining appropriate boundaries.

Having the applicant define these boundaries does not preclude the DEC and other parties from commenting on the proposed boundaries and proposing revisions. Instead, it would allow an applicant to utilize the information it has developed

regarding the action, which may include detailed modeling, research and knowledge of any prior impacts. Furthermore, in a number of projects,

the applicant will be a local governmental agency which will have extensive knowledge of the areas that may be affected by a proposal and would best be able to delineate the community of concern.

15. Implementing Environmental Justice Strategies – The EJAC recommends that the DEC “should encourage applicants to demonstrate, in writing, whether they have identified environmental justice concerns related to a proposed action, and, if so, develop a written plan to address these concerns and implement the plan.”

We believe that the DEC has an important responsibility to provide permit applicants with fundamental information on environmental justice and to encourage strategies to ensure that environmental justice issues and concerns are addressed. For most projects, the expanded notice and public outreach initiatives contemplated by the Advisory Group's policy recommendations will ensure that environmental justice issues will be raised and heard.

An applicant, as a member of the community in which its facility is or will be located, will likely have written operating procedures and policies, and either internal staff or outside consultants, to interact with the public. If an applicant needs help developing a strategy for incorporating environmental justice concerns and for public outreach, it should be able to call on DEC's citizen participation and permit review staffs for assistance. An applicant should be encouraged to develop such a strategy voluntarily, in cooperation with community and other groups in the area of its proposed action.

Applicants may incur significant expense to research demographic information, identify the community of concern, and supply the additional information necessary to satisfy SEQRA. We see no need or purpose for an additional requirement that an applicant prepare a written plan for environmental justice outreach.

16. Executive Order – The concluding paragraphs of this report raise, as one strategy option, the issuance of an executive order by Governor George Pataki to direct the DEC and other relevant state and local agencies to address environmental justice and provide resources to fund these efforts. In our view, this suggestion appears unnecessary. The intent and goal of the EJAC's recommendations, including the explicit incorporation of environmental justice considerations into the SEQRA process, will ensure that state and local agencies address these issues and devote resources to their resolution.

We are committed to ensuring that all residents of our state share in the

benefits and protections afforded by our environmental laws and regulations. Our participation in the Advisory Group and the policy recommendations that we have advanced have been directed to that end. To ensure progress to that goal, once the DEC formally issues its environmental justice guidance, the implementation of that policy must be carefully monitored to confirm that the intended goals are being achieved.

17. Integrating Environmental Justice into SEQR – The third and fourth paragraphs under the heading of “Recommendations for Incorporating Environmental Justice into SEQR” are difficult to understand, and we question whether they accurately reflect the EJAC’s intentions regarding the SEQR process. In our comments on the final draft report, we urged that both of these paragraphs be deleted, and replaced with the following text:

To assure that the state’s environmental review process fully addresses environmental justice concerns, the EJAC proposes the following recommendations to the state’s SEQR regulations. These recommendations establish formal procedures for assessing significant, adverse and disproportionate environment impacts on minority and low income communities.

18. Distribution of Green Benefits – During its deliberations, the EJAC addressed the distribution of environmental funding of state programs. As noted in the section of the report that addresses “Green Benefits,” funds for environmental programs should be allocated as equitably as possible, taking into account the statutory requirements and legislative intent of various environment-related funding programs. In contrast, the last DEC revision of the report added language referencing “proportionate funding” in the section entitled “Recommended Policy Statement.” We believe that this added language is misleading and should be deleted.

We agree that the DEC should implement its programs to ensure that similar needs are equitably addressed. However, as a result of the specific goals of various environmental legislation – and differing regional needs – certain regions of the state receive higher levels of funding than others. These allocations, even if they result in regional differentials in funding, reflect the judgments of the state legislature of how best to address environmental priorities, considering the needs and interests of the state as a whole.

Statutory mandates and legislative directives often leave DEC with limited discretion in allocating fund to allocate funding. The public should not be led to believe that DEC has the authority to ensure that funding formulas are

“proportionate.”

19. Use of the “Short” EAF – We support the recommendation that, in the SEQR process, a full environmental assessment form be required for unlisted actions occurring in minority or low-income areas. Under current regulations, either a full environmental assessment form or a short environmental assessment form can be used. In light of the more detailed information that the full environmental assessment form elicits, mandating its use in those circumstances was supported by EJAC members.

However, we disagree with the statement in the report that the EJAC determined that the short EAF fails to provide sufficient information to enable the DEC to determine whether an identified minority or low-income community may be impacted by disproportionate adverse environmental impacts. An applicant or lead agency can provide the necessary information in completing the short EAF that would allow the DEC to make that determination. In those instances, the short EAF would be adequate. However, we believe that the full EAF provides a better format for applicants and lead agencies to utilize in setting forth potential impacts in minority and low-income communities and join in recommending its required use.

In closing, we would again like to express our appreciation to the Department of Environmental Conservation and to the members of the Environmental Justice Advisory Group for this opportunity to work together in developing a proposed environmental justice permitting policy for New York State. We look forward to working with the Department and with the other EJAC members in implementing our consensus policy recommendations.

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