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August 19, 2015

William J. Clarke
Regional Permit Administrator
Division of Environmental Permits, Region 4
1130 North Westcott Road
Schenectady, NY 12306-2014

**RE: Global Companies LLC
Albany Terminal
50 Church Street
Albany, NY 12202
DEC Application: 4-010-00112/00029**

Dear Mr. Clarke:

Global Companies LLC (Global) makes this submission in response to the August 4, 2015 letter to you from Christopher Amato of Earthjustice (Amato), in which Amato supports the New York State Department of Environmental Conservation's (DEC or the "Department") notice of intent to rescind its November 21, 2013 Negative Declaration (the "Negative Declaration") and notice of rescission of the Notice of Complete Application (NOCA) issued in connection with Global's June 2013 Title V Permit Modification Application (the "Modification Application"). The Modification Application requests permission to install natural gas-fired boilers and make other changes to enable Global to better manage an assortment of crude oils at its petroleum terminal (the "Boiler Project"), which is located at 50 Church Street adjacent to the industrialized area of the Port of Albany (the "Facility").¹ Amato's August 4th letter refers to several issues

¹ Throughout the August 4, 2015 letter, Amato refers to the project covered by the Modification Application as the "Tar Sands Project," presumably to tap into the environmental community's general antipathy to oil extracted from Canadian tar sands. However, as the Department is fully aware, the project covered by the Modification Application is

Footnote Continued on Next Page

raised in DEC's May 21, 2015 notice letter and Global's June 30, 2015 letter in response (the "June 2015 Response Letter"), the latter of which is included as Attachment 1.

Before addressing the substance of Amato's letter in detail, Global submits the following general comments. First, virtually all of the alleged "new information" and "changes in projects/circumstances" referenced by DEC as a basis for rescinding the Negative Declaration and NOCA relate to air emissions from the Boiler Project, the very subject of the Department's 18-month-long evaluation, which included an extended public comment period, numerous meetings, terminal inspections by State and Federal representatives, and a series of written Department questions and Global responses. As Global discussed in detail in its June 2015 Response Letter, any outstanding concerns regarding the air impacts of the Boiler Project could have and should have been addressed as part of the Title V permit modification process. It was neither necessary, nor appropriate, for DEC—after extending the public comment period an unprecedented seven times—to wait until the last day of the 18-month Title V review period and then rescind the NOCA and seek to rescind the Negative Declaration, rather than using the Title V review process to resolve any outstanding air emission/permitting issues.

Second, Amato wrongly asserts on several occasions that Global withheld information from DEC and/or "defied the Department's requests for additional information." As Global outlined in its June 2015 Response Letter and accompanying affidavit from Gianna Aiezza nothing could be farther from the truth. Global responded to every written and verbal information request it received from the Department and communicated with Department staff in meetings or by e-mail or telephone on over 100 occasions with the sole purpose of ensuring that DEC received the information it needed to process the Modification Application. Any assertion to the contrary is simply wrong. The communication with the Department was continuous, responsive and technically sophisticated.

Third, Amato, without any factual support, contends that "Global has withheld crucial information from DEC and the affected environmental justice community." This assertion is patently false and borders on libelous. In addition to responding to DEC's formal and informal information requests, Global representatives made themselves available to DEC staff, the environmental justice community, elected officials and the general public and responded to requests for information relevant to the Boiler Project. The Department never objected to the responses provided.

Each of Amato's specific statements of opinion in support of DEC's notice of intent to rescind the Negative Declaration and its decision to rescind the NOCA are addressed below.

I. AMATO ASSERTION I: THE DEPARTMENT CORRECTLY DETERMINED THAT THE NEGATIVE DECLARATION MUST BE RESCINDED

A. Amato Assertion A: Substantive New Information Has Been Discovered

1. Amato Assertion A.1: Substantive New Information Reveals that the Tar Sands Project is Likely Subject to Nonattainment NSR

Amato argues that Global failed to provide sufficient information to support its claim that what he characterizes as “the Tar Sands Project” is not subject to nonattainment New Source Review (NSR). In particular, Amato suggests that: (1) Global failed to provide the basis for the emission factor selected to calculate volatile organic compound (VOC) emissions from its marine delivery operations and (2) new information contained in the “August 2014 Comments” on the composition of Bakken crude shows that the vapor pressure relied on by Global in preparing the Modification Application was too low.²

As a preliminary matter, none of the purportedly missing or “new information” cited by Amato justifies rescinding the Negative Declaration or NOCA. As discussed in Global’s June 2015 Response Letter, nonattainment NSR issues were central to the Modification Application from the outset. Global submitted the information it believed necessary to enable DEC to assess nonattainment NSR applicability and responded to all of the Department’s inquiries on this issue. In addition, various entities, including Amato’s Earthjustice organization, submitted comments on nonattainment NSR. Finally, the U.S. Environmental Protection Agency (EPA) requested extensive additional information on nonattainment NSR applicability which Global provided. Armed with that information, DEC was then free to take various steps under the Uniform Procedures Act (UPA), including asking for additional information or issuing/denying the permit. Accordingly, even assuming Amato’s concerns regarding the emission factors are considered by the DEC to be correct (which they are not), they do not provide a basis for rescinding the Negative Declaration. Instead, these concerns should have been, and generally were, addressed via the Title V permitting process.

Amato’s allegation that Global failed to provide the value it used for the vapor pressure of the petroleum product handled at the Terminal when calculating marine loading emissions is absolutely false. In fact, the inputs and their sources are clearly noted in the Facility’s potential to emit (PTE) calculations to show how the Emission Factor of 1.3590 lb/1000 gal was derived. The loading emission calculations were performed in accordance with guidance in AP-42, Compilation of Air Pollutant Emission Factors, Fifth Edition, Volume I. The emission factor used was calculated per AP-42, Compilation of Air Pollutant Emission Factors, Fifth Edition, Volume I, Section 5.2, Equation 2, as noted on the facility PTE. Information on how each variable was determined was provided to DEC. Accordingly, Amato is simply wrong when he asserts that

² Global believes that the “August 2014 Comments” refers to Earthjustice’s August 27, 2014 letter to DEC, with exhibits. However, the August 27, 2014 letter does not contain any discussion of the new information relating to the vapor pressure of Bakken crude oil mentioned in the August 4, 2015 letter, including the specific 15 pound per square inch value cited as evidence that the vapor pressure of Bakken crude oil is higher than previously thought. In any event, Amato’s reference to Bakken oil is perplexing since the Boiler Project has nothing to do with Bakken oil.

Global did not provide information about the origins of the emission factor used in the Modification Application.

Equally important, the emission factor referenced in Mr. Amato's letter only impacts the fugitive component of the loading emissions calculation. The balance of the loading emissions calculation is from the vapor combustion unit (VCU) outlet. As discussed in Global's June 2015 Response Letter, to ensure its emissions did not trigger nonattainment NSR, Global agreed to limit emissions from the VCU to 2.0 milligrams per liter (mg/L) based on a guarantee received from the VCU manufacturer. The guaranteed limit, which applies regardless of vapor pressure, is based on the manufacturer's knowledge of Bakken oil. The manufacturer has designed many combustion units for Global and others, which have undergone operational performance testing in the field to demonstrate that they achieve the guaranteed limit. In fact, a test of the VCU at the Facility showed that actual emissions from the VCU are well below the 2.0 mg/L guaranteed limit. Thus, testing shows that the VCU provides even better control than the guarantee used in the calculation, making the emissions estimate that much more conservative. The "real world" emissions will be below even the estimated conservative number.

Amato also alleges, without substantive explanation, that a "more accurate" vapor pressure "likely" would cause the Project's potential to emit to exceed the threshold of nonattainment NSR applicability. However, he provides no technical justification for this assertion. In fact, the vapor pressure used in the calculation is based on actual true vapor pressure data for Bakken crude oil. Moreover, as Mr. Amato is aware, the Boiler Project calls for installing boilers to heat heavier crude oil in order to make facility loading and offloading more efficient. Bakken crude oil will not be heated when the Boiler Project is implemented. The volatility of Bakken crude oil is therefore irrelevant to the Boiler Project.

Any concerns about the emission factors selected by Global to quantify its potential VOC emissions from its marine terminal operations are specifically and effectively mitigated by its decision to accept the limit of 2.0 mg/L from the marine loading VCU. The stringent emission controls imposed on the VCU ensure that potential emissions from the marine loading unit, when combined with other Boiler Project-related increases, will remain well below the nonattainment NSR applicability threshold. Reducing the emission limit of the marine VCU from 3.0 mg/L to 2.0 mg/L reduced the project emission potential (PEP) to 37.4 tpy without internal offsets. This number is well below the 40 ton per year major modification threshold.

Envirospec and Global reviewed previously considered alternatives for reducing the PEP below 40 tons. Based on previous stack testing data and consultation with the manufacturer of the barge loading VCU, the manufacturer agreed to provide a guarantee that the VCU could achieve a VOC emission limit of 2.0 milligrams per liter (mg/L), down from the current limit in Global's Title V permit of 3.0 mg/L. There has been no dispute that the VCU can meet the reduced limit of 2.0 mg/L. The DEC is fully aware that the VCU can meet that limit, as they were provided the results of the June 2013 performance test on the VCU required by Global's existing air permit. Amato's argument appears to be rooted in a criticism of DEC technical staff and is not based on any technical reasoning.

More generally, the entire Title V permit/nonattainment NSR process is designed to ensure that facilities do not emit more than is authorized under the law. Under its Title V permit, the Global facility is subject to a series of caps on both product throughput and emissions of various pollutants, including VOCs. If the Modification Application is granted, these caps would be modified as necessary to ensure that the Boiler Project did not exceed any newly adopted limits. Global is then required to monitor its product throughput and emissions to ensure that it meets the limits in its permit. The permit is designed with the checks and balances needed to ensure that emissions do not exceed the nonattainment NSR limits.

2. Amato Assertion A.2: Substantive New Information Has Been Discovered Regarding Potential Adverse Impacts from Hydrogen Sulfide and Benzene Emissions

Hydrogen Sulfide

Amato expresses favor with DEC's allegation that new information received during the public comment period on hydrogen sulfide (H₂S) emissions requires rescission of the Negative Declaration. While acknowledging Global's assertion that the potential impacts of H₂S were addressed with DEC, Amato offers his opinion that Global did not provide final modeling results to DEC or make them available to the public.

With regard to Amato's first contention that Global "never provided the final modeling to DEC," he refuses to accept the fact that the results were provided to, and discussed with, DEC staff but that the final model was not produced because DEC did not request that it be submitted. Under DEC's DAR-1 policy, applicants first conduct a preliminary screen of project emissions based on very conservative assumptions to determine whether facility emissions may exceed health-based annual guideline concentrations (AGCs) or short-term guideline concentrations (SGCs) at the facility's fence line. As outlined in the Aiezza Affidavit, Global modeled H₂S emissions following the procedures outlined in DEC's DAR-1 guidance; this preliminary DAR-1 analysis showed that emissions associated with the natural gas-fired Boiler Project would not exceed the applicable AGCs and SGCs at the fence line of the Global facility for any pollutant, including H₂S. As a result, no additional modeling was necessary, an outcome fully consistent with DEC practice.

Although no full-scale modeling of H₂S emissions was required per DAR-1, Global nevertheless conducted such modeling and provided the results to DEC at a meeting with Department staff. Global had previously completed detailed emissions modeling to evaluate H₂S on site and at the fence line and discussed the results with DEC on several occasions throughout the public comment period. In February 2015, DEC requested that EnviroSpec refine the assumptions used in the detailed emissions modeling. The air dispersion modeling was used to determine a maximum value of H₂S in the petroleum liquid that could cause an odor at the fence line. The air dispersion model was completed using BREEZE AERMOD Software (Version 12345). Control devices and other emission sources were modeled using actual information from the site. Manufacturer and stack test information was used to develop source parameters such as stack height, stack diameter, stack temperature, and stack velocity. Emission rates were determined based on the PTE following discussions with DEC staff. Fugitive emissions were also modeled. Five years of actual meteorological data from Albany was used for the modeling. When

the modeling was complete, Global and DEC staff engaged in extensive discussions about the modeling results with DEC staff, which culminated in negotiations concerning possible inclusion of an H₂S permit condition. At no time, however, did DEC determine that Global needed to provide it with the written modeling results. To the contrary, DEC staff specifically determined that it was not necessary for Global to submit the written results.

Amato alleges that the modeling done by Global should not be accepted by the DEC without an opportunity for public review because the results of air dispersion modeling are sensitive to assumptions made concerning the height and location of emission points, emission rate, local meteorology, receptor locations, and other factors. As a preliminary matter, to the extent DEC declined to request submission of the written modeling results, Global was certainly under no obligation to provide them to the general public. Global's only obligation was to comply with the UPA and Part 621. It is DEC's responsibility to determine what information is made public and in what manner. Global simply followed DEC's direction.

While Mr. Amato may not personally be satisfied with the modeling results, the technical reality is that a large factor of safety was applied to the results when the permit limits were being discussed with DEC. These results reflect the application of guidelines for determining model inputs which have been relied on in numerous other applications. These guidelines include using five years of meteorological data, using the vent height on the storage tanks for the tank release height, and placing sensitive model receptors at locations such as schools and dense residential housing. These guidelines largely dictate the proper model design.

More generally, the proper way to address the question whether the modeling results should have been part of the public record is *not* by rescinding the Negative Declaration. If DEC had wanted the written modeling results to be a formal part of the record it could have asked for them within the framework of the Title V permitting process. If Global had declined to provide the information and DEC believed the omission was fatal to the permitting process, it could have denied the Modification Application pursuant to 6 NYCRR § 621.14(b), allowing Global the opportunity to request an impartial adjudication of the decision by an administrative law judge. In this case, DEC was aware of the modeling results; however, DEC did not ask for the written modeling results. As a result, what Amato characterizes as Global's alleged "failure" to provide the information cannot serve as a basis for rescinding the Negative Declaration.

Benzene

Amato asserts that substantive new information came to light subsequent to issuance of the Negative Declaration concerning benzene emissions from the Boiler Project. In support, Amato suggests based on the August 2014 comments that Global's benzene emissions would be more than 100 times that estimated by Global if the entire amount of authorized Albany terminal throughput was Bakken or tar sands oil. Amato goes on to cite the results of the air quality monitoring conducted in and near the community adjacent to the Albany Port as further evidence of the risks from benzene emissions.

As a preliminary matter, DEC did not raise any concerns about benzene emissions in its May 21, 2015 Notice of Intent to Rescind Negative Declaration and Notice of Incomplete Application. This indicates that DEC does not assert that "new" information about these emissions

arose that would justify restarting the permitting process. Amato is in no position to disturb that conclusion. Amato is not the permitting agency and DEC is not obliged to assert his concerns as a basis for the Notice of Rescission.

Moreover, even assuming the information regarding benzene emissions was new (which it is not) and that a significant adverse environmental impact could result (which it will not), Global *again* points out that this information could readily have been addressed during the Title V permit review process. If DEC gave any credence to the assertions regarding benzene emissions in the August 2014 letter cited by Amato, it could have: (1) required Global to respond to the assertion and provide additional information; (2) revised the draft Title V permit to include permit conditions addressing benzene emissions; and/or (3) denied the Modification Application on the ground that the Facility could not adequately control its benzene emissions. There are no factual or legal grounds for using this purportedly new information to rescind the Negative Declaration and force Global to start the permit application process over again.

From a substantive perspective, Amato is simply wrong. Benzene emissions would actually be lower if the entire amount of authorized throughput at the Albany terminal was Bakken or tar sands oil. Many of the benzene emission calculations in the facility PTE were based on gasoline blending operations which have much higher benzene content and are also more volatile than Bakken or tar sands oil. Amato also alleges that Global used “unrealistically low benzene emission assumptions” without any substantive justification for this allegation. Global’s benzene emission assumptions for both Bakken crude oil and the heavier products potentially subject to heating were thoroughly substantiated as part of the Modification Application with assays and actual sample results certified by an independent third party testing laboratory provided to DEC.

Amato also makes several false allegations regarding the air quality monitoring conducted by DEC in May and June, 2014. In particular, he asserts that the samples collected exceed the long-term benzene exposure standard. However, the samples analyzed as part of that study were short-term samples and must be compared to short-term benzene exposure standards, as they were in the study referenced. Short-term sample results cannot be compared to long-term exposure numbers because a long-term exposure is an average with periods of higher short-term exposure and lower short-term exposure. The study was designed to try to capture peak short-term benzene levels and thus was intentionally biased toward the collection of samples during expected times of peak concentrations. Under these circumstances, it would be wrong to compare these short-term sample results to long-term exposure thresholds. For the same reason, it is incorrect to average the sample results from this study and compare the average to the long-term exposure numbers because the periods of low exposure that would bring down the average were not included in the study.

3. Amato Assertion A.3: Substantive New Information Has Become Available Concerning the Potentially Significant Adverse Impacts of a Tar Sands Oil Spill

Amato’s contention amounts to a repeat of the spill-related arguments offered by DEC in support of its May 21, 2015 Notice of Intent to Rescind. In response, Global reiterates the following:

- Global is already permitted to manage heavy oils at the Albany Terminal.

- There is nothing unique about what Amato names “tar sands oil” from a spill response perspective. “Tar sands oils” are just a heavy oil that is similar, with respect to a spill response, to other heavy oils handled at the Port of Albany and elsewhere along the Hudson River.
- There is already a fully developed federal/state regulatory scheme in place to ensure that the Global facility is prepared to respond to the spill of any oil managed at the Facility. This scheme requires Global to have the following plans/permissions in place, several of which are subject to agency approval: (1) Spill Prevention, Control and Countermeasures Plan (EPA); (2) Facility Response Plan (FRP), including an Emergency Response Action Plan (ERAP) component, for the non-transportation component of the Facility (EPA and U.S. Coast Guard); (3) separate FRP and ERAP for the marine transportation portion of the Facility (U.S. Coast Guard); (4) Dock Operations Manual (U.S. Coast Guard); (5) Facility Security Plan (Department of Homeland Security); and (6) Major Oil Storage Facility license (DEC).
- These plans are tailored to the specific activities at the Global facility and must be revised to address any new spill prevention and response issues raised by any changes to the products stored. The FRP and ERAP include provisions for response and cleanup of light and heavy oils and have been approved by EPA and the U.S. Coast Guard.

Amato’s argument that new information relating to the unique characteristics of what he calls “tar sands oil” justifies rescinding the Negative Declaration is premised on the notion that the State Environmental Quality Review Act (SEQRA) is an appropriate vehicle for addressing the environmental implications of potential oil spills. In fact, however, SEQRA adds nothing to the environmental protections afforded by the multiple layers of laws and regulations implemented by DEC, EPA, the U.S. Coast Guard and the Department of Homeland Security to prevent, prepare for and respond to oil spills.

In a footnote Amato incorrectly states that the Department did not learn that Global intended to receive, store and heat heavier crude oil until after the Negative Declaration had been issued. This statement is false. As noted in Global’s June 2015 Response Letter, the entire purpose of the Boiler Project was to enable Global to heat heavier crude oils to reduce their viscosity and make them easier to pump. Under these circumstances, it is ludicrous to suggest that DEC did not learn of Global’s intent to receive heavier oils until after the Negative Declaration had been issued. Moreover, the crude formations and the fluctuation in properties of the crude oil from these formations was extensively discussed at the October 22, 2013 Region 4 meeting concerning the proposed Modification Application. This information was confirmed in a November 6, 2013 email with the DEC, both of which occurred before DEC issued the Negative Declaration.

4. Amato Assertion A.4: Substantive New Information Regarding the Volatility of Bakken Crude Has Been Discovered

Amato asserts that new information has become available regarding the volatility of Bakken crude oil, including a report by Dr. Fox describing the unique risks posed by mixed trains carrying Bakken and tar sands crude oil. In particular, Dr. Fox alleges that accidents involving both types of crude oil could result in the Bakken crude igniting the tar sands oil, releasing “huge plumes” of H₂S and releasing tar sands into the waterways.

As with the benzene argument above, DEC did not raise any concerns about additional risks associated with the volatility of Bakken crude oil or the use of "mixed trains" in its May 21, 2015 Notice of Intent to Rescind Negative Declaration and Notice of Incomplete Application. This indicates that DEC does not believe that what Amato considers to be "new information" justifies restarting the SEQRA process; that conclusion should not be disturbed.

More importantly, Amato's contentions lack a sound factual and legal foundation. As a preliminary matter, New York State is preempted from regulating the rail transportation of hazardous materials under a host of federal statutes and regulations, including the Federal Railroad Safety Act, the Interstate Commerce Commission Termination Act, and the Hazardous Materials Transportation Act. Thus, questions relating to the volatility of fuels being transported by rail and how trains are configured during transportation are exclusively federal. Any purportedly "new" information relating to rail safety is irrelevant to DEC's decision whether to grant a Title V air permit modification or to any SEQRA analysis underlying that decision. Although Amato may be frustrated by well-established preemption realities, his frustration is not a basis for governmental action that is contrary to established law and fact.

With respect to the general comment relating to the volatility of Bakken crude oil, the Pipeline and Hazardous Materials Safety Administration (PHMSA)'s Hazardous Materials Regulations (HMR) require individuals offering materials for transport to classify and characterize the material to determine proper packaging, labeling and other requirements. *See* 49 CFR Parts 171-177. Any entity shipping crude oil must classify and characterize that oil consistent with these requirements. With the recent increase in the shipment of crude oil, the PHMSA has issued various Safety Alerts and Emergency Orders designed to ensure that entities shipping these materials properly sample and characterize these materials. The PHMSA also has implemented regulations mandating special sampling and other requirements for crude oil shipments, and Global complies with these requirements. These and other measures will ensure that crude oil transported by rail is properly classified and characterized for safety purposes. DEC is preempted from regulating the volatility of crude oil in transportation or from considering the environmental/safety implications of rail transport from a SEQRA perspective.

More specifically, Amato's contention concerning what he labels as the risks associated with "mixed trains" of cars containing Bakken and tar sands crude oil lacks any legal and factual foundation. As preliminary matter, it is important to note that the terms "Bakken crude" and "tar sands oil" are generic terms that refer to the geographic and/or geological origins of certain crude oils. Both terms include oils in various oil groups and can originate from a variety of sources throughout North America. Thus, the concept of "mixed trains" as articulated by Amato is confused, reflecting a misunderstanding of the movement of crude oil to Albany.

Moreover, the PHMSA HMR regulations contain numerous provisions designed to ensure that trains are safely configured. In particular, the HMR requires segregation of materials that are incompatible or may present an extreme hazard if involved in an accident. 49 CFR 174.81(d). The PHMSA does not require segregation of sweet crude oil and heavy crude oil during transportation. In fact, the two products are transported as a Petroleum Crude Oil using a 1267 placard and are also categorized in the same Packing Group/Hazard Class indicating they present similar hazards. The U.S Department of Transportation (USDOT) also publishes an Emergency Response Guidebook which includes Emergency Response Guide 128 for flammable liquids including crude

oil. Guide 128 applies to both products and has the same procedures related to potential hazards, public safety considerations (i.e., evacuation distances) and emergency response procedures. Thus, the PHMSA—the federal agency charged with regulating the safety of crude oil transportation from a hazardous materials perspective—does not believe that “mixed” trains carrying sweet crude oil and bitumen (i.e., “tar sands oil”) pose a special risk. As noted in section A.3 above, specific concerns relating to the proper response to spills of different types of oils are addressed as part of the DEC, EPA, U.S. Coast Guard, and Department of Homeland Security spill reporting and response programs outlined above.

In closing, what Amato suggests is “new” information regarding the volatility of Bakken crude oil is not “new” at all from a SEQRA perspective, nor is it relevant to the assessment required under SEQRA. New York is preempted from regulating the rail transportation of hazardous materials, preventing DEC from considering the volatility of material in transport as part of its SEQRA review. Moreover, the PHMSA—the federal agency charged with the exclusive authority to regulate hazardous material transportation—already has a comprehensive program in place to require crude oil shippers to characterize the material they transport, which it has supplemented with special materials specifically targeted at crude oil. Under these circumstances, Amato’s opinion as to what he characterizes as “new information” regarding fuel volatility and the purported risks of so-called “mixed trains” does not support rescission of the Negative Declaration.

5. Amato Assertion A.5: Substantive New Information Makes Clear That the Climate Change Impacts of the Tar Sands Project Must be Evaluated

Amato alleges that public comments submitted after issuance of the Negative Declaration identified the significant life cycle climate change impacts of tar sands oil and that these impacts justify rescission of the Negative Declaration. In support, Amato quotes language from DEC’s October 2010 Commissioner Policy 49, *Climate Change and DEC Action*, identifying various climate change considerations DEC must consider in making decisions.

As a preliminary matter, DEC did not raise any concerns about climate change issues in its May 21, 2015 Notice of Intent to Rescind Negative Declaration and Notice of Incomplete Application. This indicates that DEC does not believe that this “new information” justifies restarting the permitting process; that conclusion should not be disturbed.

Moreover, there is, in fact, nothing “new” about the information provided relating to the climate change implications of tar sands oil. Commercial extraction of Canadian tar sands oil began in the early 1950s. Studies and articles about the climate change implications of tar sands oil appeared well before November 2013, when DEC issued the Negative Declaration and NOCA. Under these circumstances, there is no basis for suggesting that the information contained in Amato’s August 2014 submission was new information that justifies rescinding the Negative Declaration.

Moreover, the DEC document cited by Amato is DEC’s general policy document on climate change, which is “intended to integrate climate change considerations into DEC activities.” DEC Commissioner Policy CP-40, *Climate Change DEC Action*, p. 1 (Oct. 22, 2010). The document provides very general guidance to Department staff on addressing climate change

in all aspects of DEC operations, and includes a broad range of climate change factors to guide DEC programs, activities and decisions, including those factors specifically quoted by Amato in his August 4, 2015 letter. The document contains a broad overview of the role of climate change in DEC decision-making and is not intended to serve as a guide for making facility-specific decisions under SEQRA nor should it be used in that way. Specifically, Section II states, “The policy and procedures set out in this document ... are not intended to create any substantive or procedural rights, enforceable by any party in administrative or judicial litigation. The Department reserves the right to act at variance from the guidelines set forth in this Policy.” *Id.* at 2.

Note that DEC has issued guidance on the role of climate change in SEQRA decisions, entitled *Assessing Energy Use and Greenhouse Gas Emissions in Environmental Impact Statements* (July 15, 2009). That document, which Amato failed to mention, provides guidance to DEC on reviewing environmental impact statements (EISs) under SEQRA when the EIS includes a discussion of energy use or greenhouse gas (GHG) emissions. By its terms,

This policy does not create any new requirements under SEQR. It does not establish when the scope of an EIS should include energy use or GHG emissions, nor does it establish a threshold for the determination of significance under SEQR (i.e., when the lead agency must prepare or require the preparation of an EIS).

Id. at 1.

As this overview of the relevant climate change guidance makes clear, DEC regulations and policy do not compel applicants to engage in the type of life-cycle climate change analysis demanded by Amato when conducting a preliminary SEQRA review. This conclusion is confirmed by DEC’s full Environmental Assessment Form, which seeks general information about energy use and greenhouse gas emissions but does not request the type of detailed “life cycle” data identified by Amato. Absent a specific mandate to consider such information as part of the initial SEQRA review process, DEC lacks authority to rescind the Negative Declaration issued to Global on the ground that “new information” relating to GHG emissions and climate change impacts has arisen.³

Amato Assertion B: Substantive Changes are Proposed to the Project

Amato alleges based on Earthjustice’s August 2014 comments that Global’s calculations of VOC emissions from the Boiler Project are “fundamentally flawed and significantly underestimate those emissions,” citing a report from Dr. Phyllis Fox, a purported expert on air emissions from crude-by-rail facilities that allegedly shows that the project will trigger nonattainment NSR. According to Amato, triggering nonattainment NSR will necessarily result in significant changes to the Boiler Project, necessitating rescission of the Negative Declaration.

³ There is an outstanding Freedom of Information Law request to DEC seeking information and documents relating to the application of DEC’s climate change policies to individual facilities under SEQRA.

Amato's argument is nothing more than a variation on his earlier contention that new information on nonattainment NSR justifies rescinding the Negative Declaration. *Again*, however, the correct way to address that new information on air emissions is through the Title V/nonattainment NSR permitting process. Upon receiving Dr. Fox's report, DEC was required to consider the information it contained and decide whether the report justified a change in its determination regarding the applicability of nonattainment NSR. If DEC concluded based on Dr. Fox's report that the Boiler Project, in fact, triggered nonattainment NSR, it was then required to reach out to Global to inform it of the change, enabling Global to begin the process of identifying lowest achievable emission rate technology, acquiring the necessary nonattainment NSR emission offsets, and taking the other measures necessary to comply with nonattainment NSR. Alternatively, Global could have challenged DEC's decision before an administrative law judge and demonstrated that nonattainment NSR did not apply. Ultimately, DEC would have been required to issue a revised draft permit containing conditions necessary to implement nonattainment NSR that would then continue through DEC's air permit review process.

The whole purpose of a Title V permit review is to provide the relevant agencies and the general public with an opportunity to review and comment on the air emissions implications of a particular project. If new air emission-related concerns are raised, including questions about the applicability of a particular air pollution control regulation, they should be addressed during the permit review process.

From a substantive perspective, Dr. Fox's statements are inaccurate. Among other things, Dr. Fox completely ignores the existence of the control device. In particular, Dr. Fox mistakenly ignores the control device efficiency which results in erroneous emissions estimates. The 3.9 lb/1000 gallon emission factor relied upon by Dr. Fox is for uncontrolled emissions, not for controlled emissions, such as those at the Global facility.

Moreover, Global did not use traditional emission factors to estimate VOC emissions from its marine loading operations when it modified its Title V permit in 2012 to authorize additional crude oil throughput. Instead, Global estimated VOC emissions from marine loading operations using the guarantee from the control device manufacturer, which was based on emission testing performed by the manufacturer and was later found to be quite conservative based on a stack test performed on the barge-loading VCU at the Global facility. Actual emissions data from source testing is a preferred method of estimating emissions over published emissions factors as confirmed in the AP-42 Introduction, available at <http://www.epa.gov/ttn/chief/ap42/c00s00.pdf>. Loading emission calculations were performed in accordance with guidance in AP-42, Compilation of Air Pollutant Emission Factors, Fifth Edition, Volume I. The emission factor used was calculated per AP-42, Compilation of Air Pollutant Emission Factors, Fifth Edition, Volume I, Section 5.2, Equation 2. Information on how each variable was determined was provided to DEC.

In this instance, reliance on the manufacturer's guarantee was a more conservative option than relying on emission factors because the guarantee is based on actual testing information collected by the manufacturer. Global calculated emissions from marine loading operations using the 3.0 mg/L manufacturer's guarantee for the VCU. Subsequent to issuing the 2012 permit and installing the VCU, a compliance performance test was conducted which demonstrated that VOC emissions from the VCU were actually 0.03 mg/L, far below the 3.0 mg/L emission rate used to

estimate emissions from the facility's marine loading operations. The stack test showed that the standard modeling protocols used in obtaining air permits provide a very conservative picture of likely air pollution and that the reality is far below the limits. As noted above, Global is further reducing the limit on the VCU from 3.0 mg/L to 2.0 mg/L based on an updated guarantee from the manufacturer and proven performance at the facility.

Dr. Fox's analysis is replete with errors in addition to her failure to consider the impact of the emission control device on emissions. In particular, Dr. Fox alleged that Global failed to include VOC emissions from barge transit losses, releases from railcar domes, and disconnect losses. With respect to "barge transit losses," Dr. Fox failed to explain precisely what "barge transit losses are intended to cover. To the extent the term refers to fugitive losses from barge transfer operations while loading at the Global facility, these emissions were fully characterized in the permit application and are included in the facility PTE. These emissions did not increase as a result of the Boiler Project as the barge loading throughput did not increase. To the extent the term "barge transit losses" refers to exhaust emissions from the barges, these are exempt from permitting as they are classified as "trivial" under 6 NYCRR 201-3.3(c)(10). Per 6 NYCRR 201-3.3 mobile sources are exempt from permitting requirements and do not need to be listed in the Title V facility permit application. To the extent the term refers to VOC emissions from storage in the barges while they are in transit on the Hudson River, these emission sources are not part of the Global facility per 6 NYCRR 200.1(aa), which defines "facility" as "[a]ll emission sources located at one or more adjacent or contiguous properties owned or operated by the same person or persons under common control." DEC is only authorized to issue air permits to stationary sources. Mobile sources, such as barges, that are not located at the facility are not subject to the 6 NYCRR Part 201 air permit program.

Also, Dr. Fox is mistaken about the operation of the tank cars. Tank car domes provide a weather cover and are *not* an emission control device. The emergency vents under the domes are pressure/vacuum vents which are designed to open and close at a specific pressure to prohibit pressure or vacuum building up in the tank beyond what it is designed to hold. Under normal operating conditions these emergency vents and the railcar manways are closed to the atmosphere and are not an emissions source. These vents are set at 75 pounds per square inch (psi) and so would open only in an upset condition. The position of the dome cover is irrelevant to air emissions. The document cited by Dr. Fox is an April 1998 Field Manual (<http://www.globalsecurity.org/military/library/policy/army/frn/10-67-1/index.htm>) and describes rail offloading procedures, but does not speak to emissions. Also, Global's offloading procedures vary from what is described in this document. As a result, the document has no applicability.

Finally, emissions from the loading and unloading hoses are not relevant to the Boiler Project, as this information was considered during the 2012 permit review and is not affected by the current application. Furthermore, the hoses are fitted with dri-break connectors which are specifically designed to prohibit liquid leaks from occurring when disconnecting hoses. Mr. Amato fails to take into account that emissions from valves, flanges and other equipment leaks from rail operations are accounted for in the facility's fugitive calculations, which were included in the 2012 permit application. Minor fugitive emissions associated with the Boiler Project were included in the Modification Application.

More generally, Amato's argument confuses "significance" under the nonattainment NSR program with substantial adverse environmental impacts under SEQRA. As discussed in Global's June 2015 Response Letter, the actual VOC emission increase associated with the Boiler Project (i.e., installation of the boilers, conversion of Tank 33 from distillate to crude oil storage and reconfiguration of the Kenwood rail yard) was small. No evidence has been provided to show that the Boiler Project will have a significant adverse environmental impact on air quality for SEQRA purposes.

B. Amato Assertion C. Substantive Changes in Circumstances Have Arisen

Amato argues that: (1) Global's claim that the Boiler Project is not subject to nonattainment NSR and (2) Global's air dispersion modeling for H₂S emissions each constitute a "substantive change" in circumstances that justifies rescinding the Negative Declaration. This contention amounts to nothing more than a rehashing of the arguments discussed in Sections A.2 and B above that new information on these topics justifies rescission. The alleged "change in circumstances" in this case is merely the receipt of information during the normal course of the Title V permit modification process that could readily be addressed as part of that process. With respect to nonattainment NSR, the comments received during the public review process led Global to reconfigure the Boiler Project by accepting the 2.0 mg/L manufacturer guarantee on the barge-loading VCU. Public concern about H₂S emissions prompted Global to conduct a full H₂S modeling analysis, despite the fact that the preliminary screening indicated no such modeling was necessary. However, these developments do not constitute a "substantive change in circumstances" and provide no basis whatsoever for rescinding the Negative Declaration and forcing Global to restart the SEQRA process.

II. AMATO ASSERTION II. THE DEPARTMENT PROPERLY DECIDED THAT THE NOCA SHOULD BE RESCINDED.

Amato favors DEC's conclusion that substantial information is missing from Global's Modification Application, justifying its conclusion that the NOCA should be rescinded. While acknowledging Global's contention that the UPA contains no provision allowing rescission of the NOCA, Amato then contends that the UPA also contains no provision *prohibiting* rescission.

But Amato is confused and his stated opinions on this matter are contrary to established law. Amato's argument reflects a fundamental lack of understanding of the UPA generally and the purpose of the NOCA, in particular; it also significantly distorts and overstates Global's argument. The Notice of Complete Application serves a crucial function within the UPA framework. The provision requires DEC to conduct a preliminary review of a permit application to determine whether it has sufficient information to *begin* the permit review process. If information is lacking, DEC must issue a notice of incomplete application identifying the additional information it needs and giving the applicant a specified amount of time to provide it. Once the Department concludes it has enough information to commence its formal review of the permit, it issues a NOCA, signaling the start of the formal permit review under the UPA.

Although at the time the NOCA is issued DEC may not have all of the information it needs to actually issue a requested permit, the whole purpose of the review process post-NOCA is to establish a framework for DEC to assess whether additional information is needed and obtain

feedback from the public. It is the NOCA that commences this process. Once the required information is collected, DEC must then decide whether the project meets all applicable requirements/standards and whether the requested permit can be issued. Thus, the UPA specifically contemplates that “new information” obtained during the permit review process will be assessed as part of that process. There is nothing within the UPA framework to indicate that receipt of new information justifies rescinding the NOCA. In fact, there is nothing within the framework of the UPA to suggest that the NOCA can ever be rescinded. The NOCA commences the process and in this case that process was fully undertaken and completed.

The conclusion that NOCA’s cannot be rescinded has been confirmed by DEC and the courts. In *In re Application of Lafever Excavating, Inc.*, Project No. 4-1232-3/1-0, 1991 WL 302719 (Oct. 1991) (Interim Decision of Commissioner), the Department described the role of the completeness determination as follows:

The completeness determination for a permit application under the Uniform Procedures Act (“UPA”) (ECL Article 70) is intended to reflect the point at which the application contains sufficient information to commence regulatory review (ECL § 70-0105(2)). It is contemplated that during the process of reviewing the application, the Department may have occasion to require the submission of additional information necessary to make determinations required by law (*Atlantic Cement v. Williams*, 129 A.D.2d 84, 3d Dept. (1987); 6 NYCRR 621.15(b)). Therefore, it follows logically that a determination of completeness under UPA is not invalid merely because the application does not contain all the information that will ultimately be needed to render a final decision.

This point is further highlighted by the fact that the Legislature included a provision in the UPA which makes an application complete as a matter of law if the Department fails to make any completeness determination within 15 days (ECL § 70-0109(a)(b)). This provision would be meaningless if that legal mandate could simply be undone by a subsequent determination additional information was needed. If a completeness determination which occurred through the passage of time cannot be undone, it stands to reason that an actual determination of completeness by the Staff similarly is binding on the agency. If this were not so, the legislatively imposed incentive for Staff to act on an application within 15 days would be negated. *Id.* at *1.

As this discussion makes abundantly clear, NOCA’s simply cannot be rescinded.⁴ *See Concerned Citizens of Allegany County v. Zagata*, 231 A.D.2d 851, 852, 647 N.Y.S.2d 614 (4th Dept. 1996)

⁴ Consistent with the conclusion that NOCAs cannot be rescinded, DEC’s Uniform Hearing Procedures specifically provide that completeness of an application is not an issue for adjudication. 6 NYCRR § 624.4(c)(7).

(“requirement that the applicant provide additional information did not affect the status of its application as complete”).

Contrary to Amato’s attempt to mischaracterize Global’s position, Global did not assert (nor would it) that “the Department is legally required to keep the application in an active status no matter what happens.” The UPA contains specific provisions designed to address what happens once the NOCA is issued and the applicant fails to respond to requests for additional information. As Global noted in its June 2015 Response Letter, the definition of “complete application” itself contemplates the submission of additional information, with complete application defined as “an application for a permit which is in an approved form and is determined by the department to be complete for the purpose of *“commencing review of the application but which may need to be supplemented during the course of review* in order to enable the department to make findings and determinations required by law.” 6 NYCRR § 621.2(f) (emphasis added). Moreover, 6 NYCRR § 621.14(b) specifically provides:

At any time during the review of an application for a new permit, modification, or renewal, the department may request in writing any additional information which is reasonably necessary to make any findings or determinations required by law. Such a request must be explicit, and must indicate the reasonable date by which the department is to receive the information. Failure to provide such information by the date specified in the request may be grounds for permit denial.

Thus, the UPA makes clear that if an applicant fails to respond to information requests, DEC is free to deny the permit on that ground. The UPA thus has a mechanism in place to ensure that the applicant responds to Department requests for additional information other than rescinding the NOCA.

Even changes to a project do not justify rescission of the NOCA. As DEC itself has noted,

The permit application process, by necessity, requires flexibility to allow for changes to a project based upon the review of the agencies and input from the public. However, every time there is a change, it does not result in a “new” project that requires the applicant to start again.

In re American Marine Rail, LLC, Project No. 2-6007-00251/00001, p. 30 (Aug. 25, 2000) (citing *Lafever Excavating*).

In support of its argument that DEC can rescind the NOCA, Amato declares that Global has “defied or provided inadequate responses to DEC’s request for additional information, making it impossible for the Department to complete its review of the application,” pointing to various questions raised by DEC that Global purportedly failed to answer. Many of the purportedly missing items were covered in Global’s response to a pair of written information requests

William J. Clark, Regional Permit Administrator
August 19, 2015
Page 17

submitted by DEC to Global on March 24, 2014 and September 10, 2014. The Department never determined that Global's responses were insufficient.

As a preliminary matter, DEC never objected in writing to Global's responses or requested that Global provide the purportedly missing information. If DEC did not object to Global's responses, Amato is in no position to raise objections on the Department's behalf.

Moreover, consistent with 6 NYCRR § 621.14(f) above, if the Department was not satisfied with Global's responses, it was required to make an additional information request in writing. However, no such follow-up requests were ever received. Ultimately, if DEC was not satisfied with the content or quality of Global's responses, it was authorized to deny Global's Modification Application. However, the UPA does not authorize DEC to rescind NOCA on the ground that an applicant failed to respond to an information request submitted after issuance of a NOCA.

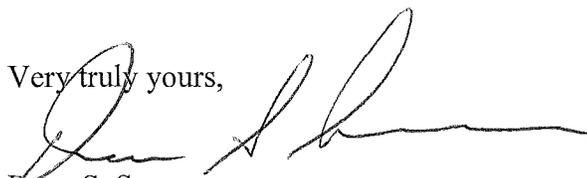
The dangers of allowing rescission of a NOCA are obvious. The UPA establishes a specific set of procedures and timeframes to ensure that permit applications are processed in a consistent and timely fashion. Allowing DEC to rescind a NOCA would render these procedures and timeframes a nullity, opening the DEC permitting process up to a never-ending, repeating spiral of process without end—the very essence of a procedural due process failure. Any time DEC received significant comments/criticisms concerning a permit application, it could simply declare the application "incomplete," rescind the NOCA, and start the permit review process over, thereby avoiding the need to make a decision.

Conclusion

Amato's August 4, 2015 opinion letter in support of DEC's notice of intent to rescind the Negative Declaration and rescission of the NOCA adds nothing to the ongoing dialogue between DEC and Global concerning the propriety of DEC's actions regarding Global's Modification Application for the Boiler Project.

Global has placed DEC on notice that DEC has no factual or legal basis for rescinding the Negative Declaration or NOCA and that its actions do not comply with the State's Uniform Procedures Act. Faced with the 18-month deadline for issuing the Title V permit modification, DEC acted without cause and in violation of procedural due process when it rescinded the NOCA and announced its intent to rescind the Negative Declaration rather than making the decision to issue/deny Global's Title V permit modification. Global has requested that DEC reconsider this decision and provide Global with the relief requested in its June 2015 Response Letter.

Very truly yours,



Dean S. Sommer

On Behalf of Global Companies, LLC

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June 30, 2015

William J. Clarke
Regional Permit Administrator
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1130 North Westcott Road
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**RE: Global Companies LLC
Albany Terminal
50 Church Street—Port of Albany
Albany, NY 12202
DEC Application: 4-010-00112/00029**

Dear Mr. Clarke:

Global Companies LLC (Global) makes this submission in response to your May 21, 2015 letter announcing, on the last day of the 18-month period for issuing major Title V permit modifications, that the New York State Department of Environmental Conservation (DEC or the "Department") intends to rescind the November 21, 2013 Negative Declaration (the "Negative Declaration") issued in connection with Global's June 2013 Title V Permit Modification Application (the "Modification Application") and has rescinded the Department's November 21, 2013 Notice of Complete Application (NOCA) issued regarding Global's petroleum storage facility located at 50 Church Street in the Port of Albany (hereinafter the "facility" or "Albany Terminal").

As set forth in greater detail below, and in the attached affidavits, there is no basis in the administrative record to rescind the Negative Declaration issued under the State Environmental Quality Review Act (SEQRA) as the standard set forth in 6 NYCRR § 617.7(f) has not been met. Global objects both to the procedural and substantive bases alleged to serve as the foundation for

William J. Clark, Regional Permit Administrator
June 30, 2015
Page 2

the Department's decision. To the extent that the Department rescinds the Negative Declaration, Global requests an administrative hearing be immediately commenced to afford Global, among other things, the opportunity to cross-examine Department staff on the alleged bases for rescission.

Note that the conclusion of your letter states that Global is "allowed a reasonable opportunity to respond to the portion of th[e] letter that announces the Department's intention to rescind the Negative Declaration," implying, by omission, that DEC is providing Global with no opportunity to respond to the Department's *ultra vires* decision to rescind the Notice of Complete Application. As set forth in greater detail below, neither the Uniform Procedures Act (UPA) nor its implementing regulation empower the Department to rescind a Notice of Complete Application. Instead, the UPA authorizes the Department to request additional information from the applicant during the permit review process which DEC has done throughout the past 18 months, and to which Global has routinely and thoroughly responded. Besides being unlawful, DEC's decision to rescind the NOCA is without factual foundation as there remain no unanswered questions regarding the application. Accordingly, Global also is taking this opportunity to respond to the wrongful notice rescinding the NOCA and affording the Department the opportunity to withdraw its rescission of the NOCA.

Project Description

On June 12, 2013, Global submitted an application to DEC to modify its existing Title V air permit. The modification does not increase the total quantity of oil permitted to be managed at the facility. Instead, the final permit application sought permission to make the following changes to Global's existing petroleum storage facility:

- (1) installation of seven natural gas-fired boilers to indirectly heat petroleum products as follows:
 - a. two boilers rated at 4 million British thermal units per hour (MMbtu/hr),
 - b. one boiler rated at 6 MMBtu/hr, and
 - c. four boilers rated at 13 MMBtu/hr;
- (2) conversion of Tank 33 from distillate to crude oil storage;
- (3) conversion of Tank 118 from gasoline, crude or ethanol storage to distillate; and
- (4) reconfiguration of the Kenwood railyard to allow for offloading of heated petroleum product.

For purposes of this Response, the above-referenced project is referred to as the "Boiler Project".

As a preliminary matter, it is worth noting that the Boiler Project will not alter the permitted throughput at the Albany Terminal, a licensed major oil storage facility that has been operating at the 50 Church Street location near the Port of Albany for more than eight decades. DEC's sole jurisdictional basis for reviewing the Boiler Project arises from Global's decision to seek a Title V permit modification to install several boilers exceeding 10 mmBtu/hour heat input and to convert Tank 33 from distillate to crude oil storage.

Although there has been public comment expressing concern as to the air emission impact of the Boiler Project, the project is, in fact, comparatively unremarkable and will have no measurable impact on ambient air quality. [See Envirospec/Aiezza Affidavit included herewith.]

The seven boilers to be installed are similar to those commonly found in numerous other industrial and commercial facilities, and the emissions associated with the operation of those boilers are no different from those associated with natural gas-fired combustion sources found in hundreds, if not thousands, of locations throughout the State, including at the Port of Albany. The conversion of Tank 33 from distillate to crude oil storage will result in a modest increase in emissions of VOCs that will be controlled through installation of an internal floating roof. In short, the review and approval of this Title V permit modification should have been quick and routine.

We have reviewed the thousands of comments received during the public comment period and note that the Boiler Project itself is not the primary source of public concern. Instead, most of the issues raised during the public comment period focused on matters unrelated to air emissions associated with the Boiler Project. For example, many commenters expressed concerns about the safety risks associated with transporting crude oil by rail. However, the broader issues associated with the transportation of petroleum products, including crude oil, by rail are beyond the scope of this application for an air permit and do not provide the basis for the DEC to rescind the Negative Declaration as those issues would not enable the State, as SEQRA lead agency, to meet its burden of proof under 6 NYCRR § 617.7(f). Moreover, as New York State has itself conceded, DEC is largely preempted by federal law from regulating rail transportation and cannot use SEQRA as a “back-door” to regulate these preempted issues.¹

Some commenters identified the risk of petroleum spills from the long-existing oil storage terminal into the Hudson River and elsewhere as a concern. Again, this matter is not directly related to the installation of the air emission sources that triggered Global’s application to obtain a Title V air permit modification. In fact, in terms of product volume, it is worth noting that the current storage at the facility is tens of millions of gallons *less* than the storage that existed prior to 1992, when the facility had 42 storage tanks, rather than the 17 tanks that now store petroleum products. Extensive spill response and spill containment measures are in place at the Albany Terminal and have been reviewed and approved by the appropriate agencies. In sum, an alleged spill risk at the Albany Terminal, a licensed major oil storage facility (MOSF), is not “new” information, nor is the potential risk from spills at this MOSF facility that has been operating since the 1920s, a “change in circumstances.” These issues were known to DEC in November 2013 when the DEC issued the Negative Declaration for the Boiler Project. [See Envirospec/Aiezza and NRC/Candito affidavits included herewith.]

¹ For example, DEC’s Fact Sheet regarding the Boiler Project states that “Federal rail regulatory agencies exclusively govern rail transportation and rail transport equipment. . . . [S]tates do not have jurisdictional authority or control over the transport of petroleum or other products by rail. The U.S. Coast Guard governs marine vessels and has jurisdiction pertaining to spill response and containment on the Hudson River.”

DEC Conducted a Thorough Review of the Boiler Project

Global submitted an application for a significant Title V permit modification to DEC in June 2013 to authorize construction and operation of the Boiler Project. Consistent with 6 NYCRR § 201-6.3(a) and (b), upon receipt of the application for the Title V permit modification for the Boiler Project in June 2013, DEC notified EPA and the affected states of the application. DEC reviewed the application and issued a Notice of Incomplete Application dated July 25, 2013 seeking additional information from Global. Global responded by letter dated September 6, 2013, providing DEC with the information and documents requested. Global subsequently submitted a revised Title V permit modification application on November 8, 2013 incorporating changes discussed at an October 22, 2013 meeting with Region 4 of the DEC and seeking an additional minor change relating to the limits on the storage of ethanol in Tank 114. After extensive review by DEC engineering and program staff, DEC issued a Notice of Complete Application on November 21, 2013 consistent with 6 NYCRR §§ 621.6(a), (c) and 621.7(i).

Upon determining that the application was complete, DEC published notice of the Boiler Project, together with the required Negative Declaration under SEQRA, in the Environmental Notice Bulletin (ENB) as required by 6 NYCRR § 621.7(a)(2), (b). In addition, Global transmitted the Notice of Complete Application to the Albany Times Union for publication consistent with 6 NYCRR § 621.7(c). The deadline for submitting comments was December 27, 2013, consistent with 6 NYCRR § 621.7(b)(6), which requires a minimum of 30 days public notice for significant Title V permit modifications.

Public concern about the rail transportation of crude oil through Albany arose after notice of the Boiler Project was published in the ENB and Albany Times Union. In response, DEC took the unprecedented step of extending the comment period *seven times* (not the five times identified in DEC's letter), giving the public more than a year to raise concerns about the Boiler Project.² Each time, Global objected to the extension and each time, its objections were ignored. In fact, during the latter part of 2014, several key environmental groups also questioned the wisdom of/need for further extensions, expressing a desire to resolve the permitting process quickly. The Department never provided any evidence that the continued extensions and delays were resulting in new, different or additional comments about the Boiler Project. In fact, DEC never explained the need for additional extensions of time for public comment.

Approximately 98% of the over 19,000 comments received were form comments. A review of the log of comments received confirms that the latter extensions served little purpose. Over 85% of comments were received by June 2, 2014, the close of the third extension of the

² Below is a complete list of the extensions granted by DEC on the Modification Application:

- On December 24, 2013, DEC extended the public comment period 17 days to January 10, 2014.
- On December 31, 2013 DEC extended the public comment period 30 days to January 31, 2014.
- On January 29, 2014, DEC extended the public comment period an additional 60 days to April 2, 2014.
- On March 26, 2014, DEC extended the public comment period an additional 60 days to June 2, 2014
- On May 28, 2014, DEC extended the public comment period an additional 60 days to August 1, 2014.
- On July 30, 2014, DEC extended the public comment period an additional 60 days to September 30, 2014.
- On October 1, 2014, DEC extended the public comment period an additional 60 days to November 30, 2014.

public comment period. Indeed, as the Department is fully aware, only 1,374 (7%) of the over 19,000 comments received arrived during the last four months of the public comment period (i.e., after August 1, 2014) and virtually all of those were form comment letters.

Interestingly, despite the public outcry, DEC never held a formal public hearing on Global's Title V permit modification application. Under the UPA, after a permit application for a major project is complete and notice of the application has been provided, DEC must evaluate the application and any comments received to determine whether a public hearing will be held. Grounds for holding a public hearing include "if a significant degree of public interest exists."⁶ NYCRR § 621.8(c)(1). If a public hearing is scheduled, the applicant and all persons who have filed comments must be notified by mail within 60 calendar days of the date the application is complete. 6 NYCRR §621.8(a). Despite the public concern that the Department assigned to the Boiler Project, DEC chose not to conduct a public hearing under the UPA. Instead, it held a public information session on February 12, 2014.³

The extensions of the public comment period are not the only example of unprecedented public involvement in the permit modification process. DEC requested, and Global volunteered and implemented, an extensive environmental justice public outreach and involvement plan that included: multiple meetings with local residents and public officials; questions, comments and responses regarding the Boiler Project; and information distribution to potentially interested individuals. This public outreach program was not mandated by law nor was it required by the DEC's environmental justice policy. The public involvement plan went above and beyond both SEQRA (which does not require a public hearing on a Negative Declaration) and the UPA requirements.

DEC Was Fully Aware of the 18-Month Deadline for Reviewing the Title V Permit Modification

Throughout the public review process, both DEC and Global were well aware that the Department had only 18 months to reach a decision on Global's Title V air permit modification application consistent with the requirements of the federal Clean Air Act (CAA) and the UPA. Section 503(c) of the CAA, 42 USC § 7661b(c), provides that "[t]he permitting authority shall approve or disapprove a completed application (consistent with the procedures established under this subchapter for consideration of such applications), and shall issue or deny the permit, within 18 months after the date of receipt thereof." This deadline has been incorporated into DEC's Title V and UPA requirements. In particular, 6 NYCRR § 201-6.2(c) provides that:

The department shall act in title V permit applications in accordance with the timeframes and procedures established in Part 621 of this Title. Failure to act on new title V permit applications within 18

³ On November 13, 2014, Global voluntarily held another informational meeting as part of its Public Participation Plan and answered questions from the community. DEC staff was present, but generally declined to participate and did not identify at that time any deficiencies in Global's application or analysis.

months of receipt of a complete application shall be grounds for judicial review in State court.⁴

As noted above, DEC issued a notice of complete application to Global for the Boiler Project on November 21, 2013. Under the CAA and UPA, DEC had 18 months—until May 21, 2015—to review the permit application, complete the public notice and comment process, conduct any public hearings it deemed necessary, review the public comments received, issue a proposed permit, transmit the proposed permit to EPA for the required 45-day review, and issue the final permit. Global never agreed to any extension of this statutory timeframe.

As noted above, DEC spent a year of the 18 months allowed for the Title V permit modification review on the public notice and comment process. During that time, Global responded to inquiries from DEC and others concerning the Boiler Project and engaged in various outreach efforts concerning the project. In the six months following the close of the public comment period, Global worked closely with Department staff to answer any remaining questions raised by the public comments and to resolve key issues, including expressions of public concern about the regulation of hydrogen sulfide emissions at the facility. As the close of the Clean Air Act-mandated 18-month deadline for issuing the Title V permit modification approached, Department staff indicated that DEC was preparing to amend the SEQRA Negative Declaration and issue a decision on the permit application. Instead, on May 21, 2015, *the last day of the 18-month review period under the CAA and UPA*, the Department announced its intent to rescind its SEQRA Negative Declaration and purported to withdraw its previous Notice of Complete Application, violating the 18-month deadline and effectively returning Global's Title V Modification Application to "square one".

DEC's Notice to Rescind the Negative Declaration is Time-Barred

DEC's announcement of its intention to withdraw the Negative Declaration is time-barred. DEC was obligated to make a decision on Global's Title V permit application by May 21, 2015. By not doing so, DEC has waived its right to even begin the process to rescind the Negative Declaration. If DEC had begun that process on a timely basis, allowing Global a reasonable opportunity to respond before finalizing the decision, it could conceivably have rescinded the Negative Declaration and Global would have been left with the arguments below demonstrating that such a DEC decision was arbitrary and capricious. However, by failing to act in a timely manner, DEC waived its right to either rescind the Negative Declaration or request additional information on the application and was required, instead, to take the remaining steps necessary to issue a final decision on the application. Therefore, notwithstanding the discussion below, Global asserts that DEC's May 21, 2015 letter is time-barred.

⁴Although the regulation refers to "new" applications, significant permit modifications, are subject to the same provisions of the Title V regulations as new applications for permits. See 6 NYCRR §201-6.6(d).

DEC Lacks the Authority to Rescind the Negative Declaration at This Stage in the Review Process

I. DEC Lacks a Substantive Basis for Rescinding the Negative Declaration Issued to Global

DEC cites 6 NYCRR § 617.7(f) as the basis for rescinding the Negative Declaration issued to Global. That section provides that DEC “must rescind a negative declaration when substantive: (i) changes are proposed for the project; or (ii) new information is discovered; or (iii) changes in circumstances arise; that were not previously considered and the lead agency determines that a significant adverse impact may result.” In order to rescind the Negative Declaration, DEC must determine (1) that it has “new information” or “changed circumstances” AND (2) that the new information or changed circumstances will have a significant adverse environmental impact. As set forth throughout this submission, including the Affidavits submitted herewith, there has been no substantive new information or changed circumstance to justify rescission. The information referenced by DEC does not justify a determination that there is a potential significant adverse environmental impact from the Project that would serve as the basis to rescind the Negative Declaration.

DEC’s “letter of intent” to rescind its prior Negative Declaration on the last day of the 18-month review period allowed under the Title V program contravenes the SEQRA process and UPA. These actions prejudice Global for the Department’s reluctance to directly face the difficult and unrelated political controversy raised by the transportation and distribution of crude oil in New York. Moreover, these actions are inconsistent with the rule of law to which the Department is subject. The Department’s actions are rooted in politics, not law, engineering, science or fact.

Each of DEC’s assertions in support of its decision to rescind the Negative Declaration are addressed below.

A. DEC Assertion A: Project Changes Made After the Submission of the Modification Application Require Rescission of the Negative Declaration.

In its letter, DEC notes that on August 3, 2014, Global proposed removing tank 118 from the project and substituting a more stringent emission cap for its barge loading vapor combustion unit (VCU) to avoid triggering nonattainment new source review (NSR). According to DEC, “[t]his change resulted in a new configuration of the facility that may increase the environmental impacts on nearby residents” and was not considered when DEC issued the Negative Declaration. While acknowledging that “[a]ltering the operating limits of the VCU might not be significant under all circumstances,” because of the proximity to the Ezra Prentice housing development, “the potential for these proposed changes to have significant adverse impacts on the environment must be fully analyzed.”

DEC’s contention fails on many levels. To the extent that DEC is suggesting that a new configuration of the facility, in and of itself, triggers DEC’s authority to rescind, this contention is inconsistent with case law and DEC’s own practices under SEQRA. In *Merson v. McNally*, 90 NY2d [1997], for example, the Court of Appeals held that a Negative Declaration may be issued

for a Type 1 action under SEQRA even when a project has been modified during the review process to accommodate environmental concerns.

DEC has no substantive basis for its statement that the change in the configuration of the Boiler Project may result in a significant environmental impact. The Boiler Project as described in the Negative Declaration called for the installation of seven natural gas-fired boilers, reconfiguration of the Kenwood rail yard, conversion of Tank 33 from distillate to crude oil storage; and conversion of Tank 118 from gasoline, crude or ethanol storage to distillate. As discussed in greater detail below, EPA raised concerns about including the emission reductions associated with the conversion of Tank 118 to distillate service in Global's NSR project emission potential calculation. To address that concern, Global proposed to accept stricter emission limits on the barge loading VCU to ensure that potential volatile organic compound (VOC) emissions remained below the relevant NSR threshold.

Although Global revised the definition of the Boiler Project for NSR purposes, the basic configuration of the facility did not change in any way. Global did not propose as part of the "reconfigured" Boiler Project to physically alter any of the existing equipment at the Albany Terminal, nor did it change any components of the Boiler Project. In fact, Global's proposal to reduce the emission limit on the barge loading VCU from 3 milligrams per liter (mg/L) to 2 mg/L reduced allowable emissions from the unit by one-third, which represents a significant environmental benefit to the surrounding community. The results of an earlier stack test, which had previously been submitted to DEC, confirmed that actual VOC emissions from the barge loading VCU are, in fact, significantly below the proposed allowable limit. In addition, Global renewed its proposal to take Tank 118 out of gasoline service, leading to further reductions in VOC and hazardous air pollutant (HAP) emissions. Thus, both components of the "reconfiguration" offered obvious environmental benefits for the community and potentially reduced environmental impacts from the Boiler Project rather than supporting a determination of new or changed circumstances resulting in a significant adverse environmental impact.

In a footnote to its discussion of this issue, DEC objected to Global's reliance on a statement from the commercial vendor that supplied the VCU in support of the new, lower emission limit, arguing that "the long term performance of the VCU at this lower emission rate remains unproven." This contention is arbitrary, lacks a solid foundation and is inconsistent with past DEC practice. DEC routinely sets emission limits based on manufacturer's guarantees at all types of facilities, including petroleum terminals. These guarantees reflect the design criteria of both the air pollution control equipment and the unit being controlled, the manufacturer's past experience with its equipment, and actual testing performed on similar units in similar applications. Once the permit is granted for a particular unit based on the manufacturer's guarantee, a performance test is then completed to prove compliance with the permit condition. Going forward, periodic stack tests are then required to measure actual emissions and confirm that the guarantees are accurate and that the facility is meeting its permitted limits. [See *Envirospec/Aiezza* affidavit.]

In the present case, Global consulted with the manufacturer who offered a guarantee that the barge loading VCU could meet a VOC emission limit of 2 mg/L. DEC also had in its

possession the results of a previous performance test of the unit which showed that actual emissions are significantly below the proposed emission limit of 2 mg/L.

Evidence that DEC accepts manufacturer's guarantees as a basis for setting emission limits is provided by Global's experience with its truck rack vapor recovery unit (VRU). In November 2010 Global submitted a proposal to DEC to reduce the VOC emission limit on the VRU at its truck loading rack from 10 mg/L to 2 mg/L. DEC accepted that reduced emission limit based on manufacturer's information only. DEC never suggested that it needed evidence of the long-term performance of the VRU.

By suggesting that Global must provide proof that the VCU can meet the proposed lower emission rate over the long-term before it will grant the permit, DEC has created a classic "Catch-22" situation. Although DEC routinely uses manufacturer guarantees to demonstrate technical effectiveness, DEC is now requiring Global, the permit applicant, to prove the guarantee with long-term performance data. Because the barge loading rack is an existing source, Global could theoretically collect the requested information by conducting multiple stack tests, something DEC ordinarily does not require. However, facilities with new sources would be placed in an impossible situation since they could not acquire the requested data without first obtaining permission from DEC to operate the units; and, the facilities could not operate the units without first showing, through the collection of long-term performance data, that the source would meet the proposed emission limits. To the extent DEC was interested in obtaining long-term performance data on the VCU from the manufacturer, it never specifically asked for that information from Global.

In short, DEC offers absolutely no proof that the change in the Boiler Project to address EPA's NSR concerns may result in a "significant adverse impact." The Department's decision to rescind the Negative Declaration is based on a mere recitation of the change and an unsupported assertion that adverse impacts may result.

As set forth above, all of the available evidence shows that the changes to the Boiler Project—in particular, Global's proposal to accept a stricter emission limit on its barge loading VCU—will *reduce* potential VOC emissions from the facility to the benefit of the community. 6 NYCRR § 617.7(f) requires more than conjecture to justify rescission of the Negative Declaration, particularly at this late stage in the review process.

To the extent DEC was concerned about the impact of the proposed reconfiguration of the Boiler Project on the neighboring community, it never communicated that concern to Global. In fact, Global submitted the proposed change to DEC in August 2014 and discussed it with DEC staff, who accepted the proposed change. DEC then waited until May 2015 to formally tell Global that it was concerned about the air emission implications of the change. Global was thus given no opportunity to address DEC's issues within the framework of the Title V permit modification review process. Instead, DEC waited until the end of the 18-month Title V review period and then suddenly raised this issue in an attempt to justify its decision to rescind the Negative Declaration.

Also, it is worth noting that the changes to Tank 118 and the barge loading VCU were driven by the need to comply with the NSR program, which is targeted in this case at reducing emissions of VOCs. In particular, Global was required to demonstrate that VOC emission

increases from the Boiler Project did not exceed a specified significant source project threshold under the nonattainment NSR program using criteria spelled out in the NSR regulations. The actual increases in emissions of VOCs associated with the Boiler Project—installation of the boilers, switching Tank 33 from distillate to crude oil storage, and reconfiguration of the Kenwood Railyard to accommodate heating—were very small, only 6.25 tons per year (tpy). (1.23 tpy of VOCs from boilers, 4.18 tpy of VOCs from the conversion of Tank 33, and 0.84 tpy of VOCs from reconfiguration of the rail yard). These emission increases associated with the Boiler Project would be offset in real terms by emission decreases of 4.18 tpy associated with removing Tank 118 from gasoline service, for an actual emission increase directly related to the Boiler Project of only 2.07 tpy. Given the small increase in actual emissions associated with the Boiler Project, and the overall decrease in the facility's potential to emit (PTE) created by the changes proposed by Global to address the NSR comments, there is no basis for DEC to argue that such a change could have "significant adverse impacts" on the environment generally or on the health of those living in the vicinity of the facility.

Finally, to the extent DEC was concerned about the impact of the proposed reconfiguration of the Boiler Project on air quality, it should have addressed those concerns through the permitting process, not by rescinding the Negative Declaration. Under the UPA, DEC may request "any additional information which is reasonably necessary to make any findings or determinations required by law" at any time during the permit review process. 6 NYCRR § 621.14(b). Once DEC identified VOC emissions from the reconfigured project as a concern, the UPA process provided DEC with the option of reaching out to Global, asking for additional information and incorporating any necessary changes into the final permit.⁵ If DEC believed that the revisions were significant enough, it could have revised the draft permit and made the new version available for public comment. The Title V permit is an air permit. Any air emissions concerns arising from the Boiler Project could have and should have been addressed as part of the air permitting process. DEC cannot legally justify rescinding the Negative Declaration on the grounds identified above, particularly after 18 months, and particularly when the proper alternative—revising the draft Title V permit—was available.

B. DEC Assertion B: New Information Received during the Public Comment Period Warrants Rescission of the Negative Declaration

The letter alleges that hydrogen sulfide (H₂S) is present at relatively high levels in the bitumen proposed to be indirectly heated by the boilers and that the H₂S levels in bitumen vary significantly. After noting that H₂S has a strong, disagreeable odor that can be detected at low concentrations, the letter goes on to state that various commenters expressed concerns about H₂S and mercaptans during the public comment period, providing information about odors and other problems at a crude oil refinery in Canada, and declaring that this information was not considered when DEC issued its initial Negative Declaration. DEC went on to suggest that the potential for a significant adverse environmental impact associated with emissions from Tank 33 (which is to be

⁵ Notably, DEC did, in fact, issue two separate and extensive "Requests for Additional Information" to Global, to which Global provided extensive answers and responses. DEC never raised any issues with the VCU until the end of the 18-month review when it issued the Notice of Rescission.

reconstructed with a floating roof and heating coils) on residential units in the South End was not considered in the Negative Declaration.

DEC lacks both a procedural and substantive basis for rescinding the Negative Declaration based on the purportedly "new" information relating to H₂S emissions. Consistent with the discussion above, once DEC identified H₂S as a concern, it was compelled to reach out to Global and ask for additional information consistent with 6 NYCRR § 621.14(b). If those concerns proved significant DEC should have responded by proposing appropriate permit conditions and, if necessary, making a revised permit available for public notice and comment *not* by rescinding the Negative Declaration. By using the purportedly "new" information regarding H₂S emissions to justify rescinding the Negative Declaration, DEC has seriously undermined its air permitting process.⁶

From a substantive perspective, the purportedly "new" issue of H₂S is not new at all. The question of odor was discussed with the DEC in Global's September 6, 2013 response to DEC's Notice of Incomplete Application submitted prior to the issuance of the Negative Declaration. As concern about H₂S remained, DEC requested additional information from Global. In response, on April 30, 2014, Global provided backup calculations for the information provided in the September 6, 2013 response, which included the results of Global's DAR-1 analysis of H₂S. The DAR-1 materials assumed an H₂S concentration in liquid (100 ppm) that translates to a vapor concentration that is orders of magnitude higher than the levels stored at the terminal (>10,000 ppm). This assumption was used to provide a conservative demonstration that any fence-line concentrations of H₂S, if detectable, would meet the published criteria. Crude oils of any type can have varying levels of H₂S since they are extracted from naturally occurring formations and H₂S is a naturally occurring compound. The assumptions underlying Global's DAR-1 analysis were conservative enough to address the likely variations in H₂S levels among the products received at the Albany Terminal, including Bakken crude oil and other heavier crude oils.⁷

Several weeks after transmitting its DAR-1 analysis to DEC, on May 13, 2014, Global submitted the results of testing of representative crude oil samples from the facility to DEC. The results indicated that the oil stored at the facility exhibits vapor phase concentrations of H₂S well below the Occupational Safety and Health Administration (OSHA) permissible exposure limit (PEL) of 20 parts per million (ppm). In fact, the concentrations are typically below the laboratory method detection limit of 1 ppm.

⁶ In fact, for a time it appeared that DEC planned to address H₂S concerns by revising the Title V permit. At the close of the public comment period, DEC and Global engaged in extensive discussions concerning the factual and legal basis for limiting H₂S emissions from the Global facility in conjunction with the Boiler Project, with the goal of drafting a permit condition that addressed the Department's concerns. Ultimately, Global agreed with the regional staff on imposing a limit on H₂S emissions which was half of what emission calculations and modeling showed could cause an odor at the fence line. The parties had earlier agreed on this permit condition specifically to alleviate concerns due to the proximity of housing.

⁷ Also, as the Department is aware, Global does not currently receive crude oil exhibiting elevated H₂S levels in vapor at the facility.

William J. Clark, Regional Permit Administrator
June 30, 2015
Page 12

Several months later, Global provided information about H₂S emissions to DEC on August 13, 2014, when it provided its PTE calculations to the Department.

After the close of the final public comment period, Global engaged in extensive discussions with DEC concerning H₂S emissions at the facility. The DAR-1 was discussed with DEC via phone on February 25, 2015. Global also attended a meeting with DEC on March 10, 2015 to discuss community concerns regarding odor and potential permit limitations to address concerns. As discussed in greater detail below, Global also had modeled emissions of H₂S from the facility to determine the maximum value of H₂S in petroleum that could cause an odor at the fence line. The results of that modeling were used as the basis for a draft permit condition limiting H₂S to half of the modeled value. DEC was fully aware of the H₂S model and refinements thereto. (See *Envirospec/Aiezza Aff.* at para. 52).

In its attempt to support its argument that new information on H₂S justifies rescission of the Negative Declaration, DEC cites the experience at a crude oil refinery and transfer station in New Brunswick, Canada. However, this comparison is misplaced given the significant operational differences between the two facilities. According to publicly available information, the source of odors at the Canadian facility was its offloading operations. During offloading, train car vents were opened as part of standard operating procedures without first pulling a vacuum on the rail cars. This resulted in substantial emissions from the unloading operations and resulted in the crude oil being openly vented to the atmosphere. It is our understanding that the facility changed its rail car offloading procedures in July 2014 and that this change has largely eliminated complaints regarding odors at the facility.

As DEC is aware, Global's standard offloading procedure is different from that used at the New Brunswick facility. Global uses a closed system to offload product. Under Global's closed system, railcars are not openly vented to the atmosphere but rather negative pressure is applied to the cars prior to offloading of product. The negative pressure results in offloading of railcars under a vacuum which does not result in emissions or venting of product other than equipment fugitives. Global's offloading procedures were observed by the EPA with a FLIR camera on at least one occasion and EPA observed no excess emissions from the offloading operations. The proposed heavy crude would be offloaded in the same manner as that observed by EPA.

As noted above, in support of its decision to rescind the Negative Declaration, DEC suggested that the potential for a significant adverse environmental impact associated with H₂S emissions from Tank 33 (which is to be reconstructed with an internal floating roof (IFR) and heating coils) on residential units in the South End was not considered in the Negative Declaration. An IFR provides control of H₂S emissions. Emissions calculations using EPA-approved methods showed a greater than 99 percent control of potential H₂S emissions. Ordinarily heavy crude oil does not require storage in an IFR tank because of its lower vapor pressure. However, Global proposed to store these types of products in an IFR tank precisely because the IFR would provide additional control of H₂S, mitigating the potential for odors.

As the above summary shows, Global provided significant information to DEC showing that H₂S emissions from the Boiler Project and the facility generally did not present a possible significant adverse impact to the community. However, to the extent DEC had concerns about H₂S

emissions it had more than enough time to address them. As noted above, Global provided the results of its DAR-1 analysis of H₂S to DEC on April 30, 2014 and submitted additional information about H₂S levels in products to DEC staff on May 13, 2014. In addition, Global included H₂S calculations in the facility PTE provided to the DEC on August 3, 2014. To the extent DEC was concerned about H₂S emissions, it could have and should have raised those concerns immediately with Global rather than waiting until the close of the Title V 18-month review period and using them as a basis for rescinding the Negative Declaration.

C. DEC Assertion C: Changed Circumstances Including Recent "Dilbit" Spills Require Rescission of the Negative Declaration

After providing a brief overview of recent activities at the facility, the letter declares that "it has become increasingly apparent that as a result of the series of modifications to Global's permits, the mix of materials stored at this facility would likely change to include increased volumes of tar sands oil and other heavy crudes." The letter goes on to note that these oils are heavier than water and are often diluted with less viscous petrochemicals to facilitate shipping. The letter then notes that a 2013 [sic] pipeline spill of diluted bitumen (dilbit) in Michigan proved difficult to clean up.⁸ Among other things, DEC asserts that dilbit is different from naturally occurring heavier crudes (heavy oil with no diluent) because a portion of it evaporates, creating a denser petroleum which, over time, weathers to the specific gravity of fresh water. According to DEC, the "Negative Declaration did not fully consider the adequacy of Global's Spill Prevention, Control and Countermeasures Plan (SPCC Plan) to address potential spills of dilbit into the Hudson River and consequently must be rescinded."

As a preliminary matter, the proposed Boiler Project will not increase the total quantity of oil permitted to be managed at the facility; instead the Boiler Project is intended merely to enable the Global facility to more readily manage viscous oils. DEC was well aware from the beginning of the permit modification process that Global planned to store a larger percentage of heavier crude oils once the permit modification was approved. In fact, the entire purpose of the Boiler Project was to enable Global to heat thicker oils to reduce their viscosity and make them easier to pump, a fact that is reflected in the permit application and in subsequent e-mails and other communications with DEC. [See generally *Envirospec/Aiezza* Affidavit included herewith.] Thus, the plan to accept an increasing quantity of heavier crude oils has not changed despite DEC's assertion that it "has become increasingly apparent" that the "mix of materials stored at the facility would likely change to include increased volumes of tar sands oil and other heavy crudes."

In focusing on Global's plan to manage an increasing percentage of heavy crude oil at the facility, DEC implies that this development poses unique concerns that require further study. In fact, however, numerous facilities throughout the Capital Region already handle heavier oils, including several facilities at the Port of Albany.

⁸ The spill to which the Department refers occurred in 2010 not 2013 and was well prior to the issuance of the Negative Declaration.

In support of its notice of intent to rescind the Negative Declaration, DEC suggests that dilbit poses a unique challenge when spilled owing to the fact that it is mixed with other lighter oils, implying that experience with naturally heavy oils is not relevant to analyzing the spill-related implications of the Boiler Project. There is no support for this contention in the administrative record, and moreover, it is substantively false. [See generally, NRC/Candito Affidavit included herewith.] There is nothing unique about dilbit that alters established spill response and remediation technologies.

This Boiler Project and the Title V Air Permit application is not the proper regulatory vehicle for DEC to challenge the adequacy of SPCC measures. As previously noted, DEC concluded its discussion of the spill issue by noting that the "Negative Declaration did not fully consider the adequacy of Global's Spill Prevention, Control and Countermeasures Plan (SPCC Plan) to address potential spills of dilbit into the Hudson River and consequently must be rescinded." This argument, at best, confuses Global's SEQRA obligations with its obligations under the SPCC program, but at worst seeks to regulate the federal SPCC program through DEC's SEQRA review. Global had a current and applicable SPCC Plan at the time DEC conducted its review of the Boiler Project under SEQRA. The federal regulations require Global to update its SPCC Plan within 6 months of changes to products or service at the Terminal. 40 CFR § 112.5. Accordingly, to the extent the increase in more viscous oils required changes to Global's spill response procedures, the facility was required to revise its SPCC to reflect those changes.

DEC's comment also ignores the numerous programs already in place to address spill-related concerns at the facility. As an MOSF, Global must have a U.S. Environmental Protection Agency (EPA) and U.S. Coast Guard (USCG) Facility Response Plan (FRP) and an Operations Manual in place. The EPA FRP demonstrates the facility's preparedness to respond to a "worst-case" oil discharge for the non-marine transportation related portion of the facility. See 40 CFR § 112.20. A component of the FRP is the "Emergency Response Action Plan (ERAP) which serves as both a planning and action document and is maintained in an easily accessible format as a stand-alone section of the larger FRP. The FRP and ERAP are submitted to EPA for review and approval. Separate and apart from the land-based FRP and ERAP, the USCG requires a FRP, which includes an ERAP, for the marine transportation portion of the facility See 33 CFR Part 154, Subpart F. In addition, the USCG requires a Dock Operations Manual which demonstrates that facility operations comply with requirements of 33 CFR Part 154, Subpart B and 33 CFR Part 156 regarding marine transfer operations for oil and hazardous materials. Lastly, the U.S. Department of Homeland Security requires a Facility Security Plan demonstrating the Terminal's preparedness for a security incident. See 33 CFR § 105.400. In light of this extensive regulatory overlay, it is difficult for DEC to argue that the risk of spills from the facility has not and will not have been properly addressed. There is a comprehensive field of federal regulation governing potential spills and cleanup of petroleum on water. SEQRA does not extend the authority of the agencies conducting a review. The Department cannot attempt to use SEQRA to regulate this established spill response and cleanup regulatory structure for the Hudson River.

In discussing its suggestion that the Negative Declaration did not fully consider the adequacy of Global's SPCC plan to address dilbit spills, DEC includes the following footnote: "The April 10, 2015 MOSF license for this facility contains special conditions concerning the SPCC. However, these conditions are not a substitute for a comprehensive assessment of the

adequacy of that plan.” This footnote appears to be intended to counter any argument that DEC could have addressed its concerns regarding dilbit spill preparation and response through Global’s MOSF license. In fact, however, the MOSF license is precisely the forum in which to address DEC’s purported spill concerns. The MOSF program was created to address spill prevention and response issues relating to the large-scale storage of petroleum products. Any unique spill-related issues associated with Global’s storage activities at the Albany Terminal can readily be addressed through the MOSF licensing program. However, given the comprehensive federal regulatory scheme for addressing oil spills, the proper forum for addressing spill response issues is clearly not SEQRA.

Simply put, the adequacy of Global’s SPCC Plan is a function of federal law and the Department cannot seek to regulate the adequacy of the SPCC Plan under the guise of a SEQRA review. The SPCC Plan cannot serve as a basis to rescind the Negative Declaration.

In support of its argument, DEC points to a “2013 pipeline spill in Michigan” as evidence of the difficulties associated with the management of dilbit spills. We believe this refers to the well-publicized spill of diluted bitumen from a pipeline owned by Enbridge into a tributary of the Kalamazoo River. This spill occurred in July 2010 not 2013, well before Global submitted its application for the Boiler Project. DEC thus had several years of information concerning that spill available for review at the time it was asked to consider the spill-related concerns associated with the Global facility’s management of diluted bitumen. The 2010 Michigan spill thus was not a “changed” circumstance justifying rescission of the Negative Declaration. To the contrary, DEC had every opportunity to consider the implications of that 2010 spill at the time it issued the Negative Declaration for the Boiler Project in 2013.

Finally, DEC mentions as justification for the change in circumstance a spill that occurred at the Albany Terminal on May 18, 2015. In particular, DEC states that “The May 18, 2015 oil spill at Global’s operations at the Port of Albany demonstrates the potential for significant adverse impacts to the environment and public health.” In fact, however, the spill offers the opposite lesson. The spill at issue involved “tank bottoms” which were removed from a crude oil tank by a contractor as part of a routine tank cleaning activity. These tank bottoms, which are semi-solid, are similar in consistency to what would be encountered when cleaning a distillate tank. The spilled material was contained at the facility, properly managed in accordance with the facility’s existing spill response procedures, and posed no risk to the Hudson River. Contrary to DEC’s suggestion, the spill demonstrated that the Global facility has the proper equipment, procedures and trained personnel in place to handle oil spills and minimize the potential for significant adverse impacts to the environment and public health.⁹

As the above summary shows, DEC’s concerns about the spill-related implications of the Boiler Project are both unfounded and untimely. Ultimately, if DEC had concerns about dilbit spills related to the Boiler Project it was obligated to raise those issues as early in the permit

⁹ The letter notes that two people were transported to Albany Medical Center after being exposed to the crude oil. However, this step was taken strictly as a precautionary measure. The two individuals were examined by hospital staff and released the same day. DEC recently closed the spill in its spill database, suggesting no further issues remain and no further action required.

review process as possible. As noted above, the Michigan pipeline spill occurred in July 2010. Hundreds of commenters pointed to this spill as evidence of the risks associated with the Boiler Project during the early stages of the permit review process. DEC thus had information early on in the public comment process that spills of dilbit theoretically posed a concern. As lead agency, DEC was obliged to consider those comments as it reviewed the Boiler Project and decide whether they merited further review. If the concerns met the criteria spelled out in 6 NYCRR § 617.7(e), justifying amendment, DEC should have amended its SEQRA Negative Declaration. But it is clear that the concerns do not justify rescission under 6 NYCRR § 617.7(f). DEC cannot wait until the last day of the 18-month Title V review period and point to these alleged spill concerns as a basis for rescinding the Negative Declaration and forcing Global to start the permit review process all over again.

II. DEC Lacks Any Substantive or Procedural Basis for Rescinding the NOCA

In its letter, DEC cites no legal basis for rescinding the NOCA. This omission is understandable since the Uniform Procedures Act contains no provision allowing rescission of a NOCA. The reason the UPA does not authorize rescission of NOCAs is obvious. The NOCA marks the end of DEC's preliminary review of a permit application and the beginning of the formal permit review process under the UPA. As previously noted, during that review process the UPA specifically authorizes DEC to seek additional information as necessary. 6 NYCRR § 621.14(b). In fact, 6 NYCRR § 621.2(f) of the UPA regulations specifically defines a complete application as "an application for a permit which is in an approved form and is determined by the department to be complete for the purpose of *commencing review of the application but which may need to be supplemented during the course of review* in order to enable the department to make findings and determinations required by law" (emphasis added). Although DEC can continue to seek additional information from the applicant during that process, it cannot use any purported lack of information as a basis for starting the entire permit review process over. This mechanism ensures that permit reviews follow a reasonable schedule and prevents the very timing and procedural abuses that have occurred here. Global submitted an application for a Title V permit modification in June 2013. DEC issued the NOCA in November 2013 and proceeded to extend the public comment period an unprecedented seven times, covering more than a year. Eighteen months after issuing the NOCA, DEC announced that the application was not, in fact, complete, forcing Global to start the permitting process all over again.

Under the UPA, if a project is subject to SEQRA, an application is not complete until a properly completed environmental assessment form has been submitted, a lead agency has been designated, and either a negative declaration has been filed or a draft environmental impact statement has been accepted. 6 NYCRR § 621.3(a)(7). In this case, DEC has announced its intention to rescind the Negative Declaration. If DEC follows through, it then arguably has the authority to withdraw the NOCA since the permit application would no longer have the Negative Declaration required by 6 NYCRR § 621.3(a)(7). However, until DEC actually rescinds the Negative Declaration, (presumably DEC has not pre-judged its final decision and will give due consideration to this response), DEC lacks the authority to withdraw the NOCA and its declaration

that it is “hereby rescinding its November 21, 2013 Notice of Complete Application” is premature and unlawful.¹⁰

A. DEC Assertion A: Comments Received Suggest that the Application is not Complete

DEC argues, bizarrely, that “[t]he 19,000 comments submitted during the public comment period raised numerous issues which suggested that the Modification Application was not complete and the NOCA was not appropriate.” In essence, DEC appears to be arguing that because the project was controversial and because certain members of the public raised concerns, the application cannot possibly be complete and Global must be forced to start over. Under this theory, every controversial project must go through at least two reviews because every controversial project is likely to raise a number of issues.¹¹

In support of its argument that Global’s Boiler Project permit application is not complete, DEC notes that “[s]everal commenters claimed that they were unable to evaluate how the proposed project would comply with the H₂S ambient air quality standard at 6 NYCRR 257-10.3.” That section provides that: “In any one-hour period, the average concentration of hydrogen sulfide shall not exceed 0.01 ppm (14 µg/m³).” As a preliminary matter, the cited provision is an ambient air quality standard. The standard is intended to set a general threshold for what is considered acceptable air quality; it is not intended to be used as an emission limit for a particular project.

Moreover, because 6 NYCRR § 257-10.3 is an ambient air quality standard and not a source category-specific emission standard, it does not identify a method of demonstrating compliance. DEC traditionally has assessed H₂S emissions by requiring applicants to conduct a DAR-1 analysis to determine the impact of facility emissions at the fence line. If the analysis shows that projected emissions are below the applicable short-term guideline concentration (SGC) and annual guideline concentration (AGC), the emissions are acceptable and no further analysis is required. As discussed above, Global submitted the results of its DAR-1 analysis addressing H₂S to DEC on April 30, 2014. That analysis showed that H₂S emissions from the facility were below the SGC and AGC. Global also provided DEC with additional H₂S emissions information on several occasions thereafter. This information was more than sufficient to allow both DEC and the commenters to assess Global’s emissions in relation to the ambient air quality standard for H₂S. No further demonstration was necessary.

¹⁰ It appears that DEC’s announcement that it was rescinding the NOCA was motivated by the impending end of the 18-month Title V review period. The NOCA marked the beginning of the Title V review process and perhaps DEC hoped that rescinding the NOCA would terminate the review and restart the clock before the 18-month period ran. However, DEC lacked the authority to rescind the NOCA as long as the Negative Declaration remained in place, rendering this blatant attempt to circumvent the 18-month deadline moot.

¹¹ In the alternative, this statement could be interpreted as suggesting that many commenters believed the Modified Application was not complete and that the NOCA was not appropriate. However, the mere fact that commenters believed the NOCA was not appropriate does not make it so. Moreover, the solution to that problem is not to rescind the NOCA but seek additional information from the applicant.

More importantly, rescinding the NOCA is *not* a legally justified way to respond to this concern. If, after reviewing the comments received during the public comment period, DEC had questions about how the facility would demonstrate compliance with the ambient air quality standard for H₂S, it was obliged to contact Global and ask the company for further information. If Global failed to provide the information and/or DEC concluded that the available information did not demonstrate compliance with the H₂S SGC and/or AGC, the Department could deny the permit application, giving Global the right to challenge that decision in an adjudicatory hearing. As part of that denial, Global would be entitled to receive an explanation of the basis for DEC's conclusion. By rescinding the NOCA instead, DEC has denied Global the opportunity to challenge the technical basis for DEC's decision in a neutral forum. DEC also has deprived Global of the opportunity to receive a detailed explanation of the basis for its decision, forcing the company to respond to the purported deficiencies in a vacuum.

In support of its argument that Global's Boiler Project permit application is not complete, DEC also suggested that several "sophisticated parties" indicated that they were unable to determine whether the Boiler Project triggered nonattainment NSR. DEC pointed to the numerous changes to Global's application, suggesting that the record did not "include an adequate description of the proposed project and all potential permit conditions necessary to satisfy applicable criteria." There is no basis whatsoever for this assertion. The original permit modification application for the Boiler Project included a detailed breakdown of the VOC emissions associated with the Boiler Project, including the calculations underlying each of the VOC emission estimates that went into the Global's final project emission potential for the Boiler Project. Thereafter, DEC discussed the NSR issues relating to the Boiler Project with Global on several occasions. After EPA raised concerns about Global's decision to include emission reductions associated with conversion of Tank 118 from gasoline, crude or ethanol storage to distillate in its project emission potential calculations, Global revised the Boiler Project to accept a lower emission limit on the barge-loading VCU, a change that would yield obvious environmental benefits. Global's NSR methodology was discussed with DEC on October 21, 2013 via phone and agreed to by DEC on October 22, 2013 during a meeting at DEC Region 4, and again on November 13, 2013 via phone.

Moreover, as noted above, the Boiler Project was not complicated, consisting solely of the installation of natural gas boilers, conversion of a tank from distillate to crude oil storage (including installation of an internal floating roof), and reconfiguration of the Kenwood rail yard to accommodate the heating process. Global provided a complete description of the Boiler Project when it submitted its initial permit application and responded to all of DEC's requests for additional information as public concern about the project grew.

Again, if DEC had concerns about Global's nonattainment NSR calculations, the legally correct way of addressing those concerns was to follow up with Global and seek additional information. If Global failed to respond or its response was inadequate, DEC could then deny the permit. However, the Department cannot simply allege "gaps in information", without a factual foundation, to rescind the NOCA, particularly after the statutory 18 month period passed.

B. DEC Assertion B. EPA's Actions and Comments Indicate that the Application is Not Complete

According to DEC, "EPA's actions in this matter indicate that the Modification Application is incomplete or too cumbersome to be used for public comment, or both." In support, they note that EPA submitted a 12-page letter with questions about the application, which suggested that Global's NSR analysis was inadequate. According to DEC, EPA then took the "unusual step" of requesting an informal written draft of the permit prior to DEC issuing the proposed permit for formal EPA review.¹²

EPA submitted the April 28, 2014 letter seeking additional information about Global's Boiler Project Modification Application to DEC, who forwarded it to Global. Global then prepared a comprehensive response to each of EPA's questions and, in accordance with DEC's directions, transmitted a letter back to DEC on August 3, 2014, more than nine months prior to EPA's second letter. Global does not know whether DEC, in turn, transmitted these responses to EPA. DEC has not disclosed whether it simply held on to Global's responses or forwarded them to EPA. This item requires further inquiry because any failure by DEC to submit Global's comments obviously implicates DEC's failure to issue the Title V permit by the 18-month deadline as well as the fairness and legitimacy of the Department's purported rescission of the NOCA.

As a preliminary matter, almost half of the twelve (12) comments (Comments 5, 7, 10, 11 and 12) in EPA's April 28, 2014 letter actually referred to the Department's configuration of Global's existing Title V permit, which the EPA had the opportunity to comment on several times in the past. These comments were irrelevant to this proposed permit modification and were simply requests to clarify existing permit language.

On May 15, 2015, less than a week before the end of the 18-month deadline for issuing Global's Title V permit modification, EPA submitted a brief letter to DEC requesting that the Department provide it with a revised draft permit prior to officially proposing it to EPA for the formal 45-day review period required by the Clean Air Act and state regulations. This request does not justify terminating the current Title V review process and starting over. Although the facts are unclear, it appears that EPA may have written the second letter because DEC failed to submit responses to EPA's first letter and the agency wanted time to review the responses outside the formal 45-day period.¹³ Regardless of the reason for the letter, the request itself is not unusual. DEC staff frequently makes informal draft permits available for review as part of the Title V

¹² Global has difficulty understanding how an application can be "incomplete" or "too cumbersome" since the two concepts are effectively opposite—either Global submitted too little information or it submitted so much information that the application became "cumbersome." Moreover, the mere fact that an application may be "cumbersome" is not justification for declining to make it available for public comment. As noted above, the project undergoing review in this case was comparatively simple. Global provided the Department with the information necessary to process the application for the Boiler Project and evinced a willingness to supplement that information whenever asked. There is no evidence to suggest that the project was so complex that the application could not readily be processed.

¹³ If DEC, in fact, failed to forward Global's August 3, 2014 response to EPA, it would be improper to blame Global for DEC's failure and use that failure as a basis for rescinding the NOCA.

permitting process to enable DEC staff and permit applicants to work through potential problems before the permit is made available for public notice and comment. In fact, DEC staff informed Global that they had provided an informal draft of the Title V permit to EPA technical staff and had been discussing potential permit conditions following the close of the public comment period.

Ultimately, although Global does not know precisely what motivated EPA to ask for additional time to review the draft permit before the formal 45-day review period, it appears that EPA was merely acknowledging that the permit was controversial, that it had some outstanding questions concerning the permit, and that it wanted an additional opportunity to review the permit so that any major concerns could be addressed before the start of the formal 45-day review period. EPA's request does not, in any way, "support [DEC's] conclusion the Modification Application is incomplete" and does not justify rescinding the November 2013 NOCA.

In fact, the EPA letter stated that providing the draft permit in advance of the 45-day review period "will allow EPA to work collaboratively with NYSDEC to ensure that outstanding permitting issues concerning Global are addressed," implying that EPA was interested in working with DEC toward issuance of the permit. If DEC had forwarded a proposed permit to EPA prior to May 21, 2015 it would have satisfied EPA's request and complied with the 18-month deadline.

C. DEC Assertion C: The Modification Application Failed to Make its Ambient Air Quality Standard Modeling for Hydrogen Sulfide Public

DEC notes that the Modification Application proposes to reconstruct Tank 33 with a floating roof and to retrofit the tank with heating coils to store the heated bitumen. DEC goes on to note that floating roofs are typically installed to control VOCs and that the tank will have no other control mechanism to treat gases such as H₂S, declaring that Global has not submitted any actual H₂S emissions data from a heated crude oil storage tank with an internal floating roof. DEC then contends that although Global modeled projected H₂S ambient emissions by assuming different concentrations of H₂S in the bitumen, this information was not available at the time the NOCA was issued and the draft permit did not include an emission limit for H₂S. According to DEC, these omissions render the Modification Application incomplete.

As a preliminary matter, the controls proposed are more than adequate to address H₂S emissions associated with the Boiler Project. Although DEC is correct that internal floating roofs typically are installed to control VOC emissions, they also are used to prevent emissions of H₂S and other sulfur compounds as well. Modeling done using the EPA TANKS 4.09d program indicates that an IFR which meets the requirements for volatile organic liquid storage tanks in 40 CFR Part 60, Subpart Kb provides greater than 99% control for H₂S emissions. The percent control efficiency is calculated by modeling the H₂S emissions from the storage tank without the IFR (as a vertical fixed roof tank) and comparing the resultant emissions to the controlled emissions (with an IFR).

Furthermore, DEC does not ordinarily require actual emissions data to be submitted as part of an air permit application. With respect to the Boiler Project, Global used approved EPA emission calculations methods to complete the permit application as well as to calculate H₂S emissions. The EPA TANKS 4.09d program is an industry accepted program and is based on the

EPA AP-42 calculation. TANKS backup calculations were previously provided to DEC for all of the other tanks at the facility as modeled in the PTE. The remaining tanks were not part of this permit modification.

The TANKS 4.09d reports provided to DEC contain the specific assumptions made for each tank input to the TANKS 4.09d software. TANKS 4.09 inputs, shown on the reports, include tank information such as tank diameter, tank volume, type of roof, type of roof fittings, types of seals, etc., as well as geographic location and product information. The geographic location allows the program to take into consideration Daily Maximum Ambient Temperature, Daily Minimum Ambient Temperature, Solar Insulation Factor (the effect the sun has on the storage tank), and Average Wind Speed. All of these parameters are used by the software to calculate potential emissions from the tanks. In fact, the **EPA Review of Available Documents and Rationale in Support of Final Emissions Factors and Negative Determinations for Flares, Tanks, and Wastewater Treatment Systems**, dated April 2015, concludes in Section 5.7 - Conclusions Regarding Tank Measurement Study Data: "The AP-42 emissions factor correlation equations provide a sophisticated modeling method to estimate emissions from organic liquid storage tanks considering a wide variety of tank-specific variables including the tank size, throughput, content properties, ambient temperatures, and the types of roofs, seals, and fittings. When this detailed information is properly used with the AP-42 equations, the emission estimates agree well with the measurement data we have evaluated, suggesting the AP-42 equations for tanks are appropriate and accurate." Section 7 - Conclusions - says: "The AP-42 tank emissions estimation equations sufficiently estimate emissions with accurately characterized tanks, site-specific inputs, and properly operated and maintained equipment." No other data provided in this application or any other application submitted by Global has required the submittal or collection of actual emission data. All applications have used approved EPA emission calculation methods. Furthermore, actual emission statements also use these same emission estimating methods that are approved for use by EPA, New York State and throughout the United States.

Modeling at the time of the NOCA was not necessary because H₂S emissions met New York State limits as demonstrated by the DAR-1 analysis. To provide guidance for implementing the requirements in 6 NYCRR Parts 200, 201, 212 and 257, the Department issued DAR-1 (formerly Air Guide-1). The DAR-1 approach requires source to be evaluated on an individual contaminant-by-contaminant basis with the atmospheric concentration of each chemical contaminant individually compared to either the relevant ambient air quality standard or annual/short-term (one-hour) guideline concentrations (AGCs/SGCs). DAR-1 details a screening procedure in APPENDIX B which is generally conservative. Under DAR-1, a site-specific model is necessary only when a calculated impact is predicted to exceed an AGC or SGC. These models provide a mathematical simulation of how air pollutants disperse in the air using site specific conditions. There are a number of computer programs available for air dispersion modeling, with most of them consisting of a user interface to add convenience to the EPA's AERMOD program. The computer programs simulate pollutant dispersion and predict downwind concentrations of air pollutants.

In the present case, the original H₂S emission calculations were completed using the DAR-1 guidance and met AGCs and SGCs. As a result, DAR-1 did not call for further modeling. However, after the public comment period closed, DEC asked for additional detailed emissions

modeling to help it determine an appropriate H₂S level for a permit condition. Global complied with the request and conducted air dispersion modeling to determine a maximum value of H₂S in petroleum that could cause an odor at the fence line. The air dispersion model was completed using BREEZE AERMOD Software (Version 12345). Control devices and other emission sources were modeled using actual information from the site. Manufacturer and stack test information was used to develop source parameters such as stack height, stack diameter, stack temperature, and stack velocity. Emission rates were determined based on the PTE following discussions with DEC staff. Fugitive emissions were also modeled. Five years of actual meteorological data from Albany was used for the modeling.

Once more detailed modeling was complete, DEC and Global developed a draft permit condition to limit the H₂S to half of the modeled value. The levels used in the modeling were conservative values well above any level of H₂S Global proposed to handle at the Terminal and were used to develop a conservative permit condition solely to satisfy public concerns. Note that there are several other facilities within and around the Port with a greater potential to cause H₂S odor than the Global Terminal. To the best of our knowledge, DEC has not required any of these facilities to model their H₂S emissions nor has DEC imposed permit conditions limiting or addressing H₂S emissions from these facilities.

As the above summary shows, significant information was available to allow DEC to assess the odor and other implications of H₂S emissions from the facility. More importantly, however, the purported absence of H₂S modeling at the time the NOCA was issued and the absence of any emission limit for H₂S in the draft permit do not justify rescinding the NOCA. As noted above, the NOCA marks the *beginning* of the formal permit review process. By issuing the NOCA, DEC is merely announcing to the world that it has enough information to *start* its review. Obviously, issues will arise as the review progresses, particularly in the case of complex and/or controversial projects. However, these issues are addressed as part of the permit review process. Less significant changes are typically made to the permit without further public review and, in the case of Title V permits, are then transmitted to EPA as part of the proposed Title V permit. Significant revisions, by comparison, may be subject to additional public notice and comment. However, DEC's failure to include a specific emission limit in a draft permit does *not* require or justify rescinding the NOCA and restarting the entire permit review process.

D. DEC Assertion D: Compliance with New Source Review Requirements

As discussed above, in its April 28, 2014 comment letter to DEC, EPA noted that Global subtracted a 4.27 ton emission decrease attributable to converting Tank 118 from gasoline, crude or ethanol storage to distillate in its project emission potential calculation. As a result of that decision, EPA argued that the Boiler Project exceeded the 40 ton per year significant source project threshold for VOCs under the nonattainment NSR program. DEC points to this assertion to support its position that the NSR provisions of the Modification Application are incomplete.

In making this contention, DEC ignores the fact that Global reconfigured the Boiler Project to address EPA's concern by proposing to accept stricter emission limits on the barge-loading VCU. This change was discussed with DEC staff and was submitted to the Department in August

2014, which was four months before the public comment period on the Modification Application ended.

In essence, the permit review process for this modification worked precisely as intended. DEC made Global's draft Title V permit application available for review. A member of the "public" (in this case, EPA) identified a potential problem with the project, as proposed, and the applicant (Global) worked with DEC to resolve the problem and revise the draft permit. If DEC was concerned that the solution deviated significantly from the original permit, it had the option of revising the permit and making a new draft available for public review. However, DEC chose instead to wrongly rescind the NOCA and require Global to start over, in contravention of the letter and intent of the UPA.

Conclusion

DEC's announcement, after 18 months, that it intends to rescind the Negative Declaration issued to Global for the Boiler Project and has withdrawn the Notice of Complete Application issued to the project violates the rule of law and poses a serious threat to the environmental permitting process in New York. Faced with public opposition to the Boiler Project grounded primarily in non-air-related concerns, DEC extended the public comment period for a year, despite evidence showing that the last few extensions were wholly unnecessary. DEC then waited until the last day of the 18-month period allowed for issuing a Title V permit modification under State regulations and Clean Air Act before rescinding the NOCA and announcing its intention to rescind the Negative Declaration issued in November 2013.

DEC cites no statute or regulation in support of its decision to rescind the NOCA as there is no legal basis for this action. The NOCA serves a vital role in New York's permitting process. It forces DEC to review each application to determine whether Department staff has sufficient information to start their review and marks the beginning of the UPA process. Once the NOCA is issued, DEC must adhere to the procedures and deadlines in the UPA, which were established precisely to ensure that permit applications are reviewed in a timely and consistent manner. Once the NOCA is issued, it cannot be rescinded. Any issues identified during the permit review process, including any "missing" information, must be addressed within the procedures and time frames of the UPA. Any other conclusion would eviscerate the UPA.

The potential abuses of the UPA process that could occur by allowing DEC to rescind the NOCA are evident in the present case. Global submitted its Title V permit modification for the Boiler Project in June 2013 and, after responding to a Notice of Incomplete Application from DEC, received its NOCA. DEC then spent the next 18 months engaged in an elaborate public review process that ended not with a decision on Global's permit application but with an attempt to start the permitting process over. By taking this path, DEC has deprived Global of the permit modification it requested and denied Global the opportunity to make its technical case for the permit in front of an objective third party, i.e., an administrative law judge.

DEC also has offered no grounds to justify its decision to rescind the Negative Declaration. None of the information provided indicates that either substantive changes have been made to the project or that new information or changes in circumstances have occurred that may result in a

William J. Clark, Regional Permit Administrator
June 30, 2015
Page 24

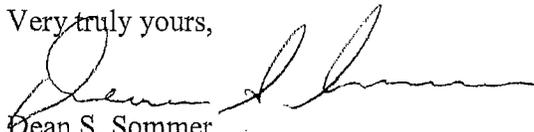
significant adverse environmental impact. With one notable exception, all of the issues raised by DEC involve air emissions from the facility and so could readily have been addressed as part of the air permitting process; DEC did not need to rescind the Negative Declaration. The spill-related concerns identified in DEC's notice letter either were already well known at the time DEC issued its Negative Declaration or could readily be addressed through the multiple programs already in place to regulate spill prevention, management and response issues.

In recent years, the State has declared that "New York is Open for Business." However, businesses cannot operate in this State if they cannot rely on regulators to apply their laws fairly and consistently. In this case, faced with opposition to crude oil transport in the State - most of which was wholly unrelated to Global's Title V air permit modification application - DEC ignored its own SEQRA and environmental permitting laws in order to avoid making a politically difficult decision.

On the basis of the administrative record, including the submissions herein, Global hereby requests the following relief:

1. The Department withdraw the Notice of Incomplete Application;
2. The Department issue an amended Negative Declaration pursuant to 6 NYCRR § 617.7(e);
3. The Department refer the Application and Final Permit to EPA to complete the Title V Permit Review process; or
4. In the event the Department rejects such relief, the Department immediately Order a due process hearing on the Notice of Rescission prior to any determination on such rescission.

Very truly yours,



Dean S. Sommer

On Behalf of Global Companies, LLC

DSS/alr

Enclosures

cc: Mr. Richard Ostrov
Mr. Edward McTiernan