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By Fax and Regular Mail

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To Whom It May Concern:

On behalf of the City of New York, the Mayor's Office of Environmental Coordination would like to compliment the Department of Environmental Conservation's Environmental Justice Office on completion of its draft "Recommendations for the New York State Department of Environmental Conservation Environmental Justice Program" (Draft Recommendations), dated January 2, 2002. The City appreciates the complexity of this issue and the effort required to produce the Draft Recommendations. We would nevertheless like to offer the following comments on the Draft Recommendations.

General Comment

The Draft Recommendations set forth a methodology for conducting an environmental justice (EJ) analysis that would be required for projects or permits affecting minority or low-income communities. Pursuant to this methodology, in urban areas, including New York City, any community with a minority population of greater than 48.5% would be deemed a minority community, and any community with greater than 24.8% of residents below the poverty level would be deemed a low-income community. The minority population of New York City as a whole is approximately 65%. As applied to the City, adoption of the Draft Recommendations in their present form, using this methodology, will make it difficult or impossible to site certain facilities or projects in the City even in areas where these facilities or projects are consistent with applicable zoning. This matter is of even more importance for New York City in the current period of rebuilding.

The result will be either that certain projects which benefit the City as a whole (including large infrastructure projects) may not be built at all, or that other economically

beneficial projects will be relocated to other areas where the permitting process will be less lengthy and uncertain. This outcome may occur even if the adverse environmental impacts of such projects can be feasibly mitigated. Furthermore, the City already has a regulatory framework in place (e.g., ULURP, Fair Share analysis, zoning, and a City Environmental Quality Review [CEQR] process that goes beyond the requirements of SEQRA in certain instances) that takes into account some EJ concerns. The review process in New York City is more extensive than elsewhere in the state, and generally more protective of the environment in all communities.

New York City therefore advocates that the EJ policy should focus on that limited number of projects that have adverse environmental impacts that cannot be mitigated. For such projects, additional information should be required to address EJ concerns so decisionmakers could determine whether the project should proceed in the proposed location, be relocated, or whether any additional conditions should be developed. Absent these changes, the Draft Recommendations, as proposed, could have a disproportionate impact on projects in urban areas of the state, including New York City.

Specific Comments

In addition to the general comment set forth above, the City offers the additional specific comments on the Draft Recommendations.

Public Participation. The Draft Recommendations are unclear whether the public participation program to be submitted to DEC requires DEC approval. No standards for evaluating the sufficiency of the proposed public participation plan are included in the Draft Recommendations.

Alternative Dispute Resolution (ADR). The ADR provisions of the Draft Recommendations are in need of clarification. For example, there are no standards for how to select which community representatives participate in ADR. No provisions are made for funding of ADR or for memorializing and enforcing agreements reached through ADR. New York City is especially concerned that the invocation of ADR early in the permitting process will lead to delay that may effectively prevent the permitting of controversial facilities. The City considers ADR to be appropriate only in disputes where there is a reasonable likelihood that the parties to the dispute will compromise their positions, and not in disputes in which the parties' differences are based on principle.

Failure to Define "Disproportionate" Impacts. The premise of EJ is that minority or low-income communities should not bear disproportionate environmental or health burdens. However, the Draft Recommendations do not contain a workable definition of "disproportionate" impact. Without such a definition, implementation of the Draft Recommendations is likely to lead to confusion, disputes and litigation.

Absence of Background Data Required for Determining Causality and/or Disproportionality of Adverse Environmental Impact. Sufficient and reliable health data

do not currently exist to permit recommended analyses within the normal parameters of environmental review. Requiring collection and analysis of such data by project proponents could introduce unacceptable delay and expense into the SEQRA process.

Cumulative Impacts. The Draft Recommendations suggest that a cumulative impact analysis be conducted for any proposed action that may include the potential for at least one significant adverse environmental impact that may impact a minority or low-income community. There is no clearly understood or agreed-upon method for conducting such a cumulative impact analysis. Requiring different treatment of cumulative impacts in minority/low-income communities also raises significant issues for other areas in the City where a cumulative impact analysis would not be included in the review process. This recommendation is likely to result in disputes and litigation.

New Coordinated Review Requirements. New York City believes that coordinated review requirements are appropriately based on the type of project and not on the location of project.

City- or Area-wide Projects or Actions. The Draft Recommendations do not take into account decisions that are not tied to a specific location. No provision is made for how EJ analysis would be incorporated into such decisions. This omission from the Draft Recommendations is major, and many New York City actions are of this nature.

Electronic Submission Requirements for Applicants. In New York City, proponents of many small projects that may require EJ analysis do not currently have the capability to submit their final EASS in electronic form.

Permit Renewals. New York City agrees with the business community representatives on the Environmental Justice Advisory Group that the provisions of the Draft Recommendations that encourage DEC to treat permit renewals as new permits in response to community concerns could have significant negative effects on certain critical infrastructure. For example, renewals for permits of essential waste transfer stations could become difficult, and loss of waste transfer capacity could lead to serious public health consequences.

Justification Determination. The Draft Recommendations make no effort to describe whether and under what circumstances a disproportionate adverse impact on a minority or low-income community may be justified by other needs or factors (*e.g.*, economic development, lack of other suitable or cost-effective sites, etc.). Absent clear guidance on how agencies should balance competing concerns, EJ issues may preclude the siting of many types of facilities in New York City.

Conclusion

New York City applauds the efforts of the Environmental Justice Advisory Group to deal with the inequitable distribution of environmental burdens in New York State. However, the Draft Recommendations as currently formulated do not take into account

the particular difficulties of administering an EJ policy in the City of New York. New York City hopes that these comments will be reflected in the final version of the "Recommendations for the New York State Department of Environmental Conservation Environmental Justice Program" that will be submitted to Commissioner Crotty later this year.

If you wish further to discuss any of the comments contained herein, please do not hesitate to contact me.

Very truly yours,



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