

## NYSDEC Response to Public Comments

### DEC Program Policy DEP-00-2: Assessing and Mitigating Visual and Aesthetic Impacts

December 13, 2019

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#### **1. Introduction and Organization of Response to Comments**

The Division of Environmental Permits (DEP) administers the State Environmental Quality Review Act (SEQR), Article 8 of the Environmental Conservation Law as implemented by Section 617 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR Part 617) for the NYS Department of Environmental Conservation. On July 31, 2000, DEP issued DEP 00-2, the Division's Policy on Assessing and Mitigating Visual Impacts (Visual Policy). On November 28, 2018, DEP published a notice in the Environmental Notice Bulletin asking for public comment on proposed revisions to the Visual Policy. The changes would update the inventory of aesthetic resources; provide additional staff guidance regarding when a visual assessment is necessary and how to review a visual impact assessment; provide guidance on establishing a 'baseline' to assess visual impact; provide more detailed guidance when deciding significance; and revise guidance when assessing aesthetic resources of local concern. DEC received approximately 21 public comments on the Visual Policy. In response, DEC staff further modified the Visual Policy; the modifications appear in the final version of the policy including typographical corrections. DEC staff have set out the following responses to comments to note where it has accepted a substantive change, to clarify a provision of the Policy or to disagree with a comment. The responses to comments are organized according to topic and generally follow the format of the Visual Policy including numbering. If DEC did not receive a comment corresponding to a heading of the policy, the heading has been included but no comments appear beneath the heading.

## **2. Changes in The Draft, Revised Visual Policy**

DEC staff made several changes to the policy in response to comments. They are as follows:

- The title of the policy was changed to “Assessing and Mitigating Visual and Aesthetic Impacts.” The revised title better reflects the subject matter of the policy, i.e., visual impacts that may be aesthetically significant.
- Various typographic corrections were made such as the reference to the Department of State’s coastal program.
- References to the environmental assessment form workbooks were added to the policy.
- Where relevant and more accurate, the term “action” replaced the term “project”.
- The reference to National and State register of historic places was simplified by referring to historic resources listed or eligible for inclusion on the National or State registers of Historic Places.
- The sentence “...designation of an historic property is not always based on the aesthetic value associated with the property” was deleted. Comments pointed out that the statement was too simplistic.
- DEC added language that encourages DEC staff to coordinate with the relevant State or Federal agency responsible for the designation of an historic resource to aid in the identification of the specific quality or value of a designated resource.
- DEC removed references to industrial wind turbines and powerplants because those types of facilities, where they would generate 25 or more megawatts, are reviewed by the New York State Board on Electric Generation Siting and the Environment under Article 10 of the Public Service Law. Generally, Department of Public Service staff rather than DEC staff serves as lead reviewers for visual and aesthetic impacts of such projects.
- DEC deleted certain references to New York City since the City of New York has its own guidance for evaluating aesthetic impacts under the City Environmental Quality Review Act.

- DEC added guidance for staff to encourage applicants to submit “aesthetically compatible projects.”
- With respect to lighting issues, DEC added references to the International Dark Sky compliant lighting and to FAA guidelines for tall structures.
- Text was added to clarify that all structures regardless of type or size are subject to analysis. Comments criticized a statement that could have been read as utility structures such as wind turbines from visual impact analysis because of their inherent need to be large objects on the landscape.

### **3. Response to Comments by Policy Headings**

**I. Purpose** – No comments received.

#### **II. Applicability**

Comment:

Is it true that the Visual Policy cannot over-ride local law?

Response

Yes. Use of the Visual Policy, like all other DEC policies, is mandatory for DEC staff. For all others, the application of the Visual Policy is optional. If a municipality or state agency were to adopt a different methodology for evaluating visual and aesthetic impacts, then the municipality or agency would apply its methodology.

Comment:

Does this policy apply to Article 10 (Public Service Law Article 10) projects?

Response:

Generally, while DEC participates in Article 10 projects as a statutory party, Department of Public Service staff take the lead on reviewing Article 10 projects for the visual and aesthetic impacts. DPS staff may use the policy but its use is only mandatory for DEC staff.

### **III. Background**

Comment:

“Most people have not considered nor been encouraged to define and codify their definition of beauty. Alas, the updated draft to the DEC Visual Policy does not even provide a definition of beauty...”

Response:

The term “beauty” has been used in the policy from its beginning in 2000 and there have been no issues with it. As used in the policy, the term carries its ordinary or dictionary meaning. DEC defines “aesthetically significant place” as “a place that is formally designated as such and visited because of its beauty.” “Designated” means that the area has been described by federal or state governments pursuant to statutory authority.

Comment:

“‘Visual impacts’ should be considered in greater detail throughout the Policy. Public interest and adverse effects warrant consideration of impacts not necessarily ‘aesthetic’ as defined above. For example, poorly planned exterior lighting installations can cause visual impacts including glare, light-trespass, and sky-glow, which are not necessarily aesthetic impacts, but which can adversely affect land use, community character, and public health and safety.”

“Specify dark-sky compliant lighting, use of manually controlled task-lighting, and full-cutoff fixtures with no drop-down optics, where feasible”

Response:

The Department has updated the section on lighting to address the commenter’s examples of visual impacts.

### **V. Policy – No comments received.**

## **VI. Responsibility**

### Comment:

“The Town of Nassau Natural Resources Committee encourages the NYS DEC to strengthen local and neighborhood visual resource and community character considerations in revising the Visual Policy guidance document. We note that this can be accomplished by simple outreach efforts by the Lead Agency or permit Applicant, during scoping of EIS...”

### Response:

While aesthetics is an element of community character, “community character”, as it has come to be understood, includes other elements as well. The Visual Policy was not intended to address the larger subject of community character. DEC has, however, addressed the community character in other SEQR related publications including the SEQR Handbook (Chapter 4, Determining Significance), in the Full EAF Workbook, Part 2, Question 18, in the Short EAF Workbook, Part 2, Question 3 and in SEQR caselaw (see SEQR Handbook, Notable Court Decisions on SEQR).

Rather than relying on individual outreach efforts, local governments should identify their places of aesthetic importance through comprehensive planning. That simplifies the task in identifying such places during project reviews and ensures that the designation comes about through democratic and deliberative manner (see Department of State, Creating the Community You Want: Municipal Options for Land Use Control, p. 17, James A. Coon Local Government Technical Series, Revised 2009).

### Comment:

“It also occurred to me that no single individual or committee should be entrusted to describe what is beautiful and what should be protected. Each community should conduct some type of polling to get a community’s view, not an individual [’s view].”

### Response:

Municipal comprehensive planning is a public process. Under the State municipal enabling laws, comprehensive plans must be adopted by a local legislative body to have force and effect. Thus, the comprehensive plan process is suited to ensuring that the

designation of aesthetically significant places comes about through a process that is open to the public and sanctioned by the local government. At the same time, the generic inventory in the Visual Policy is built around designated resources that have been formally recognized as such by local, state or federal government and not left to individual interpretation.

Comment:

“This new section [local resources] directs NYSDEC staff to ‘defer to local decision makers who are more likely to be familiar with and best suited to address impacts to such resources.’ To that end, the proposed policy revision states that when NYSDEC is the lead agency, staff shall only consider aesthetic resources that are officially designated in an adopted comprehensive plan or through zoning.’ Scenic Hudson opposes this provision because in cases where Comprehensive Plans are out of date or not adopted, this provision would unnecessarily prevent NYSDEC reviewers from considering visual impacts on these local resources.... It is beyond dispute that many municipalities have not updated Comprehensive Plans for many years and in some parts of New York State local plans are insufficient and even non-existent.”

Response:

The policy is only mandatory for DEC staff. If another agency, such as a municipality, is serving as lead agency or making an uncoordinated SEQR determination, the municipality is not bound by the policy. Moreover, municipalities may identify their own list of aesthetic resources beyond the inventory of aesthetic resources identified in the Visual Policy. However, those inventories should be officially adopted and readily available. Scenic Hudson’s suggestion that DEC Staff should be required to consider aesthetic resources that are not officially adopted would create uncertainty and is contrary to the main purpose of the policy — which was to enhance predictability in the evaluation of visual and aesthetic impacts.

## **VII. Procedure**

### Comment:

“Scenic Hudson recommends that an additional category should be added [to the Inventory of Aesthetic Resources] that would include ‘lands held by qualified conservation organizations.’”

### Response:

While Scenic Hudson and other non-governmental organizations acquire and protect important aesthetic resources, the suggestion would defeat one of the reasons the Visual Policy was first adopted, that is, to create a list of resources that have been vetted and officially adopted by units of government as places of aesthetic significance to those communities and thereby instill greater objectivity and predictability to visual and aesthetic impact analysis.

### Comment:

“The City asks that DEC include historic resources designated by LPC [Landmarks Preservation Commission] in the inventory of aesthetic resources on page 5, section A.”

### Response:

The inventory of aesthetic resources already includes all historic resources listed or eligible for inclusion in the State or National registers of historic places.

### Comment:

“[T]he Department’s consideration of locally important aesthetic resources may not be legally limited to those which have been officially designated by local governments.”

### Response:

DEC disagrees. Further, the Visual Policy has used the inventory for almost two decades without an issue. The Visual Policy is only binding on DEC staff. Municipalities and state agencies, outside of DEC, may adopt their own rules that do not limit the inventory.

Comment:

“Undertaking consultation with local municipalities, instead of relying on comprehensive plan and zoning code, for an inventory of aesthetic resources of significance to the community is paramount. Many rural communities do not have either a comprehensive plan or zoning code; or, if they do, they are outdated.”

Response:

As stated above, one of the purposes of the Visual Policy was to provide predictability to the assessment of visual impacts and identification of places that may be aesthetically important. DEC’s Inventory of Aesthetic Resources has been the basis of the agency’s visual impact assessment for almost 20 years, involving hundreds of projects that have been successfully reviewed under the Visual Policy. While DEC recognizes that some municipalities lack comprehensive plans or have outdated ones, the inventory in the Visual Policy covers a broad range of protected resources.

Comment:

Does the analysis provide leaf-on, leaf-off impact analysis?

Response:

The Visual Policy is not intended to cover all the technical details of a visual impact assessment and therefore does not specifically address leaf-on, leaf-off; however, if a viewshed analysis is appropriate for a given project, it is typical to include an analysis that includes leaf-on and leaf-off conditions.

Comment:

“Part I, E3 of the Full-EAF asks, among other things, ‘if the project site is within five miles of any officially designated and publicly accessible federal, state, or local scenic or aesthetic resource? Why five miles given the 500+ foot nature of IWTs [industrial wind turbines]?’”

Response:

The Policy allows for longer distances to be considered depending on the circumstances. See the section “Determining Distance Limits for Visual Analysis.”

Comment:

“The City requests that DEC delete the sentence stating that a ‘one mile viewshed radii or less is adequate’ in New York City or revise this sentence to reflect that viewshed radii of 5 miles or more are appropriate for both urban or built up areas, consistent with the rest of the policy.”

Response:

DEC has deleted the sentence stating that a ‘one mile viewshed radii or less is adequate in New York City’ and added general guidance that urban or built-up areas may require smaller radii for a viewshed analysis to be determined on a project by project basis.

Comment:

“Scenic Hudson recommends that the policy state that ‘due to their effectiveness and to the ease for reviewers, interested parties, and the public to interpret the results, the use of computer-generated visual analysis is encouraged and preferred. Only in rare cases when small-scale projects are proposed near less sensitive visual resources (e.g., not within proximity of sites or districts in the inventory of Aesthetic Resources) would the use of higher-tech, computer-based methods not be necessary.”

Response:

DEC does not agree with this suggestion. Such a requirement could unreasonably increase costs for smaller projects without a commensurate benefit in the level of analysis. Most projects will use some level of computer analysis. There is no need to create a more ironclad rule. Finally, the policy does not apply unless the action is within the viewshed of sensitive resources.

Comment:

“The Policy should not limit SEQR review to sites that are currently accessible to the public. Ownership can change over time, and a site that is currently in accessible may someday become accessible. Consistent with SEQR, DEC should take a long-term view, not a short-term view.”

Response:

The Policy does not limit the analysis of visual and aesthetic impacts to sites that are publicly accessible. However, whether a site is publicly accessible plays an important role in determining significance under SEQR. As stated in the policy, “while private individuals or landowners are members of the public, aesthetic impacts to a non-publicly accessible scenic or aesthetic resource would not usually rise to the level of significance contemplated in this policy inasmuch as a criterion of significance involves evaluating the number of people affected by an action (6 NYCRR §617.7 [c] [3] and EAF, Part 3.)” As the commenter points out, it is true that sites change ownership and that ones that were inaccessible become accessible. Nonetheless, the number of members of the public effected by an action has always been a factor under SEQR in determining significance.

Comment:

“Under the heading of ‘Significance’ DEC is weighing the number of people affected by an action inappropriately. Do we value and protect a place of beauty because it is used and accessible by many people? Or do we protect it because it is a place of beauty and it brings peace and connectedness to those who view it? If we only protected the former, we would have no parks in our country. People protected areas of beauty long before throngs of people visited...”

Response:

As explained in the policy, the number of persons that may be affected by an action is a factor (but not the only factor) in deciding the significance of an action under SEQR (see 6 NYCRR 617.7[c][3][vii]). Under the Visual Policy, DEC has not created a bright line in terms of the number of persons that may be affected and the significance of an impact. Still, in assessing significance, DEC must ask whether the view is publicly accessible — which looks at whether the public could enjoy the view.

Comment:

“Explore options [for lighting] in FAA guidelines: use of less intrusive amber lighting rather than white lighting at night; and aircraft detection periods of required lighting.”

Response:

The comment (with respect to use of less intrusive lighting) was incorporated into the Policy.

Comment

“It would be helpful for the policy to clarify the appropriate level of mitigation when a ‘visual impact’ may exist (when effects of perspective don’t diminish visibility) but an ‘aesthetic impact does not exist.”

Response:

The Visual Policy asks DEC staff to evaluate both visual and aesthetic impacts. However, the emphasis of the Visual Policy has and continues to be on visual impacts that may be aesthetically significant. As a result, DEC has renamed the policy to “Assessing and Mitigating Visual and Aesthetic Impacts...” from Assessing and Mitigating Visual Impacts” though this response to comments still uses “the Visual Policy” as a shorthand reference.

The level and type of mitigation for either visual or aesthetic impact is case specific. Generic example of types of mitigation are provided in Section E that applies to both visual and aesthetic impacts. See responses above about lighting and visual impacts.

Comment:

DEC must have the option of stating that the visual impacts cannot be mitigated so placement of the project in the location is not recommended.

Response:

Agreed. Under SEQR, DEC has this option to deny an action based on significant impacts that cannot be mitigated and where the unmitigated impacts are not outweighed by social, economic and other essential considerations as happened.

Comment:

“Consider a tiered cost structure according to project type and/or size to recommend the acceptable percentage of the total project cost to be dedicated to visual impact mitigation. Dedicating up to 10% of the project cost (according to the revised program

guidance) can be unreasonably burdensome for many types of projects with tight budgets.”

Response:

The percentage referred to was not changed from the policy that has been in effect since 2000. DEC is not aware of any issue with using that percentage. The commenter is free to provide DEC with a proposal that would be considered in a potential future amendment of the Visual Policy.

Comment:

“Elaborate on how decommissioning can be an effective measure for different types of projects.”

Response:

The Policy provides some examples. An illustration of decommissioning could be an applicant who proposes removal of a tall stack from the viewshed of an historic site where the viewshed is an element of aesthetic importance for the historic site.

## **VII. Glossary**

Comment

“The glossary would benefit from addition of the term ‘serenity’ being defined as that quality of the natural environment which produces the highest level of human wellbeing.”

Response

Serenity is not a term that is used in the Visual Policy so there is no need to separately define it.

Comment:

“For the term ‘Viewer Characteristics,’ should the definition be modified to also include in some way the relative numbers of viewers that are affected?”

Response

The Visual Policy defines “viewer characteristics” to include “both the type of viewer groups and the activity in which designated aesthetic resource users may be engaged in.” DEC cannot readily draw a bright line based on the numbers of viewers affected with respect to the viewer characteristics.

**4. Response to General Comments**Comment:

“Nowhere in this document is aesthetic resource impact weighed when considering structures ‘in motion.’ It is one thing to weigh the impact on viewsheds of immovable buildings being proposed, but it is completely different thing to weigh the impact of multiple 600-foot spinning structures [wind turbines] ...How could industrial wind turbines of the heights envisioned by developers and given the most recent technologies be visually consistent with other buildings and structures in any area in NYS?”

Response:

The Visual Policy is intended to provide a generic means to assess aesthetic impacts for SEQRA reviews conducted by DEC staff. The focus of the Visual Policy is not on wind turbines — which, for wind projects of 25 or more megawatts, are reviewed by the New York State Board on Electric Generation Siting and the Environment under Public Service Law Article 10 as implemented by 16 NYCRR §1001.24 (which sets out the application requirements pertaining the assessment of visual impacts). Further, judgements about visual impacts are context specific so Department staff do not agree that one can make an across the board judgment for tall structures.

Comment:

These examples [power plants and industrial wind turbines] are generally subject to Public Service Law Article 10, which has specified visual assessment protocols; applications under Article 10 are not subject to SEQRA or the DEC Visual Policy.”

Response:

Comment noted. In the publicly noticed Visual Policy DEC used power plants as an example and subsequently updated the policy to remove reference to such facilities.

Comment:

“One major item that is not covered is shadow flicker. While it is unique to wind, the visual simulations pictured include wind.

Response:

DEC has replaced the simulations of wind turbines with other, non-wind specific examples. By way of explanation, the policy is for the benefit of DEC staff carrying out project reviews under the State Environmental Quality Review Act (Article 8 of the Environmental Conservation Law). Since the advent of Article 10 of the Public Service Law (the State’s energy siting law), wind projects that would generate twenty-five megawatts or more of electrical power are reviewed for their environmental impacts under Article 10. DEC is a statutory party to those proceedings and may refer to the Visual Policy in the course of the reviews.

Comment:

“The proposed policy revision should be revised to include ‘neighborhood character’ as legitimate considerations in assessing visual impacts of proposed actions, as envisioned by the SEQR regulations.”

Response:

While aesthetics is an element of community character, community character includes other elements as well. The Visual Policy was not intended to address the larger subject of community character — which is already well developed in SEQR through caselaw.

Comment

“The Visual Policy does not address other aspects of ‘community character’ considerations as recommended and described in SEQR guidance documents including EAF Workbooks. This topic warrants additional guidance in the Visual Policy.

Response

The Visual Policy is not intended to address the larger issue of community character.

Comment:

“The Policy clearly applies to views from a listed aesthetic resource, where the proposed action lies within its viewshed and would be visible from the resource. However, it is not entirely clear on the point that visual impacts include impacts on views of a historic site or other aesthetic resource from an off-site point, which would be affected by the action. For instance, in the Sour Mountain Realty hearings before DEC in the 1990s, the proposed mine was only slightly visible from the adjoining Hudson Highlands State Park, but the public’s views of the Park would have been severely affected by the mine that was proposed for an adjacent property. This was found to be an adjudicable issue. See Sour Mountain Realty, Inc. - Interim Decision of the Commissioner, July 18, 1996. The Policy should be clarified to make sure that it covers this type of impact.”

Response:

An analysis would include not only the view from the resource but looking towards the resource from a place that is publicly accessible. If the Visual Policy was triggered, then DEC staff would ask the applicant to prepare a viewshed map. The definition of “viewshed” is “[a] map that shows the geographic area from which a proposed action may be seen...” DEC Staff have added text to the Policy to clarify the point.

### List of Commenters

Name	Affiliation
Jeffrey Anzevino, AICP	Scenic Hudson
Anne Britton	
John C. Caffry, Esq.	Caffry & Flower
Andrew C. Davis, Utility Supervisor	NYS Department of Public Service
Kathy Dillon	
John Droz, Physicist	
David Duff and Susie Wood	
David Engert, Supervisor	Town of Somerset
Kevin Franke, Senior Associate Director of Environmental Services	The LA Group
Kate Kremer	
Fred Nuffer, Chairman	Town of Nassau Natural Resources Committee
Cliff Schneider	
Hillary Semel, Director and General Counsel	NYC Mayor's Office of Environmental Coordination
Mary Sennett	
James Simon, Town Supervisor	Town of Yates
Alice Sokolow	
Kathy Spenser, Principal Environmental Analyst	LaBella Associates
Graham L. Treistad, AICP, WSP	
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