



August 4, 2015

William J. Clarke
Regional Permit Administrator
New York State Department of Environmental Conservation
Region 4
1130 North Westcott Road
Schenectady, NY 12306-2014

**Re: Global Companies, LLC Application for Modification of Title V Permit
Albany Terminal, 50 Church Street, Albany, New York
DEC Application No. 4-010-00112/00029**

Dear Mr. Clarke:

Earthjustice submits this letter on behalf of the Ezra Prentice Homes Tenants Association, Sierra Club Atlantic Chapter, Center for Biological Diversity, Riverkeeper, Scenic Hudson, Natural Resources Defense Council, Environmental Advocates of New York, and People of Albany United for Safe Energy in support of the May 21, 2015 Notice of Intent to Rescind Negative Declaration and Notice of Incomplete Application (“Notice”) issued by the Department of Environmental Conservation (“DEC” or “Department”) with respect to the above-referenced application by Global Companies, LLC (“Global”). This letter also responds to several of the numerous misstatements of law and fact contained in Global’s June 30, 2015 letter to DEC opposing the Notice.

BACKGROUND

Throughout the pendency of Global’s application to modify its Title V permit to allow it to receive, store, heat, and transfer tar sands oil at the Albany Terminal (the “Tar Sands Project”), Global has withheld crucial information from DEC and the affected environmental justice community, defied the Department’s requests for additional information, misrepresented key aspects of its proposed Tar Sands Project, and failed to comply with the Department’s Environmental Justice Policy, Commissioner’s Policy 29 (“CP-29”). On this basis alone, the Department is justified in rescinding its Notice of Complete Application (“NOCA”) and Negative Declaration. *See* 6 NYCRR § 621.3(a); CP-29 § V.D.

In addition, subsequent to the Department’s November 21, 2013 issuance of its NOCA and Negative Declaration, significant new information has come to light concerning (i) the applicability of Nonattainment New Source Review (“NNSR”) requirements to the Tar Sands Project; (ii) potential adverse impacts to the affected environmental justice community of hydrogen sulfide and benzene emissions from the Tar Sands Project; (iii) the potentially disastrous ecological consequences of a spill of tar sands oil; (iv) Global’s proposed

reconfiguration of the Project; (v) the volatility of Bakken crude oil and the resultant increased risk of a fire, explosion or spill involving mixed trains of Bakken and tar sands oil; and (vi) the life cycle climate change impacts of tar sands oil. This newly discovered substantive information further supports DEC’s decision to rescind the NOCA and Negative Declaration.

On June 30, 2015, Global submitted a response to the Notice. Ltr. from Dean Sommer, Esq., Young Sommer LLC, to William Clarke, DEC Regional Permit Administrator (June 30, 2015) (“Global Submission”). The repetitive, disjointed, and voluminous Global Submission—totaling nearly 1,000 pages—presents Global’s unsolicited interpretation of how it believes DEC should have reviewed the Tar Sands Project, but offers no persuasive legal or factual justification for either the NOCA or Negative Declaration to remain in effect. Moreover, as discussed below, the Global Submission is plagued with numerous legal and factual errors.

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

The Department’s regulations implementing the State Environmental Quality Review Act (“SEQRA”) set forth the circumstances in which a negative declaration must be rescinded:

(f) Rescission of negative declarations.

(1) At any time prior to its decision to undertake, fund or approve an action, a lead agency 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 related to the project arise; that were not previously considered and the lead agency determines that a significant adverse environmental impact may result.

6 NYCRR § 617.7.

As the quoted regulation makes clear, the Department has a nondiscretionary duty to rescind a negative declaration when any one of the following three things occur: (1) substantive changes are proposed for the project; (2) substantive new information is discovered; or (3) substantive changes in circumstances arise that were not previously considered and the lead agency determines that a significant adverse environmental impact may result. Here, the Department has correctly determined that it must rescind the Negative Declaration because all three triggering events have occurred since it was issued.

A. Substantive New Information Has Been Discovered.

1. Substantive New Information Reveals That the Tar Sands Project is Likely Subject to NNSR

Both DEC and the Environmental Protection Agency (“EPA”) have correctly pointed out that Global has failed to provide sufficient information to support its claim that the Tar Sands

Project is not subject to NNSR. Notice at 6–8. Critically, Global failed to provide the basis for its calculations of the potential to emit VOCs for Global’s marine loading operations at the Albany Terminal. Those calculations assumed that the emission factor for the petroleum product handled at the Terminal is 1.3590 pounds of VOCs emitted per 1,000 gallons of crude oil transloaded, but never explained how it calculated that figure.¹ In particular, Global failed to provide the value it used for the vapor pressure (or volatility) of the petroleum product handled at the Terminal.

The assumed vapor pressure is particularly important because newly discovered information revealed after the issuance of the Negative Declaration strongly suggests that Global used a vapor pressure—and therefore an emission factor—that was too low, thereby underestimating VOC emissions from Terminal operations. As set forth in the August 2014 Comments, studies conducted after November 2013 have found that the vapor pressure of the Bakken crude oil that is currently transloaded at the Albany Terminal can exceed 15 pounds per square inch (“psi”). August 2014 Comments at 15-16. This value is significantly higher than the vapor pressure of 5 to 11.7 psi that was cited, and apparently relied upon by Global, in a Material Safety Data Sheet provided to DEC prior to the Negative Declaration. The use of a more accurate vapor pressure likely would cause the Project’s potential to emit to exceed the threshold of NNSR applicability. *Id.* This new data about the true vapor pressure of Bakken crude oil represents substantial new information not considered at the time of the Negative Declaration and has significant implications for the Tar Sands Project’s NNSR analysis.

2. Substantive New Information Has Been Discovered Regarding Potential Adverse Impacts From Hydrogen Sulfide and Benzene Emissions

The Notice correctly acknowledges that new information received during the public comment period on the Tar Sands Project regarding potentially significant emissions of hydrogen sulfide from the heating of tar sands oil requires rescission of the Negative Declaration. As set forth in the public comments, including a report from Dr. David Carpenter, a public health expert, hydrogen sulfide is highly toxic, can cause significant adverse public health impacts, and creates severe “rotten egg” odors. *Id.* at 18–19. The Notice states that heavy crudes such as tar sands oil contain much higher levels of hydrogen sulfide than the Bakken crude currently handled at Global’s Albany Terminal, and that the tank in which Global proposes to heat the tar sands oil is located less than one quarter mile from the Ezra Prentice Homes. As the Department correctly determined, the potential impacts of hydrogen sulfide emissions from the heating of tar sands oil must be fully examined.

The Global Submission claims that the potential impacts of hydrogen sulfide emissions have been considered, asserting that Global’s consultant discussed an air dispersion model with DEC that estimated hydrogen sulfide concentrations from operation of the Tar Sands Project. Global Submission at 10–13. However, Global’s own submissions suggest that the company never provided the final modeling to DEC. *See* Affidavit of Gianna Aiezza, sworn to on June 30, 2014 (“Aiezza Aff.”) at ¶¶ 54–56. Global also failed to provide its purported modeling results to the affected environmental justice community in clear violation of CP-29. *See* CP-29 at V.D.1.4

¹ The emission factor is used as the basis to calculate the facility’s potential to emit VOCs.

(requiring the applicant to make “application materials, studies [and] reports” available to the affected environmental justice community at “easily accessible document repositories.”); *id.* at V.D.1.3 (requiring applicant to “hold public information meetings to keep the public informed about the proposed action and permit review status.”).²

Because the results of air dispersion modeling are notoriously sensitive to assumptions made concerning the height and location of emission points, emission rates, local meteorology, receptor locations, and other factors, Global’s suggestion that DEC simply accept its modeling results without any opportunity for public review and comment should be rejected. The public—particularly the affected environmental justice community—must be provided with the opportunity to critically review Global’s modeling assumptions and results.

Substantive new information also came to light subsequent to issuance of the Negative Declaration concerning potential adverse impacts of benzene emissions from the Tar Sands Project. As pointed out in the August 2014 Comments, if Global were to import the full amount of authorized Albany Terminal throughput as Bakken or tar sands crude, the product moving through the facility would have over a hundred times more benzene than is assumed in Global’s emission analyses. August 2014 Comments at 16-17. Benzene will be emitted from storage tanks and leaks from pumps, valves and fittings throughout the Terminal at potentially significant levels. As noted in the public comments, the Negative Declaration is based in part on Global’s unrealistically low benzene emission assumptions. *Id.*

The potential significance of benzene emissions from the Tar Sands Project was underscored by the results of DEC’s air quality monitoring conducted in and near the affected environmental justice community during May and June, 2014. As discussed in Dr. Carpenter’s expert report analyzing the monitoring results, the results show that benzene levels in 20 out of 21 samples exceeded the long-term benzene exposure standard, and the mean value for all samples is nearly three times the long-term benzene standard. *See* David O. Carpenter, M.D., Report on the New York State Department of Environmental Conservation’s Albany South End Community Air Quality Screening (Sept. 30, 2014). Because benzene is a known human carcinogen and can have serious adverse health impacts even at low exposure rates, the substantive new information provided by the community air monitoring results provides further support for rescission of the Negative Declaration based on this new information.

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

The Department accurately noted that the Tar Sands Project will result in increased volumes of tar sands oil and other heavy crudes being received, stored, heated, and transferred at the Albany Terminal. DEC correctly determined that new information regarding the potentially significant adverse environmental impacts of a spill of tar sands oil or other heavy crude oil,

² Although Point II.C of the Global Submission purports to address the issue of its failure to provide its hydrogen sulfide modeling results to the public, that section only discusses what the company discussed with DEC and does not dispute that it failed to provide those results to the public. Global Submission at 20–22.

particularly a spill into the Hudson River, must be fully assessed.³ Indeed, the report to the Governor on crude oil transport in New York State, which was co-authored by DEC subsequent to issuance of the Negative Declaration, specifically noted that “Canadian Tar Sands oil presents a different set of challenges to effective prevention and response . . . Since Tar Sand oil sinks when introduced to water, different spill response equipment and protocols would be needed.” DEC *et al.*, *Transporting Crude Oil in New York State: A Review of Incident Prevention and Response Capacity* (2014) at ix.

Public comments, including expert reports by Dr. Isaac Wirgin and James Elliott, submitted after the issuance of the Negative Declaration also identified the unique characteristics of tar sands oil that are likely to cause severe ecological damage in the event of spill into a water body such as the Hudson River. August 2014 Comments at 19–22. In particular, the comments pointed out that the heavier specific gravity of tar sands oil causes it to sink to the bottom of a water body rather than float on top of the water like lighter crudes, making cleanup nearly impossible, as well as much more expensive and likely to result in significant, long-term ecological damage. As the comments pointed out, the ecological importance of the Hudson River, including the presence of two endangered species, require that the potential impacts of a spill of tar sands oil be fully analyzed. *Id.*

4. Substantive New Information Regarding the Volatility of Bakken Crude Has Been Discovered

As discussed above, subsequent to issuance of the Negative Declaration new information became available regarding the extreme volatility of Bakken crude oil. Public comments, in particular the expert report of Dr. Fox, describe the unique risks posed by mixed trains carrying both Bakken and tar sands crude. *Id.* at 24–25. As described by Dr. Fox, an accident involving both types of crude could result in the Bakken crude igniting the tar sands crude, releasing huge plumes of highly toxic hydrogen sulfide and releasing tar sands oil into waterways. *Id.* These risks were not evaluated by DEC prior to issuance of the Negative Declaration.

5. Substantive New Information Makes Clear That the Climate Change Impacts of the Tar Sands Project Must Be Evaluated

The extraction, processing, refining and burning of tar sands oil is a significant source of greenhouse gas emissions. Public comments submitted subsequent to the issuance of the Negative Declaration identified the significant life cycle climate change impacts of tar sands oil, including that carbon emissions from tar sands are 81 percent higher than those from conventional oil on a well-to-tank basis. *Id.* at 25–26. The climate change impacts of the Tar Sands Project were not evaluated in the Negative Declaration and provide additional grounds for rescinding it. *See* Commissioner Policy 49, Climate Change and DEC Action, § V.2.c (requiring DEC to consider “[w]hether a new project . . . will lead to an increase . . . in [greenhouse gas] emissions.”); § V.2.f (requiring consideration of “[w]hether a project’s . . . implementation may contribute [to greenhouse gas] emissions.”); § V.2.g (requiring DEC to consider “[l]ife cycle [greenhouse gas] implications of actions or choices being made.”).

³ Moreover, as DEC correctly notes, the Department did not learn that Global intended to receive, store and heat tar sands oil until after the Negative Declaration had been issued. *See* Notice at 4.

B. Substantive Changes Are Proposed for the Project.

The Notice states that on August 3, 2014, Global proposed significant changes to the Tar Sands Project as part of its effort to avoid NNSR requirements. Notice at 2-3. Given the proximity of the Ezra Prentice Homes, a residential community immediately adjacent to Global's Albany Terminal, the Department correctly determined that Global's proposed changes—like the Tar Sands Project itself—could have significant impacts on nearby residents and these impacts must be fully analyzed.

In any event, as discussed in detail in public comments submitted after issuance of the Negative Declaration, Global's calculations of volatile organic compound ("VOC") emissions from the Tar Sands Project are fundamentally flawed and significantly underestimate those emissions. *See* Ltr. From Christopher Amato, Staff Attorney, Earthjustice, to William Clarke, DEC Regional Permit Administrator (Aug. 27, 2014) ("August 2014 Comments") at 13–19. The August 2014 Comments include a report from Dr. Phyllis Fox, an expert on air emissions from crude-by-rail facilities, demonstrating that Global's Tar Sands Project will result in increased VOC emissions triggering NNSR requirements. *Id.* Compliance with applicable NNSR requirements will require significant changes to the Tar Sands Project, including changes to the project's design to meet Lowest Achievable Emission Rate standards for VOCs. Thus, the Department was correct in its determination that there have been and will be substantive changes to the Tar Sands Project requiring rescission of the Negative Declaration.

C. Substantive Changes in Circumstances Have Arisen.

As discussed above, Global claims that its Tar Sands Project is not subject to NNSR requirements. However, as discussed in detail in the public comments, this claim is based on erroneous VOC emission calculations for the Project. When the proper emission calculations are used, it is clear that the Tar Sands Project triggers NNSR requirements. This constitutes a substantive change in circumstances affecting the Project.

In addition, Global's air dispersion modeling for hydrogen sulfide emissions from the Tar Sands Project constitutes a substantive change in circumstances. Both the NNSR and hydrogen sulfide modeling issues were not previously considered and may have significant environmental impacts.

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

The Notice accurately states that public comments, including expert reports submitted as part of the comments, made clear that substantial information is missing from Global's application for its Tar Sands Project, including critical information concerning the applicability of NNSR requirements and compliance with hydrogen sulfide ambient air quality standards. These concerns were echoed by EPA in letters dated April 28, 2014 and May 15, 2015. Accordingly, the Department properly decided that the NOCA should be rescinded because Global's application is incomplete.

The Global Submission argues at length that the Department lacks the authority to rescind the NOCA, but cites to no legal source supporting its claim. Global argues only that the Uniform Procedures Act (“UPA”) “contains no provision allowing rescission of a NOCA.” Global Submission at 16. While this is true, the UPA also contains no provision prohibiting rescission of a NOCA, and Global cites to no legal authority suggesting that rescission is impermissible under the UPA.

Moreover, Global’s interpretation of the UPA—that a NOCA can never be rescinded—is nonsensical. Under Global’s interpretation, once a NOCA is issued, the Department is legally required to keep the application in an active status no matter what happens. Thus, in Global’s view, even if the applicant ignores or fails to adequately respond to requests for additional information (which even Global acknowledges are proper under the UPA), the Department must continue to “review” the application.⁴

Indeed, Global has defied or provided inadequate responses to DEC’s requests for additional information, making it impossible for the Department to complete its review of the application. For example, Global failed to provide the following additional information requested by DEC: (i) the process it uses to sample and analyze products in oil train cars; (ii) the feasibility of adding secondary containment to Terminal areas currently without such facilities; (iii) the volume and types of crude oils to be received and stored at the Albany Terminal; (iv) insurance coverage; (v) a sample rail carrier contract; (vi) where and how the size of trains entering the Albany Terminal is determined; (vii) barge shipment agreements and size of barges; (viii) how potential impacts to the community from fires, explosions, or spills can be successfully avoided; (ix) how Global will communicate and coordinate with first responders and the local community in the event of fire, explosion or spill; (x) additional resources that should be provided to first responders; (xi) the nature and frequency of drills and on-site response capacity; (xii) best practices for containment when product is being pumped onto barges; (xiii) steps to be taken to address potential corrosion and accidental leaks if the crude oil’s Total Acid Number is elevated; and (xiv) whether Global intends to accept Group 5 oils.

Keeping Global’s application under active review in the face of its failure and refusal to provide crucial information serves no practical purpose and is a waste of DEC’s limited resources. Accordingly, under these circumstances the Department’s proposed rescission of the NOCA is clearly justified. *See* 6 NYCRR § 621.3(a).

⁴ In fact, the Department may simply deny Global’s application based on the company’s failure to provide the requested information. *See* 6 NYCRR § 621.14(b).

III. CONCLUSION

Based on the above, we urge the Department to finalize its proposed rescission of the NOCA and Negative Declaration.

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher Amato". The signature is fluid and cursive, with the first name "Chris" and last name "Amato" clearly distinguishable.

Christopher Amato
Staff Attorney

C: Basil Seggos, Deputy Secretary for the Environment
Marc Gerstman, Acting Commissioner