

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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CHARLENE BENTON, President, on behalf of the
EZRA PRENTICE HOMES TENANTS ASSOCIATION,
et al.,

Petitioners,

Index No. 3010-14

-against-

Oral Argument Requested

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, et ano.,

Respondents.

ORIGINAL

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PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF PETITION

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Preliminary Statement

In less than two years, the Hudson River Valley has been transformed into one of the major hubs in the nation for transportation of crude oil. Billions of gallons of highly volatile Bakken crude oil – the type of crude oil responsible for the deaths of 47 people in Quebec and numerous catastrophic fires, explosions, and spills in the United States, and which has been identified by federal and state regulators as posing an imminent and substantial endangerment to public safety – are being transported through and stored in the Valley annually. Respondent Global Companies, LLC (“Global”), the owner of two Hudson River Valley crude oil facilities and a major handler of Bakken crude oil, now proposes to significantly expand its operations to begin receiving by rail, storing, and transshipping environmentally destructive heavy crude/tar sands oil from Canada into this ecologically sensitive area, as well as to increase its capacity to receive and store volatile Bakken crude oil.

Global has made no secret of its plan to remake the bucolic Hudson River Valley into a “virtual pipeline” that will be a national leader in the import, storage and export of Bakken crude and tar sands oil. Indeed, Global’s current operations at its Albany Terminal have already transformed the City’s waterfront into an industrialized zone, with hundreds of black oil-filled rail cars lining the Hudson River corridor and the City’s downtown areas daily. Moreover, operations at Global’s Albany Terminal – which run 24 hours a day, seven days a week, 365 days a year – are a constant source of air pollution, noise, and odors that are significantly impacting the health and well-being of neighboring residents.

Global’s proposal to expand its Albany Terminal operations by importing and heating tar sands oil (as well as other heavy crudes) will have significant air quality, odor, noise, and public health impacts on the thousands of people who live, work and recreate in Albany’s South End,

and would pose entirely new risks and potential impacts to the Hudson River that would result from a crude oil spill into the river. Moreover, as set forth in the recent report to the Governor co-authored by respondent Department of Environmental Conservation (“DEC” or “Department”) and four other New York State agencies, the rail transportation of Bakken crude oil (the oil currently handled at Global’s Albany Terminal) and tar sands oil and other heavy crudes (which Global is proposing to add to its operations) pose significant public safety as well as environmental threats. As described in the report to the Governor, Bakken crude oil is highly volatile and has been involved in a string of recent catastrophic fires, explosions, and spills. Citing the fact that most rail lines in New York are located along waterways, the report also warned that rail transport of tar sands oil “is a significant concern and one that must be addressed if Canadian Tar Sands crude oil begins to be transported through New York State.” N.Y. Dep’t of Env’tl. Conserv., *et al.*, *Transporting Crude Oil in New York State: A Review of Incident Prevention and Response Capacity* at ii (April 30, 2014) (“Crude Oil Report”), annexed to Petition as Exhibit 15.

The environmental and public safety implications of the proposed expansion of Global’s Albany Terminal operations are heightened by the proximity of the facility to homes, businesses, schools, health care facilities, and the Hudson River. The Global facility is located mere yards away from the Ezra Prentice Homes, a public housing project with over 400 residents, including approximately 280 children. The playground for the housing project is located 20 feet away from the Albany Terminal rail yard. In addition to the Ezra Prentice Homes, there are numerous other residences, businesses, health care facilities, parks, and institutions in close proximity to the Global facility, including the Picotte Center for Disability Services, the Mount Hope residential community and playground, the Albany Community Charter School, Krank Park, the

Steamboat Square Apartments and Townhouses (361 residential units), the Giffen Memorial Elementary School, the Albany County Health Department, Centro Civic Hispano Americano, the “2 Together” Children's Tutoring Center, St. Peter’s Family Health Center, Island Creek Park, and the College of St. Rose Sports Complex at Hoffman Park. There are also a number of churches, agency offices, and community gathering places in close proximity to the Albany Terminal, including the Department of Motor Vehicles, St. Francis Catholic Church, the Evangelical Protestant Church, Mt. Zion Baptist Church, Reigning Life Family Church, the Salvation Army Center for Adult Rehabilitation and Disaster Relief, and the Capital City Rescue Mission.

Early in Global’s permit application process, DEC issued a determination that the neighborhoods adjacent to the Albany Terminal, including the Ezra Prentice Homes, constitute an “Environmental Justice Community” within the meaning of DEC’s Environmental Justice Policy. N.Y. Dep’t of Env’tl. Conserv., Commissioner Policy 29, Environmental Justice and Permitting (March 19, 2003) (“Environmental Justice Policy” or “CP-29”), annexed to Petition as Exhibit 1. CP-29 requires that where an Environmental Justice Community has been identified in connection with a permit application, the applicant must prepare an enhanced Public Participation Plan which must, at a minimum, identify stakeholders, including nearby residents, local elected officials, community-based organizations, and community residents; provide for distribution and posting of written information on the proposed action and permit review process; provide for public information meetings to keep the public informed about the proposed action and permit review process; and establish easily accessible document repositories in or near the potential environmental justice area to make available pertinent information.

Despite the numerous significant public health and environmental repercussions of Global's proposed expansion of operations at its Albany and New Windsor Terminals, the Department failed to require preparation of an environmental impact statement ("EIS") as mandated by the State Environmental Quality Review Act, N.Y. Envtl. Conserv. Law Art. 8 ("SEQRA"). Instead, in November 2013, the Department issued a Negative Declaration pursuant to SEQRA stating that Global's proposed expansion of crude oil operations at its Albany Terminal would have no significant environmental impacts. *See* N.Y. Dep't of Envtl. Conserv., Negative Declaration (Nov. 21, 2013) ("Negative Declaration"), annexed to Petition as Exhibit 10.

The Negative Declaration was issued without consulting the affected Environmental Justice community, without following the procedures set forth in DEC's Environmental Justice Policy, and without adequately identifying and evaluating the environmental and public safety impacts of the proposed rail import and heating of tar sands oil and other heavy crude oils. Among the impacts that DEC either inadequately assessed or ignored entirely are significant increases in emissions of volatile organic compounds, including benzene, a known human carcinogen; additional emissions of odiferous sulfur compounds including hydrogen sulfide, which can be lethal in even small doses; emissions of greenhouse gases; additional noise impacts; impacts to community and neighborhood character; threats to public health and safety posed by trains carrying Bakken crude and tar sands oil, including the risk of catastrophic fires, explosions, and spills; potentially catastrophic spill impacts to the Hudson River and other waterways; and potential impacts to shortnose and Atlantic sturgeon, two endangered species that utilize the upper Hudson River near the Albany Terminal.

Petitioners seek to have the Negative Declaration vacated and annulled on the ground that DEC failed to identify all areas of relevant environmental concern, take a hard look at them, and provide a reasoned elaboration for the determination of non-significance. In fact, as recently as March 24, 2014, DEC admitted in a letter to Global that it is currently reviewing its Negative Declaration in order to determine “whether the Department took the requisite hard look under [SEQRA] when it issued a negative declaration of significance in November 2013.” See Ltr. from William J. Clarke, DEC Reg’l Permit Adm’r, to Tom Keefe, Director of EHS Operations, Global Companies, LLC (March 24, 2014) at 1, annexed to Petition as Exhibit 16. Given DEC’s admission that it is uncertain whether it has met the legal criteria for issuance of a negative declaration, the Department is in no position to now claim that it has complied with SEQRA’s mandates.

Petitioners alternatively seek an order directing DEC to perform its nondiscretionary duty – a duty firmly imposed by the SEQRA regulations – to rescind the Negative Declaration on the ground that substantive new information has been discovered demonstrating beyond dispute, and as acknowledged by DEC, that Global’s tar sands oil proposal may have significant environmental and public safety impacts. The new information – which was compiled in the above-referenced report to the Governor co-authored by DEC – includes an array of significant environmental and public safety risks posed by the rail transportation of Bakken crude and tar sands oil. Yet, despite its role in the development of the new information, DEC has failed and refused to rescind its Negative Declaration as mandated by the SEQRA regulations and requested by Petitioners.

There can no dispute that the handling of Bakken, tar sands, and other heavy crude oil poses significant environmental and public safety risks, including the risk of a potentially

catastrophic fire and explosion that could result in loss of life, serious injuries, widespread damage to homes, businesses and schools, and severe and long-lasting environmental pollution. All of these risks have been specifically identified by DEC in its report to the Governor, as well as in the expert reports and testimony submitted by Petitioners and discussed in detail below. A catastrophic spill or accident would threaten the lives, property and well-being of the residents who literally live next door to Global's Albany Terminal and of all who live, work and recreate in the Hudson River Valley; wreak havoc on the river's resources; set back decades of efforts to restore and revive the river; and destroy one of New York's premier and irreplaceable natural attractions. In light of these serious risks, Petitioners seek an order annulling the Negative Declaration on the ground that its issuance was arbitrary and capricious and directing issuance of a Positive Declaration or, in the alternative, directing DEC to perform its nondiscretionary duty to rescind the Negative Declaration and issue a Positive Declaration.

Overview of SEQRA

SEQRA's purposes are "to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of ecological systems, natural, human and community resources important to the people of the state." N.Y. Env'tl. Conserv. Law ("ECL") § 8-0101 (McKinney 2014). In the words of the Court of Appeals, "SEQRA's fundamental policy is to inject environmental considerations directly into governmental decision-making; thus, the statute mandates that 'social, economic, and environmental factors shall be considered together in reaching decisions on proposed activities.'" *Coca-Cola Bottling Co. of New York, Inc. v. Bd. of Estimate of the City of New York*, 72 N.Y.2d 674 (1988) (citations omitted). Through SEQRA,

“[t]he State has made protection of the environment one of its foremost policy concerns.” *E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359, 371 (1988) (citation omitted).

Consistent with the Act’s overarching purpose, the “environment” that SEQRA is designed to protect is broadly defined:

“Environment” means the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution or growth, and existing community or neighborhood character.

ECL § 8-0105(6).

SEQRA accomplishes its beneficial purposes by requiring that “[a]s early as possible in the formulation of a proposal for an action, the responsible agency shall make an initial determination whether an environmental impact statement need be prepared for the action.”

ECL § 8-0109(4); see *Sun Beach Real Estate Dev. Corp. v. Anderson*, 98 A.D.2d 367 (2d Dept. 1983), *aff’d*, 62 N.Y.2d 965 (1984). Critically, the determination of environmental significance must be made *before* a decision is reached to undertake a proposed action. After-the-fact determinations make a mockery of SEQRA’s purpose and are unacceptable. See *E.F.S. Ventures* 71 N.Y.2d at 371; *WEOK Broad. Corp. v. Planning Bd. of Town of Lloyd*, 165 A.D.2d 578, 580-81 (3d Dep’t 1991), *aff’d*, 79 N.Y.2d 373 (1992) (“SEQRA’s fundamental policy is to inject environmental considerations directly into governmental decision-making at the earliest possible time so that agencies conduct their affairs in a manner which will protect the environment.”).

For purposes of SEQRA, subject “actions” include:

(i) projects or activities directly undertaken by any agency; or projects or activities supported in whole or part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies; or projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies;

(ii) policy, regulations, and procedure-making.

ECL § 8-0105(4) (emphasis added).

DEC's implementing regulations further refine the meaning of a SEQRA "action" by establishing three categories: Type I, Type II, and Unlisted. Type I actions are those "more likely to require the preparation of an EIS" and are listed in 6 NYCRR § 617.4. Type II actions, which are listed at 6 NYCRR § 617.5(c), are those which "have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under [SEQRA]." *Id.* § 617.5(a). Unlisted actions are all other actions not specifically listed in the SEQRA regulations as either Type I or Type II actions. *Id.* § 617.2(ak).

DEC's SEQRA regulations require that an agency proposing to undertake an action must make a threshold determination as to whether it is a Type I, Type II or Unlisted action. *Id.* § 617.6(a)(1). If the action is determined to be a Type II action, that threshold finding must be documented at the time of the determination. If the action is determined to be a Type I or Unlisted action, the agency must prepare an Environmental Assessment Form ("EAF") for the purpose of determining whether the proposed action may have a significant effect on the environment. *Id.* §§ 617.6(a)(2), (3). The EAF consists of several pages of questions designed to elicit critical information concerning a proposed action's potential impacts on the environment.

In reaching such a determination, the agency must review the EAF, together with criteria set forth in the SEQRA regulations; "thoroughly analyze" the identified relevant areas of environmental concern; and set forth its determination of significance in written form containing a "reasoned elaboration" and providing reference to supporting documentation. *Id.* § 617.7(b); see *Bd. of Co-op. Educ. Servs. of Albany-Schoharie-Schenectady-Saratoga Counties v. Town of Colonie*, 268 A.D.2d 838 (3d Dep't 2000); *Cathedral Church of St. John the Divine v. Dormitory*

Auth. of State of N.Y., 224 A.D.2d 95, 100 (3d Dep't 1996) ("Prior to issuing a negative declaration, an agency must evaluate numerous criteria, take a 'hard look' at relevant areas of environmental concern and make a written 'reasoned elaboration' of its basis for the determination.").

A full and accurate EAF is crucial to an agency's determination of significance, and an improperly or incompletely filled out EAF may require annulment of a negative declaration. *See Yellow Lantern Kampground v. Cortlandville*, 279 A.D.2d 6, 12 (3d Dep't 2000) ("By failing to fulfill the requirements [for submission of a completed EAF], the Town Board failed to fulfill its obligations under SEQRA, requiring annulment of its negative declaration and its ensuing application approvals.").

Among the criteria identified by the SEQRA regulations as indicators of significant adverse impacts on the environment are a substantial adverse change in existing air quality, ground or surface water quality or quantity, traffic, or noise levels; substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat area; substantial adverse impacts on a threatened or endangered species of animal or plant, or the habitat of such a species; or other significant adverse impacts to natural resources; the impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character; and the creation of a hazard to human health. 6 NYCRR § 617.7(c)(1). In order to determine that preparation of an EIS is not required, the lead agency must determine that no significant environmental impact may result from the proposed action. *Id.* § 617.7(a)(2).

If, after considering the regulatory criteria, the agency determines that the Type I or Unlisted action will not have any significant adverse environmental impacts, the agency must

document its determination and its rationale in a “negative declaration.” *Id.* §§ 617.7(b)(4), (d); *see Bd. of Co-op. Educ. Servs. of Albany-Schoharie-Schenectady-Saratoga Counties v. Town of Colonie*, 268 A.D.2d 838, 840 (3d Dep’t 2000) (“In order to render [a] negative determination that an EIS is not necessary, the lead agency must engage in an analysis of specific mandated criteria . . . and set forth its determination in a written statement containing reasoned elaboration and reference to any supporting documentation”); *Tonery v. Planning Bd. of Town of Hamlin*, 256 A.D.2d 1097 (4th Dep’t 1998) *opinion amended on reargument sub nom. In re Tonery v. Planning Bd. of Town of Hamlin*, 703 N.Y.S.2d 762 (1999) (“[T]he lead agency must provide a reasoned elaboration for its determination of nonsignificance. Conclusory statements, unsupported by empirical or experimental data, scientific authorities or any explanatory information will not suffice as a reasoned elaboration for its determination of environmental significance or nonsignificance.”).

If, on the other hand, the agency determines that the action may have at least one significant adverse impact on the environment, an EIS must be prepared prior to undertaking the action. ECL § 8-0109(2); 6 NYCRR § 617.7(a)(1); *Spitzer v. Farrell*, 100 N.Y.2d 186, 190 (2003) (“[T]he threshold triggering an [EIS] under [SEQRA] is relatively low”); *Omni Partners, L.P. v. Cnty. of Nassau*, 237 A.D.2d 440, 442 (2d Dep’t 1997) (“Because the operative word triggering the requirement of an EIS is ‘may’, there is a relatively low threshold for the preparation of an EIS.”) (citations omitted).

A key provision in the SEQRA regulations requires an agency to rescind a negative declaration if substantive new information becomes available after its issuance but prior to a decision to undertake, fund or approve the action. 6 NYCRR § 617.7(f)(1) (stating that “a lead

agency *must* rescind a negative declaration when substantive . . . new information is discovered”)

(emphasis added).

The substantive heart of SEQRA is ECL § 8-0109(8), which provides:

When an agency decides to carry out or approve an action which has been the subject of an environmental impact statement, it shall make an explicit finding that the requirements of this section have been met and that consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided.

ECL § 8-0109(8) (emphasis added). This substantive mandate is further elaborated in DEC’s implementing regulations, which make clear that no action may be undertaken, funded, or approved prior to full compliance with SEQRA’s mandates:

No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQR. A project sponsor may not commence any physical alteration related to an action until the provisions of SEQR have been complied with . . . An involved agency may not issue its findings and decision on an action if it knows any other involved agency has determined that the action may have a significant adverse impact on the environment, until a final EIS has been filed.

6 NYCRR § 617.3(a).

DEC's Environmental Justice Policy

The Department's Environmental Justice Policy "provides guidance for incorporating environmental justice concerns into the [DEC] environmental permit review process and the DEC application of the State Environmental Quality Review Act." Petition, Ex. 1 at 1. The policy was issued to address "the lack of meaningful public participation by minority or low-income communities in the permit process; the unavailability or inaccessibility of certain information to the public early in the permit process; and the failure of the permit process to address disproportionate adverse environmental impacts on minority and low-income communities." *Id.* In order to address these concerns, CP-29 establishes "the general policy of DEC to promote environmental justice and incorporate measures for achieving environmental justice into its programs, policies, regulations, legislative proposals and activities." *Id.* at 2. Furthermore, CP-29 provides that "[t]his policy is specifically intended to ensure that DEC's environmental permit process promotes environmental justice." *Id.* (emphasis added).

CP-29 defines "environmental justice" as:

the fair treatment and meaningful involvement of all people regardless of race, color, or income with respect to the development, implementation, and enforcement of environmental laws, regulations and policies. Fair treatment means that no group of people, including a racial, ethnic, or socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.

Id. at 3.

CP-29 directs that, upon receipt of a permit application subject to the policy, DEC must conduct a preliminary screen to identify whether the proposed action is in or near a potential environmental justice area and determine whether potential adverse environmental impacts related to the proposed action are likely to affect a potential environmental justice area. *Id.* at 7.

Where a potential environmental justice area is identified by the preliminary screen, DEC must provide the applicant with relevant information on environmental justice. *Id.* at 8.

The centerpiece of CP-29 is its requirement for enhanced public participation for actions potentially affecting an environmental justice area. The policy provides that, “[w]here a potential environmental justice area is identified by the preliminary screen, *the applicant shall submit a written public participation plan as part of its complete application.*” *Id.* at 8 (emphasis added). The policy requires that, at a minimum, the Public Participation Plan identify stakeholders, including nearby residents, local elected officials, community-based organizations, and community residents; provide for distribution and posting of written information on the proposed action and permit review process; provide for public information meetings to keep the public informed about the proposed action and permit review process; and establish easily accessible document repositories in or near the potential environmental justice area to make available pertinent information. *Id.* The applicant is also required to submit a report summarizing progress on implementing the plan, all substantive concerns raised, all resolved and outstanding issues, the components of the plan yet to be implemented, and an expected timeline for completing the plan. Upon completion of the plan, the applicant must submit a written certification that it has complied with the plan, including an updated status report. *Id.*

CP-29 also requires that where a potential environmental justice area is identified by the preliminary screen, a full environmental assessment form must be completed for Type I and Unlisted actions, and specifies that “DEC shall coordinate the review of the action with the other involved state and local agencies.” *Id.* at 9.

Statement of Facts

Environmental Setting of Global's Albany Terminal

Global's Albany Terminal is located on the Hudson River in the South End of the City of Albany. Petition ¶ 22. The facility is a bulk petroleum storage and transfer terminal, consisting of storage tanks and rail and marine loading positions. *Id.* The Ezra Prentice Homes is located directly adjacent to the Albany Terminal. *See* Affidavit of Charlene Benton, President of the Ezra Prentice Homes Tenants Association, sworn to on June 5, 2014, ¶ 8, annexed to Petition as Exhibit 17. Approximately one-half (85) of the Ezra Prentice apartments are located within 20-100 feet of the railroad yard serving the Albany Terminal, and all 176 Ezra Prentice housing units are in close proximity to the Terminal. *Id.* The Ezra Prentice Homes include a playground where children from the housing development play on a regular basis. The Playground is located directly adjacent to the Albany Terminal rail yard within 20 feet of the rail cars. The Playground includes a swing set, various recreational sets for young children, and basketball courts. *Id.* ¶ 9.

In addition to the Ezra Prentice Homes, there are numerous other residences, businesses health care facilities, parks and institutions in close proximity to the Global facility, including the Picotte Center for Disability Services; the Mount Hope residential community and playground; the Albany Community Charter School; Krank Park; the Steamboat Square Apartments and Townhouses (361 residential units); the Giffen Memorial Elementary School; the Albany County Health Department; Centro Civic Hispano Americano; the "2 Together" Children's Tutoring Center; St. Peter's Family Health Center; Island Creek Park; and the College of St. Rose Sports Complex at Hoffman Park. There are also a number of churches, agency offices and community gathering places in close proximity to the Albany Terminal including the Department of Motor Vehicles, St. Francis Catholic Church, the Evangelical Protestant Church, Mt. Zion Baptist

Church, Reigning Life Family Church, the Salvation Army -Center for Adult Rehabilitation and Disaster Relief and the Capital City Rescue Mission. *Id.* ¶ 10.

The Albany Terminal also is located in the floodplain of the Hudson River estuary, and is adjacent to and/or proximate to several ecologically sensitive and important portions of the estuary that have been formally designated by the New York State Department of State, in consultation with DEC, as Significant Coastal Fish and Wildlife Habitats, including the Normanskill, Papscaanee Marsh and Creek, Shad and Schermerhorn Islands, and Schodack, Houghtaling Islands and Schodack Creek Significant Coastal Fish and Wildlife Habitats, all of which are located in close proximity to and downstream of Global's Albany Terminal. Petition ¶ 26.

Additionally, the upper Hudson River in the vicinity of the Albany Terminal provides spawning habitat for shortnose sturgeon and Atlantic sturgeon, both of which are listed as endangered species under the federal and New York State endangered species laws. See 6 NYCRR § 182.5. The upper Hudson River also provides critical nesting and foraging habitat for bald eagles, which are listed as a threatened species under New York State law. In fact, Global's Albany Terminal is located just a few miles north of an active bald eagle nest. *Id.* ¶ 27.

Global's Massive Recent Expansion of Crude Oil Operations at the Albany Terminal

Upon information and belief, Global purchased the Albany Terminal in 2007, and received approval from DEC in 2011 to begin storing crude oil at the Albany Terminal. Petition ¶¶ 33-34. On or about November 14, 2011, Global submitted an application for a Clean Air Act Title V Permit modification to allow it to increase the throughput of crude oil, gasoline and ethanol at the Albany Terminal from 450 million gallons per year to 1.8 billion gallons calculated on a 12-month rolling basis. *Id.* ¶ 35.

By letter dated December 14, 2011, DEC requested additional information regarding the proposed increase in throughput and change in terminal operations and the potential environmental impacts associated with the requested permit modification. The DEC letter also notified Global that the requested permit modification “is considered to be a major modification with respect to your Air permit and your facility is located within an area that has been identified as a potential Environmental Justice area . . . Therefore, as part of the review process for this proposed modification, you will need to address CP-29 as it relates to your proposal.” *See* Ltr. from Angelo Marcuccio, DEC Environmental Analyst, to Thomas Keefe, Global Companies, LLC (Dec. 14, 2011) (“Marcuccio Letter”) at 2 (emphasis added), annexed to Petition as Exhibit 2.

Global responded to the Marcuccio Letter by letter dated March 2, 2012 from its consultant, Ingalls & Associates, LLP, stating that the proposed terminal modifications included reconfiguring an existing intermodal rail yard to permit offloading of petroleum products via rail, expansion of Global’s existing rail loading/unloading rack, and expansion of the existing marine loading terminal. *See* Ltr. from Ameila Leonard, Environmental Specialist, Ingalls & Associates, LLP, to Angelo Marcuccio, DEC (March 2, 2012) (“Ingalls Letter”) at 1, annexed to Petition (without attachments) as Exhibit 3. The Ingalls Letter stated that construction activities associated with the proposed modifications would disturb approximately seven acres of land at the Albany terminal and claimed, without support, that the proposed doubling of crude oil throughput at the Albany Terminal would have no impacts on the neighboring Environmental Justice communities. *Id.*

On July 25, 2012, the Department issued a Notice of Complete Application, even though Global had failed to prepare an enhanced Public Participation Plan as required by DEC’s

Environmental Justice Policy and despite the fact that the Policy explicitly requires submission of an enhanced Public Participation Plan before an application can be deemed complete. *See* N.Y. Dep't of Env'tl. Conserv., Notice of Complete Application (July 25, 2012), annexed to Petition as Exhibit 4.

On or about July 25, 2012, the Department announced in the ENB that it had prepared a draft Title V Permit approving Global's application and that the Department had issued a Negative Declaration for the project. *See* ENB Region 4 Completed Applications Albany County (July 25, 2012), annexed to Petition as Exhibit 5. The ENB notice made no mention of the fact that Global's proposed project had been determined by DEC to potentially affect an environmental justice area and was therefore subject to the requirements of CP-29. *Id.* Upon information and belief, in November 2012, DEC issued a final revised Title V permit authorizing Global to approximately quadruple throughput at the Albany Terminal to 1.8 billion gallons annually. Petition ¶ 40.

Global's Pending Proposal to Expand Operations at its Albany Terminal to Receive, Store, Heat, and Transfer Heavy Crude/Tar Sands Oil

On or about June 1, 2013, Global submitted another application to modify its Title V Permit to expand the capabilities at the Albany Terminal to include the receipt, storage, heating and transfer of heavy petroleum products. The proposed project involves the installation of seven gas-fired boilers, reconfiguration of an existing intermodal rail yard to allow offloading of those heated petroleum products, and the installation of emission controls in one tank (Tank 33) to allow for the storage of crude oil. *See* Global Companies, LLC, Title V Permit Modification Request, annexed to Petition as Exhibit 6.

By Notice of Incomplete Application dated July 25, 2013, DEC notified Global that "[t]he facility is located within a potential Environmental Justice area . . . Please provide a

response indicating how the applicant is proposing to comply with the Department's Environmental Justice and Permitting Policy, CP-29." *See* DEC Notice of Incomplete Application (July 25, 2013) (emphasis added), annexed to Petition as Exhibit 7.

On or about September 6, 2013, Global submitted an Environmental Assessment Form ("EAF") to DEC which purported to identify the potential environmental impacts from the proposed expansion of crude oil operations at the Albany Terminal. *See* Global Companies, LLC, Environmental Assessment Form (Sept. 6, 2013), annexed to Petition as Exhibit 8. On or about November 8, 2013, Global submitted a revised application to DEC. The revised application included changes to Global's calculations of potential increases in emissions of air pollutants from the proposed expansion of crude oil operations. *See* Global Companies, LLC Revised Application, annexed to Petition as Exhibit 8.

On November 21, 2013 – less than two weeks after receiving Global's revised permit application – the Department issued a Notice of Complete Application which it published in the ENB on November 27, 2013 together with notification that a SEQRA Negative Declaration dated November 21, 2013 had been issued for the proposed modification. *See* ENB Region 4 Completed Applications Albany County (Dec. 31, 2013), annexed to Petition as Exhibit 9. DEC issued the Notice of Complete Application even though Global had again failed to comply with CP-29's requirement that a public participation plan be submitted as part of its application.

The Negative Declaration issued by DEC concerning Global's proposal to receive, store, heat and transfer heavy crude/tar sands oil at its Albany Terminal is fatally flawed in several respects. The Negative Declaration was issued without consulting the affected Environmental Justice community, without following the procedures set forth in DEC's Environmental Justice Policy, and without adequately identifying and evaluating the environmental and public safety

impacts of the proposed rail import, storage, heating, and transfer between rail cars, storage tanks and barges of heavy crude/tar sands oil. *See* N.Y. Dep't of Env'tl. Conserv., Negative Declaration and Expanded Narrative (Nov. 21, 2013), annexed to Petition as Exhibit 10.

Among the significant impacts that were either inadequately assessed or ignored entirely are threats to public health and safety, including increases in emissions of volatile organic compounds, including benzene, a known human carcinogen; additional emissions of odiferous sulfur compounds including hydrogen sulfide, which can be lethal in even small doses; and the risk of catastrophic fires, explosions and spills posed by trains and barges carrying Bakken crude and tar sands oil. The unexamined impacts also include significant environmental impacts including potential spill impacts to the Hudson River and other waterways; potential impacts to shortnose and Atlantic sturgeon, two endangered species that utilize the upper Hudson River near the Albany Terminal; and emissions of greenhouse gases which accelerate climate change. DEC also failed to evaluate community and neighborhood impacts, including additional odor and noise impacts, and impacts on public use and enjoyment of the area, including fishing, boating, and other forms of recreational enjoyment of the riverfront environment.

Global's Contemporaneous Proposal to Expand Operations at its New Windsor Terminal to Allow the Import, Handling and Heating of Tar Sands Oil

On or about August 9, 2013, Global submitted an application for Significant Title V Modifications at its crude oil terminal located in New Windsor, New York, as well as for several other DEC permits. The applications seek approval to construct a new rail transloading facility and other modifications to allow the receipt, storage, heating, and transfer between rail cars, storage tanks and barges of heavy crude/tar sands oil and Bakken crude oil, among other petroleum products. *See* Global Companies, LLC, New Windsor Application (Aug. 9, 2013), annexed to Petition as Exhibit 11.

By Notice of Incomplete Application dated March 24, 2014, DEC notified Global that its application was incomplete, and further notified Global “that the adjacent municipality, the City of Newburgh, has a Potential [Environmental Justice] community located nearby. As such, the Department has determined that the proposed project will require enhanced public outreach with development of a public participation plan . . . consistent with the provisions of CP-29 the commissioner’s guidance on incorporating Environmental Justice [sic].” See N.Y. Dep’t of Env’tl. Conserv., Notice of Incomplete Application is annexed to Petition as Exhibit 12.

Substantive New Information Regarding the Significant Impacts of Rail Transport of Crude Oil, and Heavy Crude/Tar Sands Oil in Particular, Was Discovered by DEC After Issuance of the Negative Declaration

On January 29, 2014, Governor Andrew Cuomo issued Executive Order 125 in response to a series of catastrophic accidents involving the transportation of crude oil by rail and the significant increase in crude oil rail shipments in New York. N.Y. Exec. Order 125, *Directing the Department of Environmental Conservation, the Department of Transportation, the Division of Homeland Security and Emergency Services, the Department of Health, and the New York State Energy Research and Development Authority to Take Action to Strengthen the State’s Oversight of Shipments of Petroleum Products* (“Executive Order 125”), annexed to Petition as Exhibit 13.

Executive Order 125 required, among other things, that DEC and the other agencies named in the Order submit a report to the Governor by April 30, 2014 setting forth (i) a summary of the State’s readiness to prevent and respond to rail and water accidents involving petroleum products; (ii) recommendations concerning statutory, regulatory, or administrative changes needed at the state level to better prevent and respond to accidents involving the transportation of crude oil and other petroleum products by rail, ship, and barge; (iii) recommendations

concerning the role that local governments across the State have in protecting their communities and their residents from spill of petroleum products shipped by rail and water; and (iv) recommendations concerning enhanced coordination between the State and federal agencies in order to improve the State's capacity to prevent and respond to accidents involving the transportation of crude oil and other petroleum products by rail, ship and barge. *Id.*

As one of the five state agencies tasked by Executive Order 125 with preparing the consolidated report, DEC was on notice by no later than January 29, 2014 that "the significant expansion" in crude oil shipments through the Port of Albany "increases the public's vulnerability to a serious accident." *Id.*

The significance of this new information was reinforced on January 30, 2014, when a broad coalition of community residents, local elected officials, and community and environmental organizations, including the Petitioners/Plaintiffs, sent a letter to DEC Commissioner Joseph Martens requesting that DEC rescind the Negative Declaration "based on new information regarding the dangers associated with rail transport of highly flammable, explosive Bakken crude oil." *See* Ltr. From Christopher Amato, Esq., Earthjustice, to DEC Commissioner Joseph Martens (Jan. 30, 2014) at 11, annexed to Petition as Exhibit 14. The January 30 letter specifically cited the string of recent catastrophic accidents involving Bakken crude oil as well as identifying the unique and significant environmental impacts of a spill involving heavy crude/tar sands oil. The letter requested that DEC (1) rescind the Negative Declaration, (2) withdraw the Notice of Complete Application, and (3) require preparation of an EIS.

Any doubt about whether DEC was on notice, post-Negative Declaration, about significant environmental and public safety risks posed by Global's proposed expansion of crude

oil shipments at its Albany Terminal is dispelled by the Crude Oil Report co-authored by DEC and four other state agencies and submitted to the Governor on April 30, 2014. The report specifically recites new information underscoring the unique environmental and public safety risks posed by transportation of crude oil by rail.

The Crude Oil Report specifically noted the unique environmental risks posed by rail transport of tar sands oil:

While the spike in Bakken crude oil has focused attention on the transportation of crude oil in New York State, there is also a concern over the possibility of transporting Canadian Tar Sands crude oil through the state. Canadian Tar Sands oil presents a different set of challenges to effective prevention and response. Tar Sands oil is less volatile than Bakken crude oil, but is so heavy that it will sink if released over water. Given that much of the crude oil transported through New York State travels along or on major waterways, that is a significant concern and one that must be addressed if Canadian Tar Sands crude oil begins to be transported through New York State.

N.Y. Dep't of Env'tl. Conserv., *et al.*, *Transporting Crude Oil in New York State: A Review of Incident Prevention and Response Capacity* (April 30, 2014) ("Crude Oil Report") at 14 (emphasis added), annexed to Petition as Exhibit 15.

Despite DEC's recognition in the Crude Oil Report that transportation of tar sands oil along waterways in New York State "is a significant concern" that "must be addressed," DEC has failed to rescind the Negative Declaration so that these newly discovered concerns can be addressed – a failure that violates the nondiscretionary duty imposed on an agency by the SEQRA regulations to rescind a negative declaration in the face of significant newly discovered information that it has determined may result in a significant environmental impact, which clearly DEC has determined here. 6 NYCRR § 617.7(f)(1).

DEC's March 24, 2014 Admissions

On March 24, 2014, DEC sent a letter to Global requesting that the company provide detailed additional information concerning 29 separate categories of issues. *See* Ltr. from William J. Clarke, DEC Regional Permit Administrator, to Tom Keefe, Director of EHS Operations, Global Companies, LLC (March 24, 2014), annexed to Petition as Exhibit 16. The scope and diversity of the information sought by the Department's March 24 letter makes unmistakably clear that the Negative Declaration was issued in the complete absence of a factual record – facts that the Department now deems critical to its evaluation of Global's application.

These significant facts include, among other things, “the nature of the crude oil that would be handled at the facility if the permit modification were issued and . . . the volumes and types of crude oil that would be handled;” the chemical composition of materials entering the Albany Terminal; chemicals added to crude oil shipments to reduce viscosity; the types and volumes of materials transported to the Albany Terminal; actions “to address any unique qualities associated with bitumen crude oil with respect to fires, explosivity, spill prevention and response;” oil spill response plans; the ability of existing retention ponds at the Albany Terminal to handle oil spills; studies regarding “the potential for a spill, fire or explosion during the processing and transport, including the loading and offloading, of heated crude oil;” an emergency evacuation plan “in the event of a large-scale disaster;” a new drawing and description of the revised configuration for the proposed boilers for heating oil; potential fire risks associated with handling and storing bitumen crude oil; and “the scope and extent of any liability insurance that Global maintains for environmental harm.” *Id.* at 2-4.

The Department's March 24 letter also includes the significant admission by DEC that it is currently reviewing its Negative Declaration in order to determine “whether the Department

took the requisite hard look under [SEQRA] when it issued a negative declaration of significance in November 2013.” *Id.* at 1. Given DEC’s admission that it is uncertain whether it has met the legal criteria for issuance of a negative declaration, the Department is in no position to now claim that it has complied with SEQRA’s mandates.

ARGUMENT

POINT I

ISSUANCE OF THE NEGATIVE DECLARATION WAS ARBITRARY AND CAPRICIOUS BECAUSE DEC FAILED TO IDENTIFY RELEVANT AREAS OF ENVIRONMENTAL CONCERN, TO TAKE A HARD LOOK AT POTENTIAL ENVIRONMENTAL IMPACTS OF THE PROPOSED ACTION, AND TO PROVIDE A REASONED ELABORATION FOR ITS DETERMINATION

Agency action taken pursuant to SEQRA is subject to the “arbitrary and capricious” standard of judicial review. N.Y. Civil Practice Law and Rules (“CPLR”) § 7803(3). The action at issue here is DEC’s issuance of the Negative Declaration regarding Global’s proposed expansion of crude oil operations at its Albany Terminal. As noted above, SEQRA requires an agency to conduct a full environmental review of any proposed action that “may have a significant effect on the environment.” ECL § 8-0109(2); *see Cathedral Church of St. John the Divine v. Dormitory Auth. of State of N.Y.*, 224 A.D.2d 95, 99 (3d Dep’t 1996). Thus, before deciding that the EIS process “can be dispensed with,” *Desmond-Americana v. Jorling*, 153 A.D.2d 4, 10 (3d Dep’t 1989), DEC must determine, in the form of a “filed and published” negative declaration, 6 NYCRR § 617.2(y), “that there will be no adverse environmental impacts” associated with the proposed action. *Id.* § 617.7(a)(2); *see Troy Sand & Gravel Co. v. Town of Nassau*, 82 A.D.3d 1377, 1378 (3d Dep’t 2011).

Because SEQRA uses the word “may” as the trigger for full environment review, “there is a relatively low threshold for impact statements.” *Shawangunk Mtn. Env’tl. Ass’n v. Planning*

Bd. of Town of Gardiner, 157 A.D.2d 273, 275 (3d Dep't 1990) (citing *H.O.M.E.S. v. N.Y.S. Urban Dev. Corp.*, 69 A.D.2d 222, 232 (4th Dep't 1979)). The issuance of a negative declaration by a lead agency constitutes the end of the SEQRA environmental review process. See *Cathedral Church*, 224 A.D.2d at 99. Accordingly, the Court must ask whether DEC “thoroughly investigate[d] the problems involved and reasonably conclude[d]” that Global’s proposed expansion of crude oil operations will not cross the low threshold for a full EIS. *Desmond-Americana*, 153 A.D.2d at 10.

In reviewing DEC’s negative declaration for compliance with SEQRA’s substantive and procedural requirements under the arbitrary and capricious standard, “the courts must review the record to determine whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination.” *Chinese Staff v. Burden*, 19 N.Y.3d 922, 924 (2012) (quoting *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990)) (internal quotation marks omitted). As discussed in detail below, DEC failed to identify all relevant areas of environmental concern and take a hard look at them, and the Negative Declaration must therefore be annulled. See *Bergami v. Town Bd. of Town of Rotterdam*, 97 A.D.3d 1018, 1022 (3d Dep’t 2012). In fact, DEC admitted in its March 24, 2014 letter to Global that it is uncertain whether it took the requisite hard look at environmental issues prior to issuing the Negative Declaration:

The Department of Environmental Conservation (Department) is continuing a comprehensive review of the Title V air permit modification requested by Global Companies, LLC (Global) for its Port of Albany facility (the Facility) and related issues. *The review encompasses an evaluation of whether the Department took the requisite hard look under the State Environmental Quality Review Act (SEQRA) when it issued a negative declaration of significance in November 2013.*

See Petition, Exhibit 16 at 1 (emphasis added). Because DEC admits that it is currently conducting a “review” to determine whether it took “the requisite hard look at environmental

issues” prior to issuing the Negative Declaration, the Department cannot simultaneously claim that it has satisfied the hard look standard established by SEQRA. Petitioners require nothing more to prove their claim that DEC’s issuance of the Negative Declaration was arbitrary and capricious because it failed to take a hard look at the environmental issues.

The SEQRA regulations provide a detailed road map that agencies must follow when determining whether a proposed action may have a significant effect on the environment. The regulations lay out a four-step process for the agency to follow to ensure that the “action” is properly framed and that all potential environmental effects are identified and thoroughly analyzed:

For all Type I and Unlisted actions the lead agency making a determination of significance must:

- (1) consider the action as defined in subdivisions 617.2(b) and 617.3(g) of this Part;
- (2) review the EAF, the criteria contained in subdivision (c) of this section and any other supporting information to identify the relevant areas of environmental concern;
- (3) thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and
- (4) set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation.

6 NYCRR § 617.7(b).

In this case, DEC failed to appropriately follow each of the four steps because it (i) failed to identify each relevant area of environmental concern and take a hard at them; (ii) failed to establish an environmental baseline against which the impacts of the proposed action could be measured; (iii) improperly limited the “action” to Global’s proposal to expand its Albany Terminal operations, thereby artificially segmenting it from Global’s contemporaneous proposal for a similar expansion of its New Windsor Terminal; and (iv) failed to provide a reasoned

elaboration for its determination that the proposed action would have no significant environmental impact. More specifically, the Department failed to identify and take a hard look at key impacts to the environment likely to result from Global's proposed action, including impacts to air quality and human health, to water quality, to significant habitat areas and threatened and endangered species in the Hudson River, and to community and neighborhood character, among others.

A. The Negative Declaration Is Fatally Deficient Because it Is Based on a Flawed and Incomplete Air Quality Analysis

As discussed in detail in the expert report of Dr. Phyllis Fox, a Board Certified Engineer, the Negative Declaration is based on a flawed and incomplete air quality analysis that failed to properly consider the potentially significant air impacts of the proposed project, including impacts of emissions of VOCs, hazardous air pollutants ("HAPs"), and greenhouse gases ("GHGs"). *See* Affidavit of Phyllis Fox, Ph.D. and annexed Report on Air Quality and Rail Safety Impacts of Proposed Expansion of Crude Oil Operations at Global's Albany Terminal, sworn to on June 5, 2014, annexed to Petition as Exhibit 26. Additionally, the Negative Declaration is fatally deficient because DEC failed to consider the changes to rail or barge traffic emissions associated with the proposed project or the increased odors likely to result from heating tar sands oil at the Albany Terminal. *Id.*

Dr. Fox summarizes her findings as follows:

- Global failed to adequately describe the Project and basic information about the nature, volume and chemical composition of the crude oil products currently being handled at Global's Albany Terminal and the new products that Global proposes to handle at the Terminal was not available to NYSDEC when it issued the Negative Declaration.
- NYSDEC and Global failed to establish or ascertain baseline air quality conditions in the vicinity of the Albany Terminal, and thus could not reliably determine how emissions from the Project would affect air quality and the health of nearby residents.

- NYSDEC relied entirely on Global's calculations concerning projected VOC emissions from the Project in its Negative Declaration, but the assumptions underlying those calculations are either unsupported or demonstrably incorrect, leading NYSDEC to significantly underestimate VOC emissions from the Project.
- NYSDEC's conclusion that the Project would have no significant impact on air quality is based on inaccurate or incomplete information; in fact, the Project's emissions of VOCs, hazardous air pollutants, and greenhouse gases will likely have a significant air quality impact.
- NYSDEC failed to consider potential odor impacts from the Project before issuing the Negative Declaration. This is a significant omission, because the heavy crude oil Global proposes to heat at the Albany Terminal contains high levels of sulfur, which will likely result in odor impacts to neighboring communities.

Id. at 1-2. Each of these deficiencies is discussed separately below.

1. The Negative Declaration Is Fatally Flawed Because it Was Issued Without Establishing an Environmental Baseline Against Which to Measure Potential Impacts

In order to determine whether a proposed action may have a significant effect on the environment it is first necessary to establish the environmental baseline against which potential impacts are to be measured. In this case, DEC failed to establish an environmental baseline, and the Negative Declaration is therefore fatally flawed.

The expert report of Dr. Fox sets forth in detail the failure by DEC to establish an environmental baseline. Dr. Fox explains why the failure to establish an environmental baseline fatally skews the analysis of potential air quality impacts from the proposed expansion of the Albany Terminal operations:

In order to understand whether the Project will have significant air quality impacts in the adjacent residential areas, NYSDEC's first step should have been to determine the current status of air quality around the Albany Terminal. This is necessary because small increases in air emissions can be significant if produced in a context where air pollution already is high. Therefore, air quality monitoring should have been conducted in the vicinity of the Terminal in order to measure existing ambient air pollutant concentrations. Then, the projected increase in air pollutant emissions from the Project should have been added to the existing ambient concentrations in order to determine whether the impact would be

potentially significant from a public health perspective. However, NYSDEC failed to do this before issuing the Negative Declaration.

Petition, Petition, Ex. 26 at 6 (emphasis added).

In fact, the SEQRA regulations make clear that establishing baseline air quality is a necessary prerequisite to determining whether the air quality impacts of a proposed action will be significant. The regulations specify that the reviewing agency must determine whether the proposed action will result in “a substantial adverse *change* in *existing* air quality.” 6 NYCRR § 617.9(c)(1)(i) (emphasis added). It is simple common sense that an adverse “change” in “existing” air quality cannot be measured in the absence of information on existing air quality conditions.

There can be no dispute that DEC failed to establish baseline air quality in the neighborhoods adjacent to Global’s Albany Terminal prior to issuing the Negative Declaration. Subsequent to its issuance of the Negative Declaration, DEC has conceded in public meetings that it has never conducted air quality monitoring for Volatile Organic Compounds (“VOCs”) in the vicinity of Global’s Albany Terminal. Indeed, DEC has implicitly conceded the need for establishing an air quality baseline by its after-the-fact announcement on April 29, 2014 – five months after issuing the Negative Declaration – that it will institute an air quality monitoring program in the neighborhoods directly adjacent to Global’s Albany Terminal. *See* N.Y. Dep’t of Env’tl. Conserv., *DEC Announces Air Screening Plan for Albany’s South End Neighborhoods, Sampling Will Evaluate Volatile Organic Compounds in Communities Near Port of Albany Facilities* (April 29, 2014).¹ In fact, DEC’s announcement specifically acknowledged that the purpose of the new air monitoring program is to establish (for the first time) baseline air quality conditions:

¹ Available at <http://www.dec.ny.gov/press/96783.html>

This initial screening will determine a baseline of current air quality conditions and will help to determine if further sampling or enhanced inspections of Port of Albany facilities are necessary.

“DEC’s priority is to protect the health and public safety of residents and communities,” Commissioner Martens said. “We have worked closely with local leaders and representatives to address their concerns about the impact of crude operations. This air sampling is another tool that will provide valuable information about air quality in neighborhoods adjacent to Port of Albany operations.”

Id. (emphasis added).

Additionally, as a result of its failure to comply with the Department’s Environmental Justice Policy, DEC also failed to establish an environmental baseline for odor and noise impacts. As noted above, the Environmental Justice Policy requires the preparation of an enhanced public participation plan, which must identify stakeholders, including nearby residents, local elected officials, community-based organizations, and community residents; provide for distribution and posting of written information on the proposed action and permit review process; provide for public information meetings to keep the public informed about the proposed action and permit review process; and establish easily accessible document repositories in or near the potential environmental justice area to make available pertinent information. CP-29 at 8. Because no public participation plan was prepared – and no effort was made by either DEC or Global to engage with the affected Environmental Justice community – DEC failed to gather input from the community regarding the baseline odor and noise conditions.

Had DEC complied with its Environmental Justice Policy and solicited input from the affected community, the Department would have learned that existing baseline odor and noise conditions are significant and having a pronounced adverse impact on the lives and well-being of nearby residents. As set forth in the affidavits from residents of the Ezra Prentice Homes, a public housing development located directly adjacent to Global’s Albany Terminal, severe odors

are a continuing problem in the community. *See* Petition, Ex. 17 ¶ 16; (“Odors from the Global facility are noticeable every week.”); Affidavit of Bebe White, sworn to on June 5, 2014, ¶ 15, annexed to Petition as Exhibit 18; (“Odors from the facility are nearly constant. Sometimes I experience headaches and dizziness when I smell the odors. Sometimes the oily smell from the facility is so bad that I am forced indoors to escape the smell.”); Affidavit of Gloria McKenzie, sworn to on June 5, 2014, ¶ 11, annexed to Petition as Exhibit 19 (“I am . . . concerned about odors from the Global facility because I am afraid that hazardous chemicals are being released into the air and that I am breathing them. My eight-year-old grandson has complained to me on several occasions about odors from the Global facility, and I am concerned for his health and the health of my younger grandson because they may be breathing dangerous chemicals.”); Affidavit of Deneen Carter-el, sworn to on June 5, 2014, ¶ 8, annexed to Petition as Exhibit 20 (“There is a strong, dirty, oily odor that comes from the Global facility. It gives a burning sensation when I breathe it, and gives me headaches. The odors are noticeable three or four days each week. The odors from the facility are worse during warm weather.”); Affidavit of Mary Williams, sworn to on June 5, 2014, ¶ 9-10, annexed to Petition as Exhibit 21 (“I am . . . disturbed by odors from the Global facility. These odors have become much more noticeable since the summer of 2013. The odor is like a heavy burning smell. I have smelled the odor on an average of once or twice a week since the summer of 2013.”).

This information should have formed the baseline for DEC’s assessment of potential odor impacts from Global’s proposed expansion of crude oil operations, but it did not. This is a fatal flaw, particularly in light of the fact that the proposed heating of tar sands oil will likely create more odors due to the high sulfur content of that oil. *See infra* Point I.D.

DEC likewise failed to establish baseline noise conditions in the neighborhoods adjacent to the Albany Terminal. Again, had DEC consulted the residents of those neighborhoods the Department would have discovered that noise from Global's Albany Terminal operations is a significant and persistent problem that interferes with social activities and sleep. Petition, Ex. 17 ¶¶ 11-13 ("Noise from the Global facility is a constant source of disturbance . . . [and] include[es] screeching from rail car brakes, and loud noises that sound like explosions that occur when rail cars are coupled and de-coupled."); Petition, Ex. 18 ¶ 6; ("The locomotive engines . . . run at all times of the night and day, seven days a week."); Petition, Ex. 19 ¶ 4-5 ("The noise [from the Global facility] is almost constant, occurring at all hours of the day and night, seven days of the week . . . [and] include[s] screeching and squealing from trains on the rails and the noise from locomotive engines."); Petition, Ex. 20 ¶ 4 ("Noise from the trains is so loud that it shakes the apartment building on a regular basis."); Petition, Ex. 21 ¶ 5 ("Noise from the trains moving back and forth at the Global facility occurs at all hours of the day and night.").

In sum, the failure by DEC to establish environmental baseline conditions for air quality, odors, and noise renders the assessment of potential impacts from the proposed expansion of crude oil operations at the Albany Terminal and the Department's Negative Declaration fatally flawed. *Cf., e.g., Ohio Valley Env'tl. Coal., Inc. v. U.S. Army Corps of Engineers*, 716 F.3d 119, 124 (4th Cir. 2013) (in reviewing challenge to agency review under National Environmental Policy Act ("NEPA") of potential watershed impacts from coal mine, court must review "whether the [agency] considered the 'relevant factors' when assessing the baseline conditions of the watershed"); *Friends of Back Bay v. U.S. Army Corps of Engineers*, 681 F.3d 581, 588 (4th Cir. 2012) ("A material misapprehension of the baseline conditions existing in advance of an agency action can lay the groundwork for an arbitrary and capricious [NEPA] decision"); *Half*

Moon Bay Fishermans' Mktg. Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir.1988) (“[w]ithout establishing ... baseline conditions ... there is simply no way to determine what effect [an action] will have on the environment and, consequently, no way to comply with NEPA”); *W. Watersheds Project v. Bureau of Land Mgmt.*, 552 F. Supp. 2d 1113, 1126 (D. Nev. 2008) (“In analyzing the affected environment, NEPA requires the agency to set forth the baseline conditions”); *Cnty. of Amador v. El Dorado Cnty. Water Agency*, 76 Cal. App. 4th 931, 953-54 (1999) (“This dispute highlights the importance of an adequate baseline description, for without such a description, analysis of impacts, mitigation measures and project alternatives becomes impossible”); see also Council on Environmental Quality, *Considering Cumulative Effects under the National Environmental Policy Act* (“The concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process”).

2. Global’s VOC Emission Calculations Significantly Underestimate VOC Emissions From the Proposed Project

The Negative Declaration is fatally deficient because it is based on VOC emission calculations that significantly underestimate emissions of this pollutant from the proposed project. Specifically, the emission calculations are flawed because (i) they are based on unsupported and incorrect emission factors and (ii) they omit several sources of VOC emissions associated with Global’s Albany Terminal operations. See Petition, Ex. 26 at 7-10.

Dr. Fox points out that the emission factor used by Global for VOC emissions from its marine loading operation – the single largest source of VOCs at the Albany Terminal – was completely unsupported and that DEC “erred in basing its analysis of air quality impacts on this unsubstantiated emission factor.” *Id.* at 9. Dr. Fox explains that this “is a significant error, because the emission factor that Global used for crude oil is far smaller than the emission factor

for Bakken crude oil, which is the main type of crude oil that . . . is handled at the Albany Terminal.” *Id.* Applying the correct emission factor for the marine loading of Bakken crude oil results in a value for VOC emissions that is nearly three times Global’s estimate. *Id.*

Dr. Fox also notes that Global failed to include other VOC emission sources at the Albany Terminal in its calculations, including barge transit losses, releases from railcar domes, and disconnect losses. *Id.* at 9-10. These omissions are significant; barge transit losses alone may account for additional VOC emissions of 107 tons/year. *Id.*

3. Global’s Estimates of Benzene Emissions, a Known Human Carcinogen, Are Not Based on the Latest Data Concerning Benzene Levels in Bakken Crude and Therefore Underestimate the Total Emissions From Petroleum Handling at its Terminal if the Project Is Approved

Benzene is designated by EPA as a hazardous air pollutant, as it is a known human carcinogen. *See* Affidavit of David Carpenter, M.D., and annexed Report on Public Health Impacts of Proposed Expansion of Crude Oil Operations at Global’s Albany Terminal, sworn to on June 5, 2014, annexed to Petition as Exhibit 27. Dr. Carpenter, a medical doctor who specializes in the human health effects of environmental toxins, states that human exposure to benzene may result in increased risk of leukemia, birth defects, pulmonary edema, acute granular tracheitis, laryngitis, and bronchitis. *Id.* at 6. Benzene can remain in the air for several days once it is released into the air. Children exposed to benzene exhibited altered blood profiles, liver enzymes, and somatic symptoms within days after a benzene release at a Texas City refinery. *Id.*

Material Safety Data Sheets (MSDSs) submitted in support of applications for similar projects elsewhere indicate Bakken and tar sands crude oils contain very high concentrations of benzene, up to 7%. Petition, Ex. 26 at 10. Global’s air emission analyses are based on a default crude oil that contains 0.06 percentage by weight (wt%) benzene, which is a typical value for a generic crude oil but well below the value for Bakken and tar sands crudes. *Id.*

If Global were to import the full amount of authorized Terminal throughput as Bakken or tar sands crude, the product moving through the Terminal would have over a hundred times more benzene than is assumed in Global's Tank emission analyses. *Id.* at 11. This benzene will be emitted from storage tanks and leaks from pumps, valves and fittings throughout the Terminal at potentially significant levels. Because DEC's assessment of HAP emissions from the Project is based on Global's unrealistically low benzene emission assumptions, the Negative Declaration is seriously flawed.

4. The Negative Declaration is Flawed Because Basic Information Critical to Determining the Proposed Project's Impacts is Missing or Incomplete

Dr. Fox has identified several categories of vital information concerning current and proposed operations at the Albany Terminal that are indispensable to assessing the environmental impacts of Global's proposed expansion, yet were not requested by or provided to DEC prior to its issuance of the Negative Declaration. These include the chemical composition of the types of oil currently handled by the facility and the chemical composition of the types of heavy crude oil that Global proposes to begin importing, heating and storing. Petition, Ex. 26 at 5-7. As Dr. Fox points out, knowledge of the chemical composition of the various types of crude oil currently being handled at the Albany Terminal as well as of the types of oil that Global is proposing to handle and heat is absolutely essential to an accurate assessment of potential air pollution impacts from the offloading, piping, storage, loading and heating of those materials. *Id.* at 5 ("Global's failure to include the specific composition and characteristics of the materials to be handled and heated prevents an accurate assessment of the Project's potential environmental impacts.").

DEC's March 24, 2014 letter to Global requesting that the company provide detailed additional information concerning 29 separate issues is a clear admission that the Department

lacked crucial information at the time it issued the Negative Declaration. *See* Petition, Ex. 16. In fact, the letter clearly concedes that the information requested by the letter is required so that the Department can determine whether adverse environmental impacts will be mitigated – precisely the determination that should have been made *before* the Negative Declaration was issued:

The Department’s review will comprehensively evaluate whether Global and others have taken measures to minimize any impact to the environment by implementing measures to prevent and respond to a potential release of crude oil. The characteristics of the crude oil subject to Global’s application raise potentially unique issues associated with its transfer, storage, and spill and release prevention and response due to its viscosity and the additional measures needed to facilitate transfer of the crude from tank cars to storage tanks.

Id. at 1.

Indeed, the scope and diversity of information sought by the Department’s March 24 letter makes crystal clear that the Negative Declaration was issued in what amounts to a factual vacuum. The letter seeks additional information concerning, among other things, “the nature of the crude oil that would be handled at the facility if the permit modification were issued and . . . the volumes and types of crude oil that would be handled;” the chemical composition of materials entering the Albany Terminal; chemicals added to crude oil shipments to reduce viscosity; the types and volumes of materials transported to the Albany Terminal; actions “to address any unique qualities associated with bitumen crude oil with respect to fires, explosivity, spill prevention and response;” oil spill response plans; the ability of existing retention ponds at the Albany Terminal to handle oil spills; studies regarding “the potential for a spill, fire or explosion during the processing and transport, including the loading and offloading, of heated crude oil;” an emergency evacuation plan “in the event of a large-scale disaster;” a new drawing and description of the revised configuration for the proposed boilers for heating oil; potential fire

risks associated with handling and storing bitumen crude oil; and “the scope and extent of any liability insurance that Global maintains for environmental harm.” *Id.* at 2-4.

The long litany of missing information identified in DEC’s March 24 letter underscores the absence of factual support for the Negative Declaration. Indeed, the Department plainly states in the March 24 letter that the vast amount of additional information requested is “[i]n connection with the Department’s review of Global’s permit application *and the determination of significance . . .*” *Id.* at 2 (emphasis added). Thus, DEC’s March 24 letter constitutes the proverbial “smoking gun” admission that the Negative Declaration was issued in the absence of critical information regarding the potential environmental and public safety impacts of Global’s proposed expansion and is therefore fatally flawed. *Silvercup Studios, Inc. v. Power Auth. of State of New York*, 285 A.D.2d 598, 600-01 (2d Dep’t 2001) (annulling agency’s negative declaration where “the record reveals that the negative declaration was issued before much of the documentation concerning . . . areas of environmental concern was submitted to [the agency]”).

As Dr. Fox notes, the environmental impacts of handling petroleum products – particularly air quality impacts, hazards to human health from emission of HAPs, and the effects of accidental release of petroleum products into the environment – depend directly on the specific petroleum product and its chemical and physical characteristics. Petition, Ex. 26 at 5-7. Thus, the specific identity of and chemical and physical characteristics of the products that Global proposes to import, store, and export from the Albany Terminal must be known in order to adequately assess those impacts. *Id.*

However, Global failed to provide – and DEC failed to request – basic information concerning either the type(s) of crude oil to be handled or the chemical and physical characteristics of those products prior to issuance of the Negative Declaration. Global’s

application refers only to generic categories of petroleum products that would be handled – crude oil, residual fuels, bio-fuels, and distillate or “heated product 1,” “heated product 2,” and “heated product 3.” *Id.* There is a very large range in the composition of the materials in each of these categories, which translates into a wide range in resulting environmental impacts. Thus, Global’s failure to include the specific composition and characteristics of the materials to be handled and heated prevented an accurate assessment of the Project’s potential environmental impacts. For this reason, DEC’s issuance of a Negative Declaration in the absence of this critical information was scientifically unsupportable. *Id.*

5. The Negative Declaration Failed to Consider GHG Emissions

The Negative Declaration failed to evaluate or even mention the GHG emissions associated with extraction and use of heavy crude/tar sands oil, and the heating process at the Albany Terminal. GHG emissions would result from burning natural gas in the six new boilers; leaks of methane from pumps, valves, and flanges along the natural gas pipeline serving the boilers; combustion of fuel in the train and barges that service the Project; and combustion of loading and unloading emissions in the VCUs. Petition, Ex. 26 at 12-13. Further, greenhouse gases are not a local or regional pollutant, but rather contribute cumulatively to global climate change. Therefore, emissions associated with the entire lifecycle of the heated materials, from its extraction and production in Canada or elsewhere to its refining in New Jersey, Delaware, or elsewhere, including rail and barge transport along the entire transport route should have been estimated and assessed. *Id.*

B. The Negative Declaration Failed to Identify or Evaluate the Risk and Impacts of a Crude Oil Spill into the Hudson River

A spill of crude oil of any kind (let alone heavy, sinking crude oils or volatile crude oils), and certainly the expanded storage, transloading and transportation of those oils, would

significantly affect the communities, ecosystems, and economy of the region, and must be considered in a full EIS. DEC issued the Negative Declaration without taking the requisite hard look at oil spill or Hudson River risks, and no reasoned elaboration was provided as to why those risks were omitted (listing oil spill potential as “small to moderate” such that no further analysis of significance is required) – despite the substantial contrary evidence detailed below. Given that the Negative Declaration, “without sound basis in reason and . . . without regard to the facts,” omits any review of the risk of oil spills, it should be annulled as arbitrary and capricious. *See Pell v. Board of Education*, 34 N.Y.2d 222, 231 (1974).

Dr. Isaac Wirgin explains how an oil spill into the Hudson River would severely impact the river’s ecosystem and endangered species that inhabit the river:

Hudson River sturgeon species would be particularly vulnerable to the toxic effects of heavy, sinking oil spilled into the river. ... [Fish, in general,] are extremely sensitive to oil-induced early life-stage toxicities and that effects of exposure can persist to the adult life-stage and significantly affect recruitment into populations. ... The heavy, viscous nature of certain lipophilic contaminants, such as heavy crude oils, may cause the contaminants to sink and persist in the benthic environment, potentially increasing duration of exposure for sturgeons.

See Affidavit of Dr. Isaac Wirgin, sworn to on June 6, 2014, ¶¶ 12, 19, 20, annexed to Petition as Exhibit 28.

Dr. Wirgin adds that long-lasting impacts to the ecosystem and endangered sturgeon would result from any spills:[S]pillage of heavy crude oils into the tidal Hudson River environment will almost certainly adversely impact its ecosystem which is already burdened with unusually high levels of other damaging, sediment-borne contaminants. It is likely that these heavy crude oils will be highly persistent in the benthic environment and will be acutely toxic to adult life stages of its fish community. ... Because the developing heart in fishes, and perhaps particularly sturgeons, is an exceptionally sensitive and consistent indicator of crude oil impacts, the Hudson River population of [the] two protected [sturgeon] species will almost certainly be challenged and damaged by the spillage of heavy crude oil in the environment.

Id. ¶ 26.

These warnings of the dangers presented by this rail, terminal, and barge “virtual pipeline” down the Hudson River, were echoed by the State of New York in the April 2014 Crude Oil Report prepared for the Governor – co-authored by DEC and four other state agencies – assessing the risks of rail transport of crude oil:

Canadian Tar Sands oil present a different set of challenges to effective prevention and response. Tar Sand oil is less volatile than Bakken crude oil, but is so heavy that it will sink if released over water. *Given that much of the crude oil transported through New York State travels along or on major waterways, that is a significant concern and one that must be addressed if Canadian Tar Sands crude oil begins to be transported through New York State.*

Petition, Ex. 15 at 14 (emphasis added).

In addition, oil spills into the Hudson River would be extremely difficult to clean up because, unlike many petroleum products which float, bitumen sinks, making any possible recovery much more difficult, costly and time consuming. More than three years after the spill of tar sands oil into Talmadge Creek and the Kalamazoo River in Michigan, the river’s bottom sediment remains contaminated and the U.S. Environmental Protection Agency estimates that 180,000 gallons of oil have yet to be recovered. Health impacts ranging from headaches to chronic coughing have been reported by individuals living close to the Kalamazoo River.

According to James Elliott, who has decades of experience responding to oil spills,

[T]he effectiveness of on-water oil recovery technology remains only at about a 10 to 25% recovery rate. The effective oil recovery rates for submerged oil recovery operations are typically lower than 25%, as evidenced by the Tank Barge DBL 152 and Deepwater Horizon oil spill incidents in the Gulf of Mexico. . . . Based on this discussion of the complexities of oil spills in riverine environments, and given the current state of oil spill recovery technology at about a 10 to 25% recovery rate, it is likely that oil spill responders in the Hudson River could potentially achieve a lower than average spill recovery rate.

Affidavit of James Elliott, sworn to on June 6, 2014, ¶¶ 7, 9, annexed to Petition as Exhibit 29.

Global has stated that it intends to store and ship Group IV oils if its permit application is approved. As Mr. Elliott notes, Group IV oils include types of crude oil that would sink in a spill into an estuarine environment like the Hudson, complicating spill response efforts and reducing the effective rate of recovery of the oil spilled. *Id.* ¶¶ 6, 11.

The New York Area Contingency Plan (“ACP”), the Coast Guard’s regional emergency and spill response plan for the Port of New York and the Hudson River, recognizes the potential for catastrophic environmental damage associated with facilities such as the Global Albany Terminal:

The potential for a major pollution incident is always present when petroleum products or hazardous materials are moved or stored in bulk quantities on or near the water. In recent years, oil shipments have increased, tank vessels have grown in size and cargo capacity, shoreside terminals are larger, and the possibility of material failure in terminals and vessels has increased due to age and attendant fatigue.

See New York/New Jersey Area Committee, New York and New Jersey Area Contingency Plan, at A-1.² As Mr. Elliott notes, “the Hudson River is a unique riverine ecosystem, tidally influenced and seasonally subjected to cold weather, ice conditions.” Petition, Ex. 29 ¶ 14. This seasonal issue is a significant concern in the event of an oil spill at the facility because:

[I]n the Area Contingency Plan, the cold weather season is a period of a “greater volume of petroleum products being handled in the greater New York area.” Thus, the operating conditions for recovering oil are often the most complex during the largest volume of oil transits within and near the Hudson River.

Id. ¶ 10.

When the Negative Declaration was issued, the ACP was under revision; the plan relies upon “pre-2000 technology and inventories” and “does not address the potential impacts of the planned increase in rail car and marine based transport.” *Id.* ¶ 8(a). In sum, the Hudson River is

² Available at <https://homeport.uscg.mil/mycg/portal/ep/portDirectory.do?tabId=1&cotpld=2>, (June 6, 2014).

unique in terms of its ecology and its vulnerability to oil spills; specifically, spills from transloading terminals (and the shipment of crude to and from those terminals):

The Area Contingency Plan states “the Hudson River is unique in that it has a full tidal cycle through much of its course.” The National Oceanic and Atmospheric Administration further describes the Hudson River as follows: “Profoundly influenced by the ocean’s tides for more than half its length, the Hudson River estuary stretches 153 miles and includes a wide range of wetland habitats, from the brackish marshes of Piermont to the slightly brackish wetlands of Iona Island, and the freshwater tidal mudflats and marshes of Tivoli Bays and Stockport Flats.” As such, the Hudson River is a complex riverine system, from fast flowing to tidal flats with unique tidal influences that would complicate oil spill response operations, likely reducing the effective recovery rate given existing oil spill response technology.

Id. ¶ 8(b); *see also, id.* ¶ 8(b) and ¶ 9 (noting that “[b]ased on this discussion of the complexities of oil spills in riverine environments, and given the current state of oil spill recovery technology at about a 10 to 25% recovery rate, it is likely that oil spill responders in the Hudson River could potentially achieve a lower than average spill recovery rate.”).

Overall, there is overwhelming evidence that a spill of crude oil into the Hudson River would result in severe, potentially catastrophic impacts to the river’s ecosystem, including river habitat and endangered shortnose and Atlantic sturgeons. The expert analysis provided by Dr. Wirgin and James Elliott clearly demonstrate that the impacts to critical river species would be severe, and the state of spill response preparation for the Hudson River in case of a spill of crude oil, particularly heavy crude, would not be sufficient to respond to, or recover significant amounts of oil from the river.

In sum, a spill of heavy/tar sands oil from the Global facility, or from such oil shipped to or from the facility on barges and rail on the Hudson, is reasonably foreseeable and would result in severe – possibly devastating – impacts to the Hudson River, a unique and virtually invaluable natural resource. Additionally, oil spills from railroads on approach to the Global facility, and

barges and vessels carrying Global-transloaded heavy or volatile crude oils down the Hudson, expand the area of potential devastation that could result from the action under review. Because DEC utterly failed to consider oil spill impacts, the Department's issuance of a Negative Declaration was arbitrary and capricious. As such, the Negative Declaration should be annulled, a positive declaration should be issued by the agency, and the full impact potential of oil spills and a host of other possibly significant environmental risks should be reviewed as part of an EIS.

C. The Negative Declaration Failed to Identify or Evaluate Environmental and Safety Risks Associated with Rail Transport of Crude Oil

Dr. Fox notes that the Negative Declaration failed to identify or evaluate the environmental and public safety impacts associated with a potential fire, explosion or spill in connection with the proposed project. Petition, Ex. 26 at 13-21. This is a significant omission, because the impacts of a spill of tar sands oil could be disastrous. *Id.*

As Dr. Fox notes, “[t]he recent exponential rise in crude transportation by rail has resulted in soaring numbers of crude oil releases to the environment in the form of both accidents and ‘non-accident’ releases such as leaks.” *Id.* at 13. The increase in crude-by-rail accidents is cause for concern because most rail lines – including the ones servicing Global’s Albany Terminal – traverse densely populated areas:

Crude rail lines frequently pass through high density population areas because they were originally laid out to service passenger and freight to those areas. The rail lines that connect Global’s transload facility in Columbus, North Dakota with Albany, for example, pass through densely populated areas in New York including Massena, Buffalo, Rochester, and Syracuse. As demonstrated by recent experiences, crude rail accidents can cause major risks to human health, as well as significant property damage and environmental consequences. The sharp increase in crude oil rail shipments has significantly increased safety risks to the public, particularly because the crude oil is commonly shipped in large amounts.

Id. at 14.

Dr. Fox also identifies the significant risks posed to sensitive aquatic ecosystems in New York posed by the rail transport of crude oil:

Rail lines frequently follow rivers and major creeks because the ground is typically more level in those areas. Thus, rail accidents frequently result in spills to waterways. The heated products that are the subject of this modification would pose a much greater risk to waterways than the Bakken crudes they would replace because they are more likely to sink in water, are more difficult to contain and clean up, and can have more severe ecological effects. Further, they would have a long residence time in the water and could consequently contaminate water supplies.

This is a significant concern for this Project as the rail lines pass through parts of New York richly endowed with lakes, rivers, and creeks, including Lake Erie, Lake Ontario, Lake Champlain, Oneida Lake, the Mohawk River, and the Hudson River.

Id. at 15.

Dr. Fox's findings were echoed in the April 30, 2014 report to the Governor – co-authored by DEC and four other state agencies – assessing the risks of rail transport of crude oil:

Canadian Tar Sands oil presents a different set of challenges to effective prevention and response. Tar Sand oil is less volatile than Bakken crude oil, but is so heavy that it will sink if released over water. *Given that much of the crude oil transported through New York State travels along or on major waterways, that is a significant concern and one that must be addressed if Canadian Tar Sands crude oil begins to be transported through New York State.*

Petition, Ex. 15 at 14 (emphasis added).

Despite the clear recognition in the report that it co-authored that transportation of tar sands oil along New York waterways – precisely what Global is proposing to do – “is a significant concern,” DEC failed to conduct any analysis whatsoever of the significant risks to communities or the environment posed by Global's crude-by-rail operation. The Negative Declaration is silent on this issue, and there is no evidence in the record that DEC evaluated the risks posed by trains carrying mixed loads of Bakken crude and tar sands oil, poor track

conditions, high train speed, or tank car design, each of which may have significant impacts on the environment and public safety. Petition, Ex. 26 at 18-21.

The SEQRA regulations require that the significance of a likely consequence be assessed in connection with its setting, probability of occurrence, duration, irreversibility, geographic scope, magnitude, and number of people affected. 6 NYCRR § 617.7(c)(3). Here, the effects of a rail accident involving a spill or explosion could be catastrophic, given the close proximity of Global's Albany Terminal to residential housing, the Hudson River, and to the Normanskill, Papscanee Marsh and Creek, Shad and Schermerhorn Islands, and Schodack, Houghtaling Islands and Schodack Creek Significant Coastal Fish and Wildlife Habitats. For these reasons, the Department erred in issuing a Negative Declaration. *See Anderson v. Town of Chili Planning Board*, 12 N.Y.3d 901 (2009) (town planning board violated SEQRA by failing to consider effects of potential explosion and fire at proposed metal shredder); *Riverhead Bus. Imp. Dist. Mgmt. Ass'n, Inc. v. Stark*, 253 A.D.2d 752, 753 (2d Dep't 1998) (annulling town board's negative declaration because possible release of toxic or hazardous materials into groundwater and potential for accidental release or explosion were significant effects requiring preparation of an EIS); *Price v. Common Council of City of Buffalo*, 3 Misc. 3d 625 (Sup. Ct. Erie County 2004) (holding that city council violated SEQRA by failing to take "hard look" at hospital's helipad proposal because it failed to consider potential danger to surrounding neighborhood of fire and explosion of liquid oxygen tanks); *see also Gov't of the Province of Manitoba v. Salazar*, 691 F. Supp. 2d 37, 50 (D.D.C. 2010) ("It may be that the risk of a breach is low given the pipeline's construction, but that is not an excuse . . . to refuse entirely to analyze the consequences. When the degree of potential harm could be great, i.e., catastrophic, the degree of analysis and mitigation should also be great.") (emphasis in original); *San Luis Obispo Mothers*

for Peace v. Nuclear Regulatory Comm'n, 449 F.3d 1016, 1033 (9th Cir. 2006) (requiring preparation of an EIS due to “events with potentially catastrophic consequences ‘even if their probability of occurrence is low, provided that the analysis of impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason’”) (citations omitted); *Tri-Valley Cares v. Dep’t of Energy*, 203 F. App’x 105, 107 (9th Cir. 2006) (holding that potential terrorist attack on proposed biological weapons laboratory was required to be considered as part of National Environmental Policy Act environmental assessment).

D. The EAF Contains Inaccurate and Incorrect Information That Resulted in a Fatally Flawed Negative Declaration

An agency’s determination of significance under SEQRA is informed and guided by the information concerning a proposed project’s scope and impacts as set forth in the EAF. *See* 6 NYCRR § 617.7(b)(2). The SEQRA regulations require an agency to review the information provided in the EAF and compare it to the significance criteria set forth in 6 NYCRR § 617.7(c) in order to determine whether the proposed action must be the subject of an EIS. *Id.* Thus, an accurate and complete EAF is indispensable to a correct determination of significance. *See id.* § 617.2(m) (“A properly completed EAF must contain enough information to describe the proposed action, its location, its purpose and its potential impacts on the environment”); *Corrini v. Vill. Of Scarsdale*, 1 Misc. 3d 907(A) (Sup. Ct. Westchester Co. 2003) (citing *Niagara Mohawk Power Corp. v. Green Island Power Authority*, 265 A.D.2d 711 (3d Dep’t 1999), *app. dismissed*, 94 N.Y.2d 891 (annulling negative declaration because proposed project “has the potential to affect noise, visual aesthetics (lights), traffic patterns and the community or neighborhood character (even if those effects may not prove to be significant) [and] the responses provided on the EAF were misleading and failed to provide an adequate basis for the Board’s adoption of a negative declaration in this case”); *Lorberbaum v. Pearl*, 182 A.D.2d 897,

899 (3d Dep't 1992) (annulling negative declaration which was based on inaccurate EAF).

In this case, the EAF prepared by Global for the proposed expansion of crude oil operations at its Albany Terminal contained significant errors and misrepresentations concerning the proposed action's odor, air pollution and noise impacts, as well as the action's impacts on community and neighborhood character. In contrast to the conclusions set forth in Global's EAF, those impacts are potentially significant and the Negative Declaration is therefore fatally flawed.

1. The EAF Misrepresents the Potential Odor and Public Health Impacts Associated With the Heating of Tar Sands Oil

Global answered "no" to the EAF question, "Will [the] project routinely produce odors (more than one hour per day)? *See* Exhibit 8 to Petition at 7. Global's application materials assert that the reconfiguration of the existing rail yard will not contribute to any changes in odors in the surrounding area as "no changes in traffic or throughput to the Terminal would be involved." *See* Petition, Ex. 10 at 2. However, this is misleading because the proposed action involves adding new petroleum products not previously handled by the Terminal, including products that are likely to have significant odor impacts on the surrounding community.

The Negative Declaration did not evaluate – nor even mention – odor impacts. This is a significant omission because, as set forth in the expert reports of Dr. Phyllis Fox and Dr. David Carpenter, the heating of tars sands oil is likely to result in additional odor impacts on nearby residential communities due to the oil's high sulfur content.

As Dr. Fox points out, tar sands oil differs from the Bakken crude currently imported to the Albany Terminal in several important respects. For example, the sulfur in tar sands crudes is substantially higher than in Bakken crude. The sulfur content of a crude oil affects its corrosiveness and toxicity. Bakken crude oil generally contains less than about 0.1% sulfur by

weight, while tar sands crudes contain 3% to 5% sulfur. The chemicals that make up total sulfur in tar sands crudes include compounds such as hydrogen sulfide, mercaptans, thiophene, benzothiophene, methyl sulfonic acid, dimethyl sulfone, and thiacyclohexane. The environmental impacts of these sulfur compounds, including health impacts, depend upon the specific sulfur chemicals and their relative concentrations. Petition, Ex. 26 at 11-12.

Global's application lacks any sulfur data for any of the petroleum products currently imported or that would be added by the proposed addition of tar sands and other heavy crude oils. Each crude has a different suite of individual sulfur chemicals. Mercaptans, for example, are odiferous and can be detected by human olfactory receptors at concentrations substantially lower than will likely be present in emissions from the tar sands crude tanks, leaks from equipment including pumps, valves and connectors, and emissions from loading racks. Many of these same sulfur compounds are known to cause significant health impacts, generally categorized as "chemical brain injury" at and below the level at which the compound can be smelled (i.e., its odor threshold). Thus, the potential for emissions of additional odiferous compounds, such as mercaptans, associated with handling and heating tar sands oil should have been evaluated, but were not. *Id.*

One of the sulfur-based compounds that will be emitted from the heating of tar sands oil is hydrogen sulfide, a potentially lethal gas that is found in "exceptionally high" levels in tar sands oil. Petition, Ex. 27 at 8. Dr. Carpenter describes the potential human health effects of exposure to hydrogen sulfide as including neurotoxicity, cardiac arrhythmias and chronic eye irritation. High concentrations can result in reversible loss of consciousness, shortness of breath, and wheeze with chest tightness, all symptoms of bronchial hyperresponsiveness. Adverse respiratory effects occur at remarkably low concentrations. *Id.* at 8-9.

2. The Coastal Assessment Form Incorrectly Claims That There Are No Significant Fish and Wildlife Habitats in the Vicinity of the Albany Terminal

The Coastal Assessment Form submitted with the EAF incorrectly states that the proposed action is not located contiguous to and will not have a significant effect on any significant fish or wildlife habitats. *See* Petition, Ex. 8. In fact, an accident or spill at Global's Albany Terminal could have a significant effect on several areas that the New York Department of State, in consultation with DEC, has designated as Significant Coastal Fish and Wildlife Habitat, including the Normanskill, Papscanee Marsh and Creek, Shad and Schermerhorn Islands, and Schodack, Houghtaling Islands and Schodack Creek Significant Coastal Fish and Wildlife Habitats, all of which are located in close proximity to and downstream of Global's Albany Terminal. Additionally, the upper Hudson River in the vicinity of the Albany Terminal provides spawning habitat for shortnose sturgeon and Atlantic sturgeon, both of which are listed as endangered species under the federal and New York State endangered species laws. *See* 6 NYCRR § 182.5. The upper Hudson River also provides critical nesting and foraging habitat for bald eagles, which are listed as a threatened species under New York State law. *Id.* In fact, Global's Albany Terminal is located just a few miles north of an active bald eagle nest. Thus, contrary to the erroneous information in the Coastal Assessment Form, an accident or spill from Global's operations could have significant adverse effects on these listed species and their habitat.

3. The Department Failed to Adequately Consider Impacts on Community and Neighborhood Character

The express terms of SEQRA and the Department's implementing regulations broadly define environment to include "existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character." ECL § 8-0105(6); 6 NYCRR §

617.2(l). The Department's Negative Declaration is flawed because it failed to adequately consider the potential impacts of Global's current and proposed operations on the community and neighborhood character of the affected environmental justice community.

As recognized by the New York Court of Appeals, impacts on community and neighborhood character must be assessed independently of impacts to other parts of the physical environment:

[T]he impact that a project may have on population patterns or existing community character, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis since the statute includes these concerns as elements of the environment. That these factors might generally be regarded as social or economic is irrelevant in view of this explicit definition. By their express terms, therefore, both SEQRA and CEQR require a lead agency to consider more than impacts upon the physical environment in determining whether to require the preparation of an EIS. *In sum, population patterns and neighborhood character are physical conditions of the environment under SEQRA and CEQR regardless of whether there is any impact on the physical environment.*

Chinese Staff & Workers Ass'n v. City of New York, 68 N.Y.2d 359, 365-66 (1986) (emphasis added).

The Department's Negative Declaration summarily dismisses any potential impacts from Global's operations on the existing community or neighborhood character of adjacent neighborhoods, including the identified environmental justice community. Indeed, the Negative Declaration's discussion of community and neighborhood impacts denies that there will be any impact to neighboring communities, claiming that "[t]he proposed action will impact only previously disturbed areas within an existing industrial facility." N.Y. Dep't of Env'tl. Conserv., *Global Companies LLC – Albany Terminal Negative Declaration Expanded Narrative* (Nov. 21, 2013) ("Neg. Dec. Narrative"), annexed as Exhibit 10 to Petition, at 2.

However, the Department reached this conclusion without soliciting or considering the views of the affected environmental justice community as required by CP-29. Additionally, the

conclusion is at odds with the fact that rail tank cars from Global's operations are routinely parked within feet of homes and a playground, that odors from the Albany Terminal are a persistent problem in the community, and that the noise associated with Global's operations interferes with residents' peaceful enjoyment of their homes. *See* Exhibits 17-21. Yet the Department issued the Negative Declaration without adequately considering how these impacts may be exacerbated or changed by Global's proposed expansion of crude oil operations to handle heavy crude/tar sands oil and the proposed heating of that oil. Thus, the Department erred in failing to consider the impacts of Global's operations on community and neighborhood character, and this omission by itself warrants annulment of the Negative Declaration.

E. DEC Improperly Segmented Its Review by Treating Global's Contemporaneous Proposals to Expand its Albany and New Windsor Terminals for Handling of Tar Sands Oil as Separate, Independent Actions Under SEQRA

1. Global's Albany and New Windsor Expansion Proposals Are Related Actions That Are Part of the Company's Plan to Transform the Hudson River Valley Into a Major Crude Oil Transportation Corridor

The SEQRA regulations plainly require that, in defining the proposed "action" under consideration, a reviewing agency must consider other related actions:

Actions commonly consist of a set of activities or steps. The entire set of activities or steps must be considered the action, whether the agency decision-making relates to the action as a whole or to only a part of it.

(1) Considering only a part or segment of an action is contrary to the intent of SEQR. If a lead agency believes that circumstances warrant a segmented review, it must clearly state in its determination of significance, and any subsequent EIS, the supporting reasons and must demonstrate that such review is clearly no less protective of the environment. *Related actions should be identified and discussed to the fullest extent possible.*

(2) If it is determined that an EIS is necessary for an action consisting of a set of activities or steps, only one draft and one final EIS need be prepared on the action provided that the statement addresses each part of the action at a level of detail sufficient for an adequate analysis of the significant adverse environmental impacts

6 NYCRR § 617.3(g) (emphasis added).

The requirement to consider related actions is further underscored in the section of the regulations governing determinations of significance:

For the purpose of determining whether an action may cause one of the consequences listed in paragraph (1) of this subdivision, *the lead agency must consider reasonably related long-term, short-term, direct, indirect and cumulative impacts, including other simultaneous or subsequent actions* which are:

- (i) included in any long-range plan of which the action under consideration is a part;
- (ii) likely to be undertaken as a result thereof; or
- (iii) dependent thereon.

Id. § 617.7(c)(2) (emphasis added); *see also* See *Bergami v. Town Bd. of Town of Rotterdam*, 97 A.D.3d 1018, 1021 (3d Dep't 2012) (“In determining whether a given action ‘may’ have a significant effect on the environment, the agency should consider reasonably related effects of the action, including other simultaneous or subsequent actions which are: (1) included in any long-range plan of which the action under consideration is a part; (2) likely to be undertaken as a result thereof; or (3) dependent thereon.”) (internal quotation marks and citations omitted)..

There can be no question that Global’s proposed contemporaneous expansion of its Albany and New Windsor Terminals are part of the company’s long-range plan to transform the Hudson River valley into a major crude oil transportation corridor. In a recent submission to the federal Securities and Exchange Commission, Global confirmed that the company’s Albany operations are part of its plan to establish a transnational “virtual oil pipeline:”

[I]n Albany, New York, we completed a build-out project that increased rail receipts and throughput storage capacities of ethanol and crude oil and converted certain storage tanks for the handling of crude oil. This expansion increased our capacity to receive and distribute crude oil and other products from the midcontinent from 55,000 barrels per day to 160,000 barrels per day and allows the terminal to offload two 120-car unit trains in a 24-hour period. *Our rail expansion serves to enhance our “virtual pipeline” solution for the transportation of crude oil and other products from the mid-continent region to Albany.*

Global Partners LP, Form 10-K (March 15, 2013) at 55 (emphasis added).³

The intimate connection between Global's Albany and New Windsor expansion proposals is unmistakable. The applications for the two expansions were submitted within three months of each other, both include similar major modifications to allow heavy crude/tar sands oil to be heated, and both will impact Environmental Justice communities identified by DEC. Indeed, the Department has recognized the interconnectedness of the two proposals by placing information regarding them on the same web page on the DEC website. *See* N.Y. Dep't of Env'tl. Conserv., *State's Actions on Transport of Crude Oil* (June 6, 2014).⁴

Despite the fact that Global's contemporaneous Albany and New Windsor expansion proposals are clearly "reasonably related" actions, DEC failed to consider the New Windsor proposal in issuing its Negative Declaration for the proposed expansion of the Albany Terminal. In fact, the Negative Declaration does not even mention Global's companion proposal for a substantially similar expansion at its New Windsor Terminal. Even though the Department has clearly segmented its review of these two related projects, it failed to provide "supporting reasons and . . . demonstrate that such review is clearly no less protective of the environment" as required by the SEQRA regulations. 6 NYCRR § 617.3(g)(1).

Courts applying SEQRA have consistently held that agency attempts to segment environmental review of projects are contrary to the intent of SEQRA. In *Concerned Citizens for the Environment v. Zagata*, 243 A.D.2d 20, 22 (3d Dep't 1998), *leave to appeal denied*, 92 N.Y.2d 808, the Appellate Division elaborated on the pitfalls of segmented review:

It is clear that segmentation, which is the dividing for environmental review of an action in such a way that the various segments are addressed as though they were

³ Available at <http://phx.corporate-ir.net/phoenix.zhtml?c=190320&p=irol-IRHome>

⁴ Available at <http://www.dec.ny.gov/permits/95614.html>.

independent and unrelated activities, is contrary to the intent of SEQRA and is disfavored. Nevertheless, segmented review is permissible where the lead agency believes that it is warranted under circumstances, provided that the agency clearly states its reasons therefor and demonstrates that such review is no less protective of the environment. Additionally, the related actions must be identified and discussed to the fullest extent possible

[T]he reasons for disfavoring segmentation are twofold. First is the danger that in considering related actions separately, a decision involving review of an earlier action may be “practically determinative” of a subsequent action . . . The second danger occurs when a project that would have a significant effect on the environment is broken up into two or more component parts that, individually, would not have as significant an environmental impacts as the entire project or, indeed, where one or more aspects of the project might fall below the threshold requiring any review.

(citations omitted). *See also Long Island Pine Barrens Society v. Planning Board*, 204 A.D.2d 548, 550 (2d Dep’t 1994) (“The regulations generally prohibiting segmentation are designed to guard against a distortion of the approval process by preventing a project with potentially significant effects from being split into two or more smaller projects, each falling below the threshold requiring full-blown review”); *Teich v. Buchheit*, 221 A.D.2d 452 (2d Dep’t.1995) (Planning Board’s failure to consider proposed parking lot as part of environmental review for hospital expansion held to be improper segmentation); *City of Buffalo v. Dep’t of Environmental Conservation*, 184 Misc.2d 243 (Sup. Ct. Erie Co. 2000) (failure by DEC to consider impacts of new bridge construction together with renovation of adjacent plaza held to be improper segmentation).

Here, DEC’s attempted segmentation of the environmental review of Global’s Albany and New Windsor expansion proposals has resulted in precisely the “distortion of the approval process” warned of in *Long Island Pine Barrens Society*. Because DEC has failed to comply with any of the regulatory requirements for engaging in segmented review, its attempt to review Global’s Albany and New Windsor proposals as separate projects must be annulled.

2. DEC's Segmented Review Also Violates SEQRA's Requirement That the Cumulative Impacts of Related Projects Be Considered Together

By splitting the review of Global's Albany and New Windsor expansion proposals, DEC has also violated the requirement that cumulative impacts of related actions be considered together as part of the environmental review under SEQRA. The SEQRA regulations require that, in determining whether an action may have a significant adverse impact on the environment, the agency must consider the cumulative impacts of other simultaneous or subsequent actions:

For the purpose of determining whether an action may cause [significant adverse environmental impact] the lead agency must consider reasonably related long-term, short-term, direct, indirect *and cumulative impacts*, including other simultaneous or subsequent actions which are:

- (i) included in any long-term plan of which the action under consideration is a part;
- (ii) likely to be undertaken as a result thereof; or
- (iii) dependent thereon.

6 NYCRR § 617.7(c)(2).

The Court of Appeals has repeatedly affirmed the importance of cumulative impact review in the SEQRA process. In *Save the Pine Bush v. City of Albany*, 70 N.Y.2d 193 (1987), the Court annulled an EIS prepared by the respondent municipality because it failed to consider the cumulative impact of 10 similar rezoning proposals that would have affected 295 acres of an ecologically sensitive and unique area. In so ruling, the Court found that "the City of Albany's failure to consider the potential cumulative impacts of other pending projects . . . upon the Pine Bush before granting the zoning change constituted a violation of its obligations pursuant to SEQRA." *Id.* at 206. In *Village of Westbury v. N.Y. Dept. of Transportation*, 75 N.Y.2d 62, 69 (1989), the Court found that a parkway widening project and an interchange reconstruction were

sufficiently related that “the [SEQRA] regulations require the consideration of their combined effects.”

SEQRA’s requirement that the cumulative effects of related actions be considered is of particular importance where, as here, a unique ecological resource is at stake. As noted by the Third Department:

[W]here there is really but one plan for the development of a *single* area of special environmental significance, the accurate ecological/social/economic balancing of costs and benefits mandated under SEQRA requires that the cumulative effects of *all* actions within the plan for that area be weighed.

Stewart Park & Reserve Coalition v. N. Y. Dept. of Transportation, 157 A.D.2d 1, 10 (3d Dep’t. 1990) (emphasis in original).

In this case, the proposed contemporaneous expansions of the Albany and New Windsor Terminals for the purpose of handling tar sands oil are part of a single plan by Global to develop a single geographic area of environmental significance – the Hudson River Valley – into a major transportation corridor for tar sands oil. Consequently, the cumulative impacts of the two related proposals should have been considered together, and the Department’s failure to do so violated SEQRA.

F. DEC Failed to Provide a Reasoned Elaboration for Its Determination

Apart from completely ignoring important environmental impacts with respect to air quality including odor, human health, water quality, water resources and protected habitats and species, GHG emissions, and rail safety issues, the Negative Declaration fails to provide a reasoned elaboration supporting DEC’s determination that Global’s proposal to expand crude oil operations at its Albany Terminal will not have any significant environmental impacts.

The Negative Declaration is rife with conclusory statements that provide no elaboration of or support for DEC’s determination. *See, e.g.*, Petition, Ex. 10, Negative Declaration

Expanded Narrative, at 1 (“Since the proposed modifications will confirm [sic] to the emission caps and limits that are allowed by the regulations, and measures will be taken to minimize the impacts, it is not anticipate [sic] that the project will have a substantial adverse change in the existing air quality”); (“The project is not anticipated to have an impact to ground or surface water quality”); *id* at 3 (“The proposed action will not result in the creation of a hazard to human health.”). These types of conclusory statements in a Negative Declaration have consistently been rejected by courts as insufficient under SEQRA. *See, e.g., Baker v. Vill. of Elmsford*, 70 A.D.3d 181, 190 (2d Dep’t 2009) (“The negative declaration [was] merely conclusory . . . and does not represent the ‘hard look’ with ‘reasoned elaboration’ mandated by SEQRA”); *Tonery* 256 A.D.2d at 1097 (“[T]he lead agency must provide a reasoned elaboration for its determination of nonsignificance. Conclusory statements, unsupported by empirical or experimental data, scientific authorities or any explanatory information will not suffice as a reasoned elaboration for its determination of environmental significance or nonsignificance.”).

Moreover, DEC’s inaccurate claim that environmental impacts will not be significant because “patterns of truck, train and marine traffic and noise generation are not anticipated to change” fails the “reasoned elaboration” standard. Petition, Ex. 10, Negative Declaration Expanded Narrative, at 1. In *Niagara Mohawk Power Corp. v. Green Island Power Auth.*, 265 A.D.2d 711, 712 (3d Dep’t 1999), the Appellate Division rejected a nearly identical argument:

Maintaining that an environmental impact statement was superfluous, respondent issued a negative declaration stating that, inasmuch as it would operate the Plant in “almost” the same manner as NIMO had, “[a]ny positive or negative impacts on the environment [would] occur whether or not [it] acquires the [P]lant”. Respondent’s contention to the contrary notwithstanding, *this bald conclusory statement does not satisfy respondent’s obligation to fully analyze the environmental consequences of its contemplated action.*

(emphasis added); (citations omitted).

Accordingly, DEC's conclusory Negative Declaration does not provide the reasoned elaboration required by SEQRA, and it should be annulled.

POINT II

DEC HAD A NONDISCRETIONARY DUTY TO RESCIND THE NEGATIVE DECLARATION AFTER NEW INFORMATION REGARDING THE DANGERS OF CRUDE BY RAIL BECAME KNOWN, AND ITS REFUSAL TO DO SO VIOLATED SEQRA

The Negative Declaration failed to analyze – or even mention – the environmental and public safety risks posed by Global's proposal to import tar sands oil by rail cars and heat it at the company's Albany Terminal. After issuance of the Negative Declaration in November 2013, new information became available to DEC concerning the significant risks associated with transporting crude oil by rail. The new information revealed substantial environmental and public safety hazards posed by transport of Bakken crude oil (the type of crude currently handled at Global's Albany Terminal) and heavy crude/tar sands oil (the type of oil Global now proposes to add to its crude oil operations). Despite being provided with this new information – and participating in the preparation of a report to the Governor acknowledging and detailing the new hazard information – DEC failed to rescind the Negative Declaration in response to this substantive new information as is required by SEQRA.

The SEQRA regulations impose a non-discretionary duty on a reviewing agency to rescind a negative declaration if new information becomes available indicating that the proposed action may have a significant effect on the environment:

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(f)(1) (emphasis added).

In this case, there can be no dispute that subsequent to issuance of the Negative Declaration and prior to its decision to approve the proposed action, new information became available to DEC demonstrating that the transportation of Bakken and heavy crude/tar sands crude oil by rail poses significant environmental and public safety hazards. In fact, the new information was specifically acknowledged in the January 29, 2014 Executive Order issued by Governor Andrew Cuomo and in the April 30, 2014 report on environmental and public safety risks posed by rail transportation of crude oil that was co-authored by DEC.

Governor Cuomo issued Executive Order 125 on January 29, 2014 in response to a series of catastrophic accidents involving the transportation of crude oil by rail and the significant increase in crude oil rail shipments in New York. *See* Petition, Ex. 13. Executive Order 125 specifically noted that “there has been a *significant expansion* in the use of the Port of Albany in the distribution and transportation of crude oil” which “increases the public’s vulnerability to a serious accident,” and directed DEC and the four other state agencies named in the Order to prepare a report “summarizing the State’s existing capacity to prevent and respond to accidents involving the transportation of crude and other petroleum products by rail, ship, and barge. *Id.* (emphasis added). Thus, as one of the five state agencies tasked by Executive Order 125 with preparing the report, DEC was on notice by at least January 29, 2014 that “the significant expansion” in crude oil shipments through the Port of Albany “increases the public’s vulnerability to a serious accident.” *Id.*

The significance of this new information, which DEC became aware of after issuance of the November 2013 Negative Declaration, was reinforced on January 30, 2014, when a broad coalition of community residents, local elected officials, and community and environmental organizations, including Petitioners/Plaintiffs, sent a letter to DEC Commissioner Joseph Martens requesting that DEC rescind the Negative Declaration “based on new information regarding the dangers associated with rail transport of highly flammable, explosive Bakken crude oil.” *See* Petition, Exhibit 14 at 11. The letter went on to describe the newly available information:

Multiple derailments in the last six months of trains carrying Bakken crude oil have resulted in enormous conflagrations of burning crude, millions of gallons of oil spilled into nearby water bodies, and, in a single accident, significant loss of human life. As Executive Order 125 recognizes, “Bakken crude oil has a lower flashpoint and is therefore more prone to ignite during a rail accident” . . . The environmental and public safety issues associated with Global’s massive shipments of highly volatile Bakken crude oil were not addressed in the prior permit modification. Those issues must be addressed now before a potentially catastrophic accident occurs in the heart of downtown Albany.

Id.

The January 30, 2014 letter also identified the unique and significant environmental impacts of a spill involving tar sands oil, including that tar sands oil often arrives from Canada as a highly corrosive, acidic, and potentially unstable blend of thick raw bitumen and volatile natural gas condensate; that the chemicals used to dilute the bitumen are hazardous and more likely to ignite or explode than conventional crude; that an explosion involving tar sands oil may produce hydrogen sulfide, a toxic gas; and that spills of tar sands oil into waterways are extremely difficult to clean up because it sinks to the bottom. *Id.* at 8-9 (footnotes omitted).

Any doubt that DEC was on notice, post-Negative Declaration, about significant environmental and public safety risks posed by Global’s proposed expansion of crude oil

shipments at its Albany Terminal is dispelled by the report co-authored by DEC and four other state agencies and submitted to the Governor on April 30, 2014. In the report, DEC specifically recites new information underscoring the unique environmental and public safety risks posed by transportation of crude oil by rail:

[T]he boom in crude oil transportation has . . . raised public safety and environmental concerns due to the inherent volatility of Bakken crude, the sheer volume being transported, and the poor safety record of the type of tank cars used to carry the majority of crude oil. *In the past nine months, three have been multiple crude-by-rail incidents in North America that resulted in damage to property, the environment, and catastrophic loss of life. Canadian tar sands oil does not have the same volatility, but because it is denser than water and sinks if spilled into waterways, it is a major environmental concern.*

Crude Oil Report, Petition, Exhibit 15, at ii (emphasis added); *id.* at 12 (“As this reports details, the volume and inherent volatility of Bakken crude oil, plus the outdated tank cars contribute to unique hazards.”).

DEC’s Crude Oil Report specifically notes the unique environmental risks posed by rail transport of tar sands oil:

While the spike in Bakken crude oil has focused attention on the transportation of crude oil in New York State, there is also a concern over the possibility of transporting Canadian Tar Sands crude oil through the state. Canadian Tar Sands oil presents a different set of challenges to effective prevention and response. Tar Sand oil is less volatile than Bakken crude oil, but is so heavy that it will sink if released over water. *Given that much of the crude oil transported through New York State travels along or on major waterways, that is a significant concern and one that must be addressed if Canadian Tar Sands crude oil begins to be transported through New York State.*

Id. at 14 (emphasis added).

Despite DEC’ admission in the Crude Oil Report that transportation of tar sands oil along waterways in New York State “is a significant concern” that “must be addressed,” it has nevertheless failed to rescind the Negative Declaration so that the newly discovered concerns can be addressed – a failure that violates the nondiscretionary duty imposed on an agency by the

SEQRA regulations to rescind a negative declaration in the face of significant newly discovered information. *Id.*; 6 NYCRR § 617.7(f)(1).

As the New York Court of Appeals has recognized, a nondiscretionary duty may “derive from the Federal or State Constitutions, statutes, *or regulations.*” *Klostermann v. Cuomo*, 61 N.Y.2d 525, 541 (1984) (emphasis added). Here, the SEQRA regulations specify that an agency “must” rescind a negative declaration in the face of new information that it determines is indicative of a significant environmental impact. 6 NYCRR § 617.7(f)(1); *see Gardner v. Constantine*, 142 Misc. 2d 623, 625-27 (Sup. Ct. St. Lawrence Co. 1989) *aff’d*, 155 A.D.2d 823, (3d Dep’t 1989) (regulation “mandates procedures” where it states that “[a] written report shall be prepared without delay,” and thus “mandamus is an appropriate remedy” for violation); *Martin A by Aurora A v. Gross*, 138 Misc. 2d 212, 219, 222 (Sup. Ct. N.Y. Co. 1987), *aff’d*, 153 A.D.2d 812 (1st Dep’t (1989) (holding, in light of regulatory phrase “shall ensure,” that the “regulations impose a mandatory duty on the City defendants”); *Maggio v. Whalen*, 102 Misc. 2d 89, 92 (Sup. Ct. Suffolk Co. 1979) (regulation providing that “the State Commissioner of Health shall reduce the current [reimbursement] rate by two percent” left “no question that the application of the [two percent] reduction in rate . . . is non-discretionary”); *Burnell v. Smith*, 122 Misc. 2d 342, 345 (Sup. Ct. Wyoming Co. 1984) (observing that “the word ‘will’ . . . ‘commonly ha[s] the mandatory sense of ‘shall’ or ‘must’”) (quoting Black's Law Dictionary 1771 (4th ed.)).

Moreover, the New York Court of Appeals has made clear that SEQRA procedures demand strict compliance, and that a failure to adhere to those procedures requires nullification of the agency action:

The mandate that agencies implement SEQRA’s procedural mechanisms to the “fullest extent possible” *reflects the Legislature’s view that the substance of SEQRA cannot be achieved without its procedure, and that departures from SEQRA’s procedural mechanisms thwart the purposes of the statute. Thus it is*

clear that strict, not substantial, compliance is required.

Nor is strict compliance with SEQRA a meaningless hurdle. Rather, the requirement of strict compliance and attendant specter of de novo environmental review insure that agencies will err on the side of meticulous care in their environmental review. Anything less than strict compliance, moreover, offers an incentive to cut corners and then cure defects only after protracted litigation, all at the ultimate expense of the environment.

King v. Saratoga Co. Bd. of Supervisors, 89 N.Y.2d 341, 347-48 (1996) (emphasis added); see *New York City Coalition to End Lead Poisoning v. Vallone*, 100 N.Y.2d 337, 350 (2003) (“Strict compliance with SEQRA guarantees that environmental concerns are confronted and resolved prior to agency action.”); *Aldrich v. Pattison*, 107 A.D.2d 258, 264 (2d Dep’t 1985) (“Since the Legislature has directed that the policies, statutes, regulations and ordinances of the State and its political subdivisions should be interpreted and administered ‘to the fullest extent possible’ in accordance with SEQRA . . . we have required literal compliance with the environmental review procedures set forth in SEQRA and the regulations.”).

Accordingly, once DEC was put on notice regarding new information pertaining to significant environmental and safety risks posed by the transportation of Bakken crude, tar sands oil and other heavy crudes, it had a nondiscretionary duty to rescind the Negative Declaration so that the new information could be assessed as part of the SEQRA review. Because DEC failed to perform that duty, Petitioners are entitled to an order directing DEC to rescind the Negative Declaration. *Klostermann*, 61 N.Y.2d at 541 (“[T]o the extent that plaintiffs can establish that defendants are not satisfying nondiscretionary obligations to perform certain functions, they are entitled to orders directing defendants to discharge those duties.”).

Moreover, because the potential environmental impacts associated with a tar sands oil explosion or spill meet the criteria for significance set forth in DEC’s SEQRA regulations, the Court should order DEC to issue a Positive Declaration. See 6 NYCRR §§ 617.7(c)(1)(i) (“a


substantial adverse change in existing air quality, ground or surface water quality”); 617.7(c)(1)(ii) (“other significant adverse impacts to natural resources”); 617.7(c)(1)(v) (“the impairment of . . . existing community or neighborhood character”); 617.7(c)(1)(vii) (“the creation of a hazard to human health”).

CONCLUSION

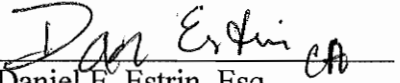
For all of the foregoing reasons, Petitioners respectfully request that this Court enter judgment against respondents for the relief demanded in the Petition.

Dated: New York, New York
June 7, 2014

Respectfully submitted,

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