New York State Department of Environmental Conservation
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Joe Martens
Commissioner

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Via E-Mail and Regular Mail

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Re: Global Companies, LLC

Dear Mr. Estrin and Mr. Amato:

The March 17, 2014 tolling agreement expires tomorrow. Despite the Department's proposals, your clients have been reluctant to extend the tolling period because of Global's refusal to agree to a reasonable extension. Nevertheless, for the reasons outlined below, the Department believes that litigation at this time would be premature. Therefore, to avoid a waste of both of our clients' finite resources, and a needless burden on the court, I write to memorialize the Department's position and legal analysis. Moreover, this letter confirms my offer to stipulate to the positions outlined below or provide an expanded tolling agreement.

As you are aware, a draft permit in this matter was published in the Environmental Notice Bulletin on January 29, 2014. The public comment period concerning this draft remains open until August 1, 2014. Moreover, the Department has announced that its review of Global's proposal is ongoing and that the Department will not make a final determination until it has fully reviewed all issues and the impacted communities have been provided a meaningful opportunity to comment on the application. We have also made it clear to you and your clients that the Department's analysis will be guided by 6 NYCRR 617.7which includes criteria for amending or rescinding Negative Declarations. There has been no final agency action concerning the application for a permit modification. Your clients have not – indeed cannot – suffer injury until there is final agency action granting a permit modification.

The Department's issuance of a Negative Declaration on November 21, 2013 does not change the fact that there has been no final agency action. Further, in the absence of a permit modification, the November 21, 2103 decision did not result in concrete harm entitling your clients to seek judicial intervention. Any suggestion that the 2003 decision in Stop-The-Barge v. Cahill (1 N.Y.3d 218; 803 N.E.361; 771 N.Y.S.2d 40) compels action at this time cannot survive even casual scrutiny. In Stop-The-Barge the Court of Appeals reinforced its position that "an agency action is final when the decisionmaker arrives at a definitive position on the issue that inflicts an actual, concrete injury." Id. at 223 (internal citations omitted). Stop-The-Barge makes clear that if further agency proceedings might render the issue moot, then such action cannot qualify as definitive nor can any perceived injury be actual or concrete. When viewed in its proper light, Stop-The-Barge is fully consistent with the leading cases on this issue: Gordon v. Rush, 100 N.Y.2d 236 (2003)(positive declaration in case where there is no coordinated review constitutes the final SEQRA action by the town and therefore triggers review); Essex County v. Zagata, 91 N.Y.2d 447 (1998)(action can only be final when it imposes an obligation or denies a right) and Long Island Pine Barren Soc. v. Planning Board of Town of Brookhaven, 78 N.Y.2d. 608 (1991)(statute of limitation begins to run only upon last step in SEQRA process).

Any suggestion that Stop-The-Barge alters New York's longstanding approach to the statute of limitation for challenging agency actions is belied by the 2006 decision in Eadie v. North Greenbush (7 N.Y.3d 306; 854 N.E.2d 464; 821 N.Y.S.2d 142). In Eadie the Court of Appeals settled any confusion caused by its earlier decisions by noting that "in Stop-The-Barge the completion of the SEQRA process was the last action taken by the agency whose determination petitioners challenged." Id. at 317. The Court went on to hold that respondents who still have an opportunity to change an administrative determination (in that instance a zoning revision; in this case a Title V permit modification) cannot have suffered concrete injury. Id. Like the petitioners in Eadie, any alleged injury to your clients based upon the Negative Declaration is "contingent: [because] they would have suffered no injury at all if they succeed in defeating the [permit modification]." Id. Thus, just as with petitioners' claim in Eadie, any claim by your clients at this point in the process is premature.

In light of the foregoing, and the assurances provided by this letter, we believe that no legitimate purpose is served by litigating at this time. Litigation now could only be intended to harass or to cause needless expenses. Therefore, any claim filed before final action on the permit application would be frivolous and we reserve the right to seek sanctions.

Please be guided accordingly.

Sincerely,

Edward F. McTiernan
Deputy Commissioner
and General Counsel