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NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

**Via Overnight Mail**

January 30, 2014

Hon. Joseph J. Martens  
Commissioner  
New York State Department of Environmental Conservation  
625 Broadway  
Albany, NY 12233-1010

**Re: Global Companies LLC Port of Albany Crude Oil Shipments: Request to Withdraw Notice of Complete Application, Rescind Negative Declaration and Issue Positive Declaration, Revoke Prior Permit Modification, and Comply With Environmental Justice Policy**

Dear Commissioner Martens:

Earthjustice submits this letter on behalf of Sierra Club Atlantic Chapter, the Ezra Prentice Homes Tenants' Association, the Center for Biological Diversity, Riverkeeper, Inc., Natural Resources Defense Council, Environmental Advocates of New York, Catskill Mountainkeeper, Albany City Council President Carolyn McLaughlin, Albany City Councilmember Leah Golby, Albany City Councilmember Dorsey Applers, Albany City Councilmember Judd Krasher, Albany City Councilmember Vivian Kornegay, Albany County Legislator Bryan M. Clenahan, Albany County Legislator Doug Bullock, People of Albany United for Safe Energy, MoveOn.Org Capital Region Council, Transition Albany, Save the Pine Bush, Bethlehem Neighbors for Peace, Restore Our Waterfront, Occupy Albany, the Muslim Solidarity Committee, and the Solidarity Committee of the Capital Region to request that the New York State Department of Environmental Conservation ("DEC" or "Department") take immediate action to address the environmental and public health and safety threat posed by massive rail shipments of volatile crude oil into the Port of Albany. Within the past year, over one billion gallons of explosive Bakken crude oil has been shipped into the Port by rail; hundreds of crude oil rail cars are being stored just feet away from homes and playgrounds; and long lines of crude oil rail cars routinely stretch for miles along Route 787 through the heart of downtown Albany. All of this has occurred without the thorough environmental review required by state law, and without any attempt to engage the residential communities that are bearing the brunt of this unprecedented industrial activity as required by the Department's Environmental Justice Policy.

For the reasons set forth in this letter, we urge DEC to require a full environmental impact statement and environmental justice analysis and process for (1) the pending application by Global Companies, LLC ("Global") for a modification of the Clean Air Act Title V Air Facility Permit ("Title V Permit") for Global's Port of Albany Terminal, and (2) the prior modification to the Title V Permit, approved by DEC in November 2012, which allowed Global to double the throughput of Bakken crude oil at the Albany Terminal.

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In 2011, the Department determined that Global's Albany Terminal operations potentially affect an environmental justice area within the meaning of DEC's Environmental Justice Policy, Commissioner's Policy 29, Environmental Justice and Permitting (March 19, 2003) ("CP-29"). This determination was reiterated by the Department on July 25, 2013. We respectfully bring to your attention the fact that, despite these determinations, neither Global nor DEC have complied with the environmental justice policies and procedures set forth in CP-29 regarding either Global's November 2011 Title V Permit modification or Global's pending Title V Permit modification.

Specifically, Global has failed to prepare and submit to DEC – much less implement – a written Public Participation Plan as required by CP-29. Moreover, the Department issued a Notice of Complete Application despite the fact that CP-29 explicitly requires that a Public Participation Plan be prepared and submitted to DEC before an application potentially affecting an environmental justice community can be considered complete. Additionally, the Department has failed to conduct a coordinated review with the City of Albany Planning Board as required by CP-29. As a result of the joint failure by Global and DEC to comply with the Department's Environmental Justice Policy, the neighboring environmental justice communities and their elected officials were not provided with adequate notification or information regarding Global's prior and current proposals to significantly increase dangerous industrial activities at the Albany Terminal. Consequently, the neighboring environmental justice communities bearing a disproportionate share of the environmental and public health risks from Global's industrial operations have been excluded from the permit review process, and the health and safety concerns of families living within feet of those operations have been neither solicited nor considered.

Additionally, neither Global nor DEC has addressed the broader concerns of those who live and work in Albany regarding the potentially catastrophic environmental and public health consequences of an accident involving Global's Bakken crude oil shipments or the newly proposed import of (what we believe to be) tar sands oil. As discussed in detail below, the recent epidemic of derailments and explosions involving Bakken crude rail shipments make clear that a similar accident at or near the Albany Terminal could have horrific consequences. The proximity of the Albany Terminal to thousands of homes and to downtown Albany – and the concentration at the Terminal of hundreds of tank rail cars carrying Bakken crude – make it likely that an accident will result in serious loss of human life and destruction of homes and businesses. Moreover, the location of the Albany Terminal in the floodplain of the Hudson River and the massive transfers of crude oil at the Terminal onto river barges create a serious threat of long-term and potentially irreversible environmental harm in the event of an explosion or spill, particularly one involving viscous tar sands oil.

In light of these concerns, we respectfully request that the Department withdraw its Notice of Complete Application regarding Global's application for a Title V Permit modification unless and until Global and the Department comply with the requirements of CP-29, and unless and until Global specifically identifies the origin and type of crude oil that it seeks to heat. Upon information and belief, Global is applying for new heating capability at the Albany Terminal in order to import, store and transfer tar sands oil. Because tar sands oil has potentially significant

adverse environmental impacts that are different in type and degree from oil currently handled at the Albany Terminal, and because the Albany Terminal is located in the floodplain of the Hudson River and is adjacent to or directly upstream of several areas designated as Significant Coastal Fish and Wildlife Habitats, Global should be required to fully evaluate and avoid or mitigate those potential impacts as required by the State Environmental Quality Review Act, Environmental Conservation Law Article 8 ("SEQRA").

Because Global and the Department have failed to comply with CP-29 and have failed to address the environmental impacts associated with the proposed handling of tar sands oil, we also request that the Department rescind the Negative Declaration previously issued for the proposed modification to the Title V Permit and issue a Positive Declaration requiring that an environmental impact statement be prepared as required by SEQRA.

We also respectfully request that the Department exercise its authority under the Uniform Procedures Act and the Department's implementing regulations to revoke the November 2012 modification to Global's Title V Permit because (i) Global made materially false and inaccurate statements in its permit application claiming that the doubling of throughput of crude oil would result in no additional train traffic at the Albany Terminal; (ii) significant and material new information has become available since the prior Title V Permit modification demonstrating that Bakken crude oil poses significant environmental and public health and safety threats that were not considered or addressed in the prior modification; and (iii) Global and DEC failed to comply with CP-29 during the prior Title V Permit modification.

We respectfully submit that the above actions are necessary and proper in order to fulfill the directives set forth in Executive Order 125 issued by Governor Cuomo on January 29, 2014, 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 hereto as Exhibit A. Executive Order 125 requires, among other things, that DEC and the other agencies named in the Order submit a report to the Governor by April 30, 2014 that includes:

- (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.

Exhibit A at 2.

The Executive Order's requirement that DEC and the other named agencies assess the State's readiness to prevent and respond to rail and water accidents involving petroleum products and make recommendations concerning ways to better prevent and respond to accidents makes clear that a comprehensive review of crude oil operations at the Albany Terminal, and the environmental and public health and safety risks posed by those operations, must be conducted and included in the report to the Governor. In fact, Executive Order 125 specifically references the significant increase in shipments of Bakken crude oil to the Albany Terminal as grounds for requiring the report. *See* Exhibit A at 1 ("there has been a significant expansion in the use of the Port of Albany in the distribution and transportation of crude oil and other petroleum products by rail, ship and barge"). The most expedient, thorough, and publicly accountable way to conduct such a comprehensive review is through an environmental impact statement ("EIS") prepared pursuant to SEQRA. Consequently, we urge the Department to immediately suspend its review of Global's pending application, revoke the prior permit modification, issue a Positive Declaration requiring Global to prepare an EIS concerning all aspects of its Albany Terminal operations, and ensure that the requirements of the Department's Environmental Justice Policy are complied with by Global and Department staff.

#### **I. 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." CP-29 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.

## **II. Global’s Massive Increase in Industrial Operations at the Albany Terminal**

On or about November 14, 2011, Global submitted an application for a Title V Permit modification to allow it to double crude oil storage and loading capabilities at the Albany terminal to 1.8 million gallons calculated on a 12-month rolling basis. By letter dated December 14, 2011, DEC requested additional information regarding the proposed 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.*” Letter from Angelo Marcuccio, DEC Environmental Analyst to Thomas Keefe, Global Companies, LLC (Dec. 14, 2011) (“Marcuccio Letter”) at 2 (emphasis added). A copy of the Marcuccio Letter is annexed as Exhibit B.

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. Letter from Ameila Leonard, Environmental Specialist, Ingalls & Associates, LLP, to Angelo Marcuccio, DEC (March 2, 2012) ("Ingalls Letter"), annexed hereto (without attachments) as Exhibit C, at 1. The Ingalls Letter stated that construction activities associated with the proposed modifications would disturb approximately seven acres of land at the Albany terminal. *Id.* at 2.

Despite the fact that Global was seeking to double crude oil throughput at the Albany Terminal and that the increase would require 7 to 10 additional barges per month, Global made the remarkable claim that "future train traffic will be almost identical to existing train traffic." *Id.* at 3. As discussed below, this claim constitutes a materially false and inaccurate statement within the meaning of 6 NYCRR § 621.13(a)(1).

With respect to the environmental justice issue raised in the Marcuccio Letter, Global responded as follows:

While we recognize that the requested permit modification is considered to be a major modification with respect to the Air Permit, and that the Albany Terminal is located within a potential Environmental Justice Area, no potential adverse environmental impacts related to the proposed action are likely to affect the area. In fact, the project will likely result in environmental benefits for residents of the area of concern. As a result, no further EJ review is required of the proposed project based on the preliminary screening criteria detailed in CP-29.

*Id.* at 4.

This statement is flawed in several respects. First, the claim that "no potential adverse environmental impacts related to the proposed action are likely to affect the [environmental justice] area" is contradicted by the fact that the application sought a massive expansion of operations at Global's Albany terminal, with the attendant increased risk of fire, explosion and spills. Second, the claim that the project would result in environmental benefits for nearby residents is lacking in credibility, to say the least, and was made without any effort to solicit the views of the affected neighboring community. Third, even if Global's environmental claims were true, the statement that no further environmental justice review was required by CP-29 is simply wrong. CP-29 requires an enhanced public participation plan to be prepared, submitted and implemented if a potential environmental justice area is identified by the preliminary screen, regardless of an applicant's claim that the area will not be adversely affected by the project. *See* CP-29 at 8 ("Where 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*") (emphasis added).

Unfortunately, the Department apparently never questioned Global's environmental claims and failed to correct Global's misinterpretation of CP-29. As a result, no Public Participation Plan was prepared by Global, and the enhanced public participation requirements of CP-29 were ignored. Despite CP-29's clear mandate that a written Public Participation Plan must be submitted before an application may be deemed complete, the Department issued a

Notice of Complete Application, ignoring Global's failure to comply with this key requirement.<sup>1</sup> See Notice of Complete Application (July 25, 2012), annexed hereto as Exhibit D.

On or about July 25, 2012, the Department announced in the Environmental Notice Bulletin ("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. ENB Region 4 Completed Applications Albany County (July 25, 2012), annexed hereto as Exhibit E. Despite that fact that Global had stated in its application that building permits for the proposed project were required from the City of Albany, see Exhibit C at 2, the Department's ENB notice stated that no coordinated review had been performed. *Id.* This was in derogation of CP-29's explicit requirement that projects potentially affecting environmental justice areas be subject to coordinated review. CP-29 at 9. Indeed, the ENB notice makes 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. See Exhibit E.

Subsequently, 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 storage of heated 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. 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." DEC Notice of Incomplete Application (July 25, 2013) (emphasis added), annexed hereto as Exhibit F.

By letter dated September 6, 2013, Global responded to the Notice of Incomplete Application through its consultant, Envirospec Engineering, PLLC. With respect to the environmental justice issue, Global again misinterpreted and misapplied CP-29:

The nearest residences to the proposed project are located approximately 800 feet northwest of Kenwood Yard on Franklin Street. The Port area has been industrialized for many years and Global's activities do not alter the character of the area, nor do any emissions, noise or lighting conditions substantially change the status quo that has existed to the east of the Interstate. The attached Expanded Narrative addresses environmental concerns associated with the proposed heated product project, including a traffic analysis, visual analysis, noise analysis and a

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<sup>1</sup> This error was compounded by the Department's conclusion in its subsequent Notice of Complete Application that "[i]t has been determined that the proposed project is not subject to CP-29." The basis for DEC's about-face on the applicability of CP-29 was not explained. There is no indication that DEC had concluded that its preliminary screening analysis was in error, nor is there any reference to any provision of CP-29 supporting the revised determination of CP-29 inapplicability. In fact, the determination directly contradicts DEC's initial determination on December 14, 2011 that the project was subject to CP-29, and DEC's reiteration of that determination in July 2013 (discussed below).

review of odor control at the Terminal. As the Expanded Narrative indicates, the proposed project will not have any adverse environmental impacts. As a result, no further environmental justice analysis is required, consistent with the methodology for conducting a preliminary screen found in DEC Policy CP-29.

Letter from Nicole Brower, PE, Envirospec Engineering, PLLC, to Karen M. Gaidasz, DEC Region 4 (Sept. 6, 2013), annexed hereto as Exhibit G, at 2.

Global apparently relied on this self-serving analysis to justify its failure to comply with the requirement of CP-29 that a Public Participation Plan be prepared and implemented – a requirement that applies regardless of the applicant’s claim (made without any input from the affected communities) that neighboring environmental justice communities will not be adversely affected by the proposed project.

On November 21, 2013, the Department issued a Notice of Complete Application and subsequently published notice of the application, together with notification that a Negative Declaration had been issued for the proposed modification, in the ENB. *See ENB Region 4 Completed Applications Albany County (Dec. 31, 2013) annexed hereto as Exhibit H.* 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. Also, as was the case with the prior permit modification, DEC failed to conduct the coordinated review required by CP-29. *See id.* at 2.

### **III. The Notice of Complete Application Should Be Withdrawn**

Because neither Global nor the Department has complied with the requirements of CP-29, the Notice of Complete Application should be withdrawn. As noted above, once the preliminary screen has identified an environmental justice community, the applicant must prepare and submit a Public Participation Plan as part of its application. CP-29 at 8. This requirement applies regardless of an applicant’s claims that its project will have no adverse impact on the identified environmental justice community. Because Global has failed to submit a written Public Participation Plan, its application is incomplete and the Notice of Complete Application was erroneously issued.

### **IV. The Negative Declaration Should Be Rescinded and a Positive Declaration Issued**

As Global acknowledges in its application, the need for installation of new heating processes at the Albany Terminal is the result of the viscosity of the new product (which Global has not identified) that will be coming into the Terminal. Upon information and belief, the new product will include crude oil extracted from tar sands in western Canada. Neither Global nor the Department has adequately addressed the potential adverse environmental and human health impacts that may result from an accident involving tar sands oil. In fact, those potential impacts make clear that the issuance of a Negative Declaration for this project was in error.



The impacts of a spill of tar sands oil could be disastrous. Unlike oil from other sources, tar sands oil often arrives into the United States from Canada as diluted bitumen, “a highly corrosive, acidic, and potentially unstable blend of thick raw bitumen and volatile natural gas liquid condensate.”<sup>2</sup> A leak or spill of diluted bitumen presents an elevated risk to the environment and public safety. The chemicals used to dilute the bitumen are hazardous and more likely to ignite or explode than conventional crude. An explosion of diluted bitumen may produce hydrogen sulfide, a highly toxic gas which can cause suffocation. Diluted bitumen also contains benzene, polycyclic aromatic hydrocarbons, and other toxins that can affect the human central nervous system.<sup>3</sup>

In addition, a spill of tar sands oil into water is extremely difficult to clean up because bitumen sinks, placing waterways and sources of drinking water at greater risk. 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.<sup>4</sup> Health impacts ranging from headaches to chronic coughing have been reported by individuals living close to the Kalamazoo River.<sup>5</sup>

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. Specifically, they meet the criteria in 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”); and 617.7(c)(1)(vii) (“the creation of a hazard to human health”).

Moreover, 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 potential 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, Paps Kane 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

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<sup>2</sup> Natural Resources Defense Council, *Tar Sands Pipelines Safety Risks*, 5 (Feb. 2011).

<sup>3</sup> *Ibid.*

<sup>4</sup> U.S. Environmental Protection Agency, *Dredging Begins on Kalamazoo River* (Aug. 2013), available at [http://www.epa.gov/region05/enbridgespill/pdfs/enbridge\\_fs\\_201308.pdf](http://www.epa.gov/region05/enbridgespill/pdfs/enbridge_fs_201308.pdf).

<sup>5</sup> CBC News, *Enbridge’s Kalamazoo cleanup dredges up 3-year-old oil spill* (Sept. 6, 2013), available at <http://www.cbc.ca/news/politics/enbridge-s-kalamazoo-cleanup-dredges-up-3-year-old-oil-spill-1.1327268>.

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’”) (internal 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 required to be considered as part of National Environmental Policy Act environmental assessment).

Moreover, because Global failed in its application for a modification to the Title V Permit to specifically identify that it is proposing to import, for the first time, tar sands oil to the Albany Terminal, this constitutes discovery of “new information” and a “change in circumstance . . . not previously considered” providing grounds for rescission of the Negative Declaration. *See* 6 NYCRR §§ 617.7(f)(1)(ii) and (iii). The SEQRA regulations specifically allow rescission of a Negative Declaration “at any time prior to [an agency’s] decision to undertake, fund or approve an action.” 6 NYCRR § 617.7(f). Since no final decision on Global’s application has been made, rescission of the Negative Declaration is permissible and appropriate.

**V. The Department Should Revoke the November 2012 Permit Modification Based on Global’s False and Inaccurate Statements, the Availability of Material New Information Regarding Bakken Crude Oil, and the Failure to Comply With CP-29**

DEC’s regulations implementing the Uniform Procedures Act authorize the Department to revoke a permit if there are “materially false or inaccurate statements in the permit application or supporting papers,” or based on “newly discovered material information . . .” 6 NYCRR §§ 621.13(a)(1) and (4). In this case, both grounds exist for initiating a permit modification with respect to the Title V Permit modification approved by DEC in November 2012. Additionally, neither Global nor the Department complied with the requirements of CP-29 during the prior Title V permit modification, and the prior permit modification should be revoked for this reason as well.

**A. Materially False and Inaccurate Statements**

As noted above, in its application materials for the prior Title V Permit modification, Global repeatedly claimed that its doubling of crude oil throughput at the Albany Terminal would result in no increase in rail traffic. *See* Exhibit C at 2-3 (“future train traffic will be almost identical to existing train traffic”); *id.* at 5 (“the project will result in no increase in rail traffic”).

It is perplexing how this claim could have gone unquestioned by DEC. It defies credibility that Global could *double* the throughput of crude oil at the Albany Terminal without *any* increase in rail traffic – particularly since Global also predicted a “substantial decrease” in truck traffic. *Id.* at 2-3. Moreover, Global’s acknowledgement in its application that an additional 7 to 10 barges would be required each month to handle the increased throughput should have raised red flags concerning its specious assertion that all of this additional crude oil would arrive at the Albany Terminal without any increase in rail traffic.

In any event, Global’s claim appears to be demonstrably false. As anyone who lives or works in Albany or has traveled along Route 787 can attest, Global’s expansion of crude oil throughput appears to have vastly increased rail traffic at and near the Albany Terminal. Hundreds of tank rail cars are routinely parked directly adjacent to the Ezra Prentice Homes and in the Port of Albany rail yard, and lines of tank cars stretch for miles on the tracks running along Route 787 through the heart of downtown Albany and right past DEC headquarters. Indeed, the vast increase in rail traffic at the Albany Terminal is specifically recognized in Executive Order 125. *See* Exhibit A at 1 (“there has been a significant expansion in the use of the Port of Albany in the distribution and transportation of crude oil and other petroleum products by rail, ship and barge . . .”). Photographs depicting the tank rail car congestion and its proximity to homes and downtown Albany are annexed hereto as Exhibit I.

To put it bluntly, Global knew or should have known that doubling the throughput at the Albany Terminal would likely result in a significant increase in rail traffic. Its statements to the contrary were thus materially false and inaccurate, and provide grounds for DEC to revoke the prior permit modification in order to fully evaluate the environmental justice, environmental, and public health and safety impacts associated with the increased rail traffic.

#### B. Material New Information

Even if Global’s claims regarding rail traffic were true, DEC should revoke the prior permit modification based on material new information regarding the dangers associated with rail transport of highly flammable, explosive Bakken crude oil. 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.” Exhibit A at 1. 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.

Currently, hundred-car trains are carrying Bakken crude<sup>6</sup> southward along the western shore of Lake Champlain and to the Port of Albany, and are also converging on Albany and the

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<sup>6</sup> Anderson, Eric, “Warning issued for crude oil: Agency says Bakken shale variety fire risk may be higher,” *Albany Times Union*, Jan. 2, 2014, available at <http://www.timesunion.com/business/article/Warning-issued-for-crude-oil-5109728.php#photo-5674154>.

Hudson River Valley from west-east rail lines. This volatile cargo has been the cause of numerous recent environmental and public safety incidents, including:

- the fiery derailment of a train at Casselton, North Dakota;<sup>7</sup>
- the evacuation of a New Brunswick town following a derailment and fire;<sup>8</sup>
- a train derailment in Pickens County, Alabama,<sup>9</sup> that caused an explosion and fire and spilled oil into a wetland feeding the Tombigbee River;<sup>10</sup> and
- on July 6, 2013, one of the worst train accidents ever in North America occurred at Lac-Mégantic, Quebec, when a 72-tanker<sup>11</sup> train carrying Bakken crude careened, unmanned, into town in the middle of the night, killing 47 people and incinerating the downtown area. Roughly 1.6 million gallons of crude oil spilled from the train, some of it reaching the lake that served as the focal point for this popular tourist town. Oil has been found as far as 74 miles downstream from the spill site.<sup>12</sup>

Earlier this month, in response to the recent spate of blazing derailments of trains carrying Bakken crude, the federal Pipeline and Hazardous Materials Safety Administration (PHMSA) issued a rare safety alert,<sup>13</sup> stating that crude oil produced in the Bakken region may be more flammable and therefore more dangerous than other types of crude oil. The alert included a reminder to emergency responders that light sweet crude, such as that from the Bakken region, has a flash point of below 73° F, and therefore “pose[s] significant fire risk if released from the package in an accident.”

Unfortunately PHMSA’s alert does nothing to reduce the risk of another disastrous derailment of a train carrying Bakken crude. While the recent North Dakota and Alabama wrecks occurred outside of populated areas and resulted in no human injuries, the consequences of a derailment in downtown Albany could be equally catastrophic as the Lac-Mégantic incident. And whether a derailment occurs in a town or in a rural area, spilled crude threatens surface and groundwater sources, wetlands, streams, rivers, and lakes, and other sensitive wildlife habitats.

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<sup>7</sup> Nunez, Christina, “N.D. Oil Train Fire Spotlights Risks of Transporting Crude,” *National Geographic Daily News*, Dec. 31, 2013, available at <http://news.nationalgeographic.com/news/energy/2013/12/131231-north-dakota-oil-train-fire/>; see also Executive Order 125, Exhibit A at 1 (referencing the Casselton accident).

<sup>8</sup> Ho, Solarina, “Evacuation Ordered as Train Carrying Crude Oil Derails, Catches Fire 35 Miles From Caribou,” *Bangor Daily News*, Jan. 7, 2014, available at <http://bangordailynews.com/2014/01/07/news/world-news/evacuation-ordered-as-train-derails-catches-fire-in-new-brunswick/?ref=latest>.

<sup>9</sup> Karlamangla, Soumya, “Train in Alabama Oil Spill Was Carrying 2.7 Million Gallons of Crude,” *Los Angeles Times*, Nov. 9, 2013, available at <http://articles.latimes.com/2013/nov/09/nation/la-na-nn-train-crash-alabama-oil-20131109>.

<sup>10</sup> “Train carrying oil derails, explodes in Alabama,” *Al Jazeera America*, Nov. 8, 2013, available at <http://america.aljazeera.com/articles/2013/11/8/train-carrying-ilderailsexplodesinalabama.html>.

<sup>11</sup> McNish, Jacquie and Grant Robertson, “The Deadly Secret Behind the Lac-Mégantic Inferno.” *The Globe and Mail*, Dec. 3, 2013, available at <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/the-hazardous-history-of-the-oil-that-levelled-lac-megantic/article15733700/?page=all>; see also Executive Order 125, Exhibit A at 1 (referencing the train derailment in Lac-Mégantic).

<sup>12</sup> Beaudin, Monique, “Lac-Mégantic Oil Spill Even Worse Than First Feared, Investigation Shows.” *Montreal Gazette*, Oct. 22, 2013, available at <http://www.montrealgazette.com/news/Mégantic+spill+even+worse+than+first+feared+investigation+shows/9063521/story.html>.

<sup>13</sup> “Preliminary Guidance from Operation Classification,” PHMSA, (Jan. 2, 2014), available at [http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/1\\_2\\_14%20Rail\\_Safety\\_Alert.pdf](http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/1_2_14%20Rail_Safety_Alert.pdf).

The environmental and public safety concerns associated with Bakken crude shipments into the Port of Albany are heightened by the rapid and significant increase in those shipments. In the last two years, the "Port of Albany has become a major transshipment point for Bakken crude."<sup>14</sup> In addition to crude oil shipments on the Canadian Pacific line, CSX Transportation and Burlington Northern Santa Fe also ship Bakken crude by rail through the Albany area.<sup>15</sup> Moreover, plans are in the works to further escalate the amount of Bakken crude moving through upstate New York, as Albany and the Hudson River corridor become a major transportation funnel for oil shipped from the western United States and Canada to East Coast refineries.<sup>16</sup> As much as one-quarter of the shale oil being produced in North Dakota may now be moving by rail to the Port of Albany.<sup>17</sup>

The threat of derailment is not merely speculative. More oil was spilled due to train derailments in 2013 than in the previous 40 years combined.<sup>18</sup> Given the significant increase in crude oil rail traffic, the question is not *whether* a derailment will occur in the Albany area, but *when* it will occur.

Global's prior false and inaccurate claims regarding the lack of increased rail traffic, together with the material new information concerning the dangers posed by Bakken crude, provide ample grounds for DEC to initiate a permit modification which should fully evaluate the environmental and public safety issues raised by Global's massive increase in shipments of Bakken crude oil into the Port of Albany. Such a permit modification would provide the Department with a new opportunity to conduct a SEQRA review which almost certainly would require preparation of an environmental impact statement.

The potential environmental impacts associated with an accident involving Bakken crude oil meet the criteria for significance set forth in DEC's SEQRA regulations. Specifically, they meet the criteria in 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"); and 617.7(c)(1)(vii) ("the creation of a hazard to human health").

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<sup>14</sup> Anderson, *supra*, at note 6.

<sup>15</sup> *Ibid.*

<sup>16</sup> Anderson, Eric, "Hudson Valley's Crude Pipeline: Rail Traffic for Oil Delivery to East Coast Refineries through Albany Area is Rising," *Albany Times-Union*, Feb. 28, 2013, available at <http://www.timesunion.com/business/article/Hudson-Valley-s-crude-pipeline-4318641.php>.

<sup>17</sup> Anderson, Eric, "Oil Shipments are Albany-bound: North Dakota Crude Will Be Shipped by Rail to Port, Loaded on Barges," *Albany Times-Union*, Aug. 8, 2012, available at <http://www.timesunion.com/business/article/Oil-shipments-are-Albany-bound-3773979.php>.

<sup>18</sup> Tate, Curtis, "More oil spilled from trains in 2013 than in previous 4 decades," MSN News, Jan. 21, 2014, available at <http://news.msn.com/us/more-oil-spilled-from-trains-in-2013-than-in-previous-4-decades>.

Moreover, as noted above, 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 potential spill or explosion could be catastrophic, given the fact that hundreds of rail cars sit in the rail yard at the Albany Terminal and on the tracks leading to the Terminal running through downtown Albany along heavily traveled Route 787, as well as the close proximity of residential housing, the Hudson River, and several Significant Coastal Fish and Wildlife Habitats. *See Anderson v. Town of Chili Planning Board*, 12 N.Y.3d 901 (town planning board violated SEQRA by failing to consider effects of potential explosion and fire at proposed metal shredder); *Riverhead Bus. Imp. Dist.*, 253 A.D.2d at 753 (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 (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*, 691 F. Supp. 2d at 50 ("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*, 449 F.3d at 1033 (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'") (internal citations omitted); *Tri-Valley Cares*, 203 F. App'x at 107 (holding that potential terrorist attack on proposed biological weapons laboratory required to be considered as part of National Environmental Policy Act environmental assessment).

### C. Failure to Comply With CP-29

As noted above, despite the fact that the Department informed Global in December 2011 that its proposal to double crude oil throughput at the Albany Terminal would potentially affect an identified environmental justice community, neither Global nor DEC complied with the requirements of CP-29. *See Exhibit B*. No written public participation plan was prepared by Global, and the enhanced public participation requirements of CP-29 were ignored. Despite the fact that CP-29 clearly requires that, for projects for which an environmental justice community has been identified, a written public participation must be submitted before an application can be deemed complete, the Department noticed Global's application as complete in the absence of such a plan. *See CP-29 at 8; Exhibit D*. Moreover, despite the fact that Global notified the Department in its application that the proposed project required building permits from the City of Albany, DEC failed to conduct a coordinated review as required by CP-29. *See Exhibit C at 2; CP-29 at 9*. The failure of Global and DEC to comply with the Department's Environmental Justice Policy completely undermined the purposes of the Policy by denying the affected environmental justice community adequate notice of Global's proposed project and depriving that community of the opportunity to evaluate and voice their concerns about the project. Accordingly, to remedy this failure, we ask that you revoke the November 2012 permit modification and require Global and Department staff to comply with CP-29.

## VI. Conclusion

For the reasons set forth herein, we respectfully request that the Department (i) withdraw the Notice of Complete Application for the pending Title V Permit modification so that Global and DEC can comply with the requirements of CP-29; (ii) rescind the Negative Declaration for the pending Title V Permit modification and issue a Positive Declaration because tar sands oil has potentially significant adverse environmental impacts that are different in type and degree from oil currently handled at the Albany terminal, and because the Albany terminal is located in the floodplain of the Hudson River; and (iii) initiate a permit modification for Global's Albany Terminal based on Global's materially false and inaccurate statements in its prior permit application and based on material new information concerning the environmental and public safety hazards posed by rail shipment of Bakken crude oil. We believe these measures are necessary and prudent in order for the Department to comply with the letter and intent of Executive Order 125.

Thank you for the opportunity to submit these comments.

Sincerely,



Christopher Amato  
Staff Attorney

C: Hon. Andrew M. Cuomo, Governor  
Hon. Neil D. Breslin, Senator, 44th Senate District  
Hon. John T. McDonald, III, Assemblyman, 108<sup>th</sup> Assembly District  
Hon. Patricia Fahy, Assemblywoman, 109<sup>th</sup> Assembly District  
Hon. Kathy M. Sheehan, Mayor, City of Albany  
Hon. Daniel McCoy, Albany County Executive  
Basil Seggos, Deputy Secretary for the Environment  
Hon. Judith Enck, EPA Regional Administrator  
Marc Gerstman, DEC Executive Deputy Commissioner  
Ed McTiernan, DEC General Counsel  
Melvin Norris, Director, DEC Office of Environmental Justice