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September 29, 2005

Charles B. Gardner
New York State Department of Environmental Conservation
Division of Environmental Permits
625 Broadway
Albany, New York 12233-3250

Re: Proposed Amendments to Part 621 Uniform Procedures

Dear Mr. Gardner:

This letter is submitted on behalf of the Committee on Environmental Law of the Association of the Bar of the City of New York (hereinafter "Committee") regarding the Department's proposed amendments to 6 NYCRR Part 621, Uniform Procedures. Members of the Committee are drawn from the private, government and non-profit sectors and represent diverse viewpoints with respect to environmental matters in the City and State. Many members have significant experience with practical, procedural and substantive issues that arise with respect to permit applications before the Department. We support the Department's efforts to update and clarify certain aspects of the Uniform Procedures, and submit the following comments for consideration:

1. Section 621.2(b): Definition of Administrative SPDES Permit Renewal

This proposed subdivision would add a new definition of administrative SPDES permit renewal, a term previously undefined in Part 621. The definition is presumably intended to address the anomaly created in 2003 when the SPDES regulations, Part 750, were amended to define "administrative renewal" by reference to Part 621 even though Part 621 itself lacked a definition of that term. *See* 6 NYCRR § 750-1.2(a)(3) ("Administrative renewal means renewal

of a SPDES permit in accordance with Part 621 of this Title, based on an abbreviated review of changes at the facility.").[1]

The currently proposed Part 621 definition would expand upon the Part 750 definition by stating:

> *Administrative SPDES Permit Renewal* means the renewal of an existing State Pollutant Discharge Elimination System (SPDES) permit, for a new term, utilizing abbreviated application and review procedures that defer full technical review of permit provisions based on priority ranking described in Part 750-1.19 of this Title.

This proposed definition, however, creates an internal contradiction in Part 621. The contradiction results from the fact that an existing provision in Part 621 requires the vast majority of SPDES permit renewals to be treated as new applications (as is required by a state statute and federal regulation),[2] while the new definition fails to limit administrative SPDES renewals to those which need not be treated as new applications. Specifically, existing subsection 621.13(f) provides that, except for those SPDES modifications considered minor under 40 CFR § 122.63, "[f]or delegated permits, an application for permit renewal or modification will be treated as a new application under this Part...." Thus, unless they are minor modifications under the federal regulations or are non-delegated permits because they regulate only discharges to groundwater (which are covered under the state SPDES program, but not the federal NPDES program), SPDES renewal applications must be treated as new applications under Part 621. But proposed subsection 621.2(b), in defining administrative SPDES renewals as those with abbreviated application and review procedures and deferral of technical review (and thus not appearing to involve the same review and public participation as new applications), contains no such limitation.

We recognize that a similar contradiction has existed in the state statutory scheme since 1994 when ECL § 17-0817(2) was amended to read "*[a]ll SPDES permits* may be administratively renewed in accordance with article seventy of this chapter," even though ECL § 70-0115(2)(c) provides that "[i]n the case of a request for the renewal ... of an *existing state pollutant discharge elimination system permit issued in lieu of a national discharge elimination*

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[1] Neither Article 17 (Water Pollution Control) nor Article 70 (Uniform Procedures) of the ECL defines administrative renewal, and the term does not appear anywhere in the federal Clean Water Act or its regulations.

[2] *See* ECL § 70-0115(2)(c) ("In the case of a request for the renewal ... of an existing state pollutant discharge elimination system permit issued in lieu of a national discharge elimination system permit the request should be treated as an application for a new permit."); 40 CFR § 122.21(d)(2) ("[P]ermittees with currently effective permits shall submit a new application 180 days before the existing permit expires.").

system permit the request should be treated as an application for a new permit." (Emphasis added.) This statutory contradiction, which was introduced into Part 750 of the regulations in 2003 – but not into Part 621 until now – is carefully considered in a recent article addressing SPDES permit renewals in New York State. *See* Karl S. Coplan, *Of Zombie Permits and Greenwash Renewal Strategies: Ten Years of New York's So-Called "Environmental Benefit Permitting Strategy"*, 22 Pace Envtl. L. Rev. 1, 18-28 (2005).

Moreover, in practice, DEC has drawn "a sharp distinction between new SPDES permit applications and renewals" (*id.* at 26), particularly with regard to (1) the information required on renewal application forms; (2) public notice of permit renewal reviews; and (3) the standards and mechanism for triggering public hearings on permit renewals. *Id.* at 25-31 (discussing department's Technical and Operating Guidance Series [TOGS]). Thus, the inconsistency is not merely a pedantic concern, but causes SPDES renewal applications to be processed in a manner inconsistent with the requirement that they be treated as new applications. The proposed definition would make this practice explicit in the regulation.

To avoid creating the internal inconsistency in Part 621, and also to render Part 621 consistent with ECL § 70-0115(2)(c) and 40 CFR § 122.21(d)(2), we recommend that DEC make clear that administrative SPDES permit renewals are only available for non-delegated SPDES permits or for minor SPDES permit modifications under 40 CFR § 122.63. This can be accomplished by either including limiting language in subsection 621.2(b) or by amending existing subsection 621.13(e) (which currently allows the department to treat renewals as new applications under certain circumstances) to require that, except for minor modifications under 40 CFR § 122.63, renewals of delegated SPDES permits must be treated as new applications and not administratively renewed.

Alternatively, DEC could address the problem by ensuring that all administrative SPDES permit renewals (except for non-delegated permits or minor modifications under 40 CFR § 122.63) meet the same application, public notice and public hearing requirements as new applications. This would involve, at a minimum, publication of proposed SPDES permit renewals consistent with that under ECL § 70-0109(2) for new applications; and providing for a mandatory public hearing prior to permit renewal where those comments raise "substantive and significant" issues, as provided under ECL § 70-0119(1) for new applications.

2. Section 621.2(g): Definition of Delegated Permit

The definition includes some permits that typically are understood as "delegated" and others that are more correctly viewed as DEC-administered permits issued under DEC regulations, as approved by EPA. For instance, in the past DEC has acted as EPA's "agent" in issuing PSD permits on EPA's behalf pursuant to the federal PSD program. Currently, DEC is not issuing new PSD permits under this arrangement, although the possibility, if not probability,

is that the arrangement will be renewed at some point in the future. Other permits, such as NSR and Title V are state run programs that generally are not considered "delegated" permits. That said, for purposes of Part 621, we believe it is appropriate to include PSD and NSR and Title V permits (each with their different status) in the definition as long as a clarification is made that the definition only applies for purposes of Part 621. The proposed definition currently reads:[3]

> *Delegated permit* means a permit issued by the department for which a comparable permit may be required by Federal law. For the purposes of this Part the term [Delegated] delegated applies to permits [are] issued by the department for the following programs: . . .

We would suggest the following to clarify the definition:[4]

> *Delegated permit* means a permit issued by the department for which a comparable permit may be required by Federal law, OR A PERMIT ISSUED BY THE DEPARTMENT PURSUANT TO FEDERAL LAW. For the purposes of this Part ONLY the term [Delegated] delegated applies to permits [are] issued by the department for the following programs: . . .

3. Section 621.2(j): Definition of Emergency

The definition of "Emergency" is proposed to be revised as follows:

> (j) *Emergency* means [an event which presents an immediate threat to life, health, property, or natural resources.] a natural, accidental, or intentional human - caused event or circumstance which presents an immediate threat to life, health, property, general welfare or natural resources of the state.

The Committee urges the Department to retain the original definition with the exception of adding "or circumstance" after "an event" and the clause for the "general welfare." Thus the definition would read:

> (j) *Emergency* means an event OR CIRCUMSTANCE which presents an immediate threat to life, health, property, GENERAL WELFARE or natural resources of the state.

The cause of such an event or circumstance is not relevant to whether an emergency exists. The Committee believes that the additional language the Department proposes may lead to unnecessary confusion when an emergency arises.

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[3] Underlined material is proposed to be added; bracketed material is proposed to be deleted.

[4] The Committee's suggested language is shown IN CAPS here and throughout this comment letter.

4. Section 621.2(s): Definition of Minor Project

The Committee suggests amending this definition to state that "Minor projects are projects which by their nature and with respect to their location are not likely to have a significant ADVERSE impact on the environment." Similarly, §§ 621.3(c)(3) and (5) should be modified to include the phrase "significant ADVERSE impact."

5. Section 621.3(a)(7)(iv): Department action to define scope of DEIS

Section 621.3(a)(7)(iv), as proposed, reads:

> (7) If a project is subject to the provisions of article 8 of the [Environmental Conservation Law] ECL (SEQR), the department must satisfy the requirements of Part 617 of this Title. An application is not complete until a properly completed environmental assessment form has been submitted and: . . .
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> > (iv) where the department[, as] is the lead agency[,] and requires the preparation of a DEIS by an applicant, the application is not complete until the department determines that the scope, content and accuracy of the DEIS prepared by the applicant are acceptable for public review. [scoping, review and acceptance of that applicant-prepared document are considered prerequisites to a determination of complete application. Accordingly,] If the department determines that public comment may be helpful in identifying the scope of the DEIS, the department may [either] solicit written public comment, [or] conduct a public [scoping] meeting, or take other actions that may be appropriate for a particular project to determine the range of issues that must be addressed in the DEIS. Where [written public comment or] public scoping [meeting] is necessary, it [shall be commenced no later than] must commence within 30 calendar days following the SEQR determination of significance.

We believe the inclusion of the phrase "or take other actions that may be appropriate for a particular project" creates too much uncertainty for both the public and the permit applicant. The Committee suggests that the Department either delete this phrase or provide examples of what these "other actions" might be to clarify the intended scope.

6. Section 621.3(a)(10): Adirondack Park projects

Based on the proposed amendments to Part 621, Section 621.3(a)(10) would read:

> A project located within the Adirondack Park requiring a department permit may also require permits from the Adirondack Park Agency, [and/or] or the New York State Department of Health[, as well as from the department] or both. In such a case, the application for a department permit [shall] will not be considered complete until the applicant has submitted complete applications to all agencies [complete applications] for all required permits, and SEQR requirements of all other agencies are fulfilled, or until the applicant demonstrates good cause not to do so.

Although not part of the proposed revision, references to "all agencies" and "all other agencies" toward the end of the quoted language may inadvertently leave uncertainty with respect to the permit applicant's obligations. The Committee therefore would suggest the following revisions to remove any ambiguity:

> A project located within the Adirondack Park requiring a department permit may also require permits from the Adirondack Park Agency, [and/or] or the New York State Department of Health[, as well as from the department] or both. In such a case, the application for a department permit [shall] will not be considered complete until the applicant has submitted A complete application to EACH OF THE FOREGOING agencies [complete applications] for all required permits, AS APPLICABLE, and SEQR requirements of EACH OF THE FOREGOING agencies are fulfilled, or until the applicant demonstrates good cause not to do so.

7. Section 621.3(f): Stay of permit proceeding pending enforcement action

The newly proposed Section 621.3(f) reads:

> (f) Enforcement actions. Processing and review of an application may be suspended by written notice to the applicant if an enforcement action has been or is commenced against the applicant for alleged violations of the ECL at the facility or site that is the subject of the application. The alleged violations may be related to the activity for which the permit is sought or to other provisions of the ECL.
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> (1) Such suspension of processing and review may remain in effect pending final resolution of the enforcement action.
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> (2) This provision does not relieve the department from the requirement to make a final decision on title V facility permit applications within 18 months of the date that the application was complete pursuant to title V of the CAA (see section 200.9 of this Title) and this Part.

The Committee believes it is appropriate to limit this authority (i.e., where alleged violations are involved) to the specific facility at issue. That said, a number of our members deal with situations where a permittee may be seeking a technical revision to a permit to correct a compliance situation, perhaps based on stack test results or other information. In such a circumstance, it could be inappropriate to hold up processing the permit revision request because, assuming the revision has a solid technical basis (which can be determined only by proceeding with a review of the permit revision request), a facility should not be required to suffer delayed non-compliance. This, of course, would not preclude the Department from seeking an appropriate penalty for past non-compliance. We propose that the beginning of the new section be revised as follows:

> (f) Enforcement actions. EXCEPT AS PROVIDED BELOW, processing and review . . .

We then suggest the following language or something similar be added to help alleviate this concern:

> In the event an applicant is seeking a technical revision to an existing permit to bring a facility into compliance, the application for a revision shall not be suspended pending the outcome of a related enforcement action.

Thank you in advance for your consideration of these comments. We look forward to reviewing the Department's final rulemaking.

Respectfully,

The Association of the Bar of the City of New York, Environmental Law Committee

Christine Fazio

Christine Fazio, Esq.
Chair

cc: Denise M. Sheehan, Acting Commissioner