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Anne Reynolds, Director
Commissioner's Policy Office
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-1010

**Re: Comments on Draft Guide for Assessing Energy Use
and Greenhouse Gas Emissions under SEQRA**

Dear Ms. Reynolds:

The Environmental Law Committee of the New York City Bar Association (the "Committee") respectfully submits comments on the draft "Guide for Assessing Energy Use and Greenhouse Gas Emissions in Environmental Impact Statements" as released on September 9, 2008 (the "GHG Guidance"). The members of the Committee are drawn from the private, public and non-profit sectors, and represent diverse viewpoints with respect to environmental matters in New York State and the City of New York. The members comment as a Committee of individuals and do not represent their respective organizations, employers, or clients in their participation in Committee activities, including in submitting these comments. While the Committee has not been a stakeholder in the development of this guidance to date, the Committee members have considerable expertise in conducting environmental reviews under the State Environmental Quality Review Act ("SEQRA") for New York State and City public projects and private developments, litigating environmental impact statements ("EISs") in all New York courts, and evaluating solutions to address climate change.

The Committee commends DEC in moving forward on addressing climate change and taking a leadership role in developing regional programs that could serve as a model nationally. The Committee recognizes that climate change is an important environmental issue that should be examined under SEQRA, and which can be examined without undue burden to its participants. The Committee is mindful that our local governments have fewer economic resources to meet essential public services and thus believes that the level and scope of environmental review must be tailored to the potential for a particular agency's project to have a significant impact on climate change. In other

words, smaller projects, such as the construction of new schools and small developments, should involve a “qualitative analysis” of climate change impacts, generally by considering the design measures discussed in Sections F and G of the GHG Guidance. The quantitative assessment of greenhouse gas emissions should be left to those larger projects that are more likely to have greater greenhouse gas emissions and thus more substantial impacts. Finally, comprehensive life-cycle analyses should be required by agencies that undertake regional or state-wide planning, such as the development of comprehensive zoning plans by local governments, solid waste management plans by DEC and municipalities and energy plans by the Public Service Commission and affected utilities.

As currently drafted, the GHG Guidance appears to require a life-cycle climate change analysis even from small projects that cannot possibly have any significant impact on climate change. New York City and State residents need more schools, health care facilities, affordable housing, and economic development. Local agencies, including school districts, developers and businesses, should not be burdened with quantifying their greenhouse gas emissions for small projects when the emissions from those projects would be too small to have a material impact on climate change and a qualitative analysis would be sufficient for such small entities to consider greener designs of their new facilities. Likewise, calculating the emissions from offsite power plants, wastewater treatment plants and solid waste facilities is best left to those agencies that are in charge of developing energy and waste management plans (i.e., the municipality should determine what is the proper mix of waste-to-energy facilities and landfill facilities for the disposal of waste and include a life-cycle analysis of climate change impacts in the EIS it prepares when adopting a new solid waste management plan; small local agencies and developers should not be required to assess such options in their individual EISs because they have no control over the ultimate comprehensive plan that is to be adopted).

Developers of large projects are generally confined to the services provided by the local municipalities and utilities (i.e., electricity is provided by the local utility from various types of power sources on the power grid, solid waste is generally removed by local sanitation departments and wastewater is sent to local wastewater treatment plants). Such developers do not have the authority to choose different municipal service providers nor can they override local decisions as to which facility takes their wastewater or mandate where their solid waste ultimately goes.¹ The Committee generally agrees with DEC that proposers of large developments should calculate their carbon footprint (although DEC should consider providing an exemption from the quantification requirement for projects that agree to be LEED certified) but believes that proposers should not be required to calculate different offsite utility options when they have no control of the decisions to be made by utilities and municipalities. Instead, DEC should provide emission factors for calculating greenhouse gas emissions based on the state’s comprehensive energy plan and solid waste management plan established to date.

¹ For instance, in New York City, the City’s Department of Sanitation has a solid waste plan for all residential waste (where waste is sent to numerous different sites, including landfills and waste-to-energy plants). Commercial waste is hauled by different private companies, again to a variety of solid waste disposal sites both in-state and out-of-state.

Proposers of large developments would then use the emissions factors to convert the proposed action's expected megawatt-hours of electricity and annual tons of solid waste and wastewater generated into estimated annual tons of greenhouse gas emissions.

In sum, a life-cycle analysis should be required only for EISs that involve comprehensive planning. Proposers of large developments should calculate their carbon footprint using emissions factors provided by DEC; but proposers of small developments should only be required to conduct a qualitative analysis of climate change impacts. This approach would be far more consistent with how environmental review is currently conducted under SEQRA (i.e., quantitative traffic analyses are limited to projects that involve a large increase in number of vehicle trips during peak time periods; smaller projects only need to include a qualitative discussion of traffic impacts).

The Committee recognizes that DEC chose not to define "significant impact" for climate change impacts. We understand that this decision was based on DEC's belief that very few individual projects would have a significant impact on climate change. Nonetheless, the Committee believes that some threshold for significance should be defined. DEC could consider that any project that would result in an annual emissions increase equal to or greater than 2.5 million tons of carbon dioxide equivalent (which would represent approximately one percent of New York State's greenhouse gas emissions inventory) would be one that is defined as "significant"² and projects that exceed other thresholds to be determined by the DEC.

Please note that the Committee is not suggesting that specific thresholds for determining what is a large versus small project or significance needs to be set forth in regulations. The Committee understands that as we learn more about climate change, such thresholds will change. Nonetheless, by setting forth such thresholds in guidance, recognizing that the guidance will be modified from time to time, DEC will ensure that projects are treated consistently.

As DEC moves forward on redrafting the GHG Guidance, the Committee wishes to reiterate that, in addition to federal legislation, the solution to the climate change challenge involves comprehensive state and local planning followed by regulation. The Committee's reading of the current draft of the GHG Guidance suggests that DEC understands this as well and thus is struggling to figure out the correct scope for environmental review under SEQRA. Comprehensive planning by agencies with the requisite authority is the best tool to address climate change. However, the current draft of the GHG Guidance appears to impose this burden on small local agencies that do not have the resources or expertise to conduct such a comprehensive analysis. Placing such a burden on small local agencies will merely increase the likelihood that small local agencies will be forced to defend legal challenges as they struggle to implement these requirements. DEC, on the other hand, already has the tools to calculate greenhouse gas emissions statewide in order to create a cap of all such emissions and can adopt regulations to reduce the level of such cap. When developing state implementation plans ("SIPs") for criteria pollutants (such as nitrogen oxide and particulate matter), DEC prepares a state-wide emissions budget using projected growths in population, new construction, expected

² DEC may wish to propose other strategies for defining significance and seek public comments on such proposal as well.

vehicle miles traveled, etc. Based on the budget, DEC develops a plan to reduce emissions, followed by regulations to carry out such plan. Greenhouse gas emissions could be treated similarly (DEC already has RGGI in place as that applies to power plants) and DEC could work with other state and local agencies to evaluate the greenhouse gas impacts of state-wide energy, waste management and land use polices (similar to how DEC and DOT work together on transportation implementation plans and transportation conformity).³

If the desired end result is that all new developments should incorporate better designs that result in energy efficiency and less waste, such requirements are best left for local zoning codes. New York can modify the state building code and permit local codes to meet state minimum requirements. Moreover, New York City and other municipalities are in the process of adopting new building codes to incorporate green designs. Proposed actions that comply with such codes should not be penalized by having to provide additional mitigation beyond compliance with a building code that already has greenhouse gas emission mitigation embedded in it.

More detailed comments are attached. The Environmental Law Committee appreciates the opportunity to comment on this important public issue.

Respectfully Submitted,

A handwritten signature in black ink that reads "Kathy Robb". The signature is written in a cursive, slightly slanted style.

Kathy Robb, Chair
Environmental Law Committee
Association of the Bar of the City of
New York

Attachment

³ For example, the Public Service Commission had adopted a Renewable Portfolio Standard and is in the process of implementing a new Energy Efficiency Portfolio Standard for all electric and gas utilities (which would reduce state-wide energy consumption by 15% by 2015).

**COMMENTS BY NYC BAR ENVIRONMENTAL LAW COMMITTEE
ON DRAFT GUIDE FOR ASSESSING ENERGY USE AND GREENHOUSE
GAS EMISSIONS IN ENVIRONMENTAL IMPACT STATEMENTS**

1. Section A: Purpose and Applicability. It is unclear whether the GHG Guidance is requiring that a comprehensive life-cycle quantification of greenhouse gas emissions be conducted for every project that involves an EIS (*see* paragraph two) or just for very large development projects (*see* paragraph four). Quite often EISs are prepared because there is a potential for a significant adverse impact in a particular environmental impact category. While an EIS examines various environmental impact areas,⁴ it does not mean that a “quantitative” analysis is required for every impact area or that mitigation is imposed for those environmental areas that have no significant adverse impacts (i.e., projects that involve less than 50 vehicle trips per peak-hour in NYC do not require quantitative traffic modeling; development on a brownfield site might require mitigation of hazardous waste impacts alone; the construction of a new building adjacent to a landmark building might require mitigation of historic resource impacts). The accompanying draft Environmental Assessment Form also uses a threshold of 1000 tons/year of carbon dioxide⁵ to apparently trigger a more rigorous quantitative analysis, which means the installation of an emergency generator at a hospital would trigger the suggested life-cycle analysis.

Rather, the GHG Guidance should establish thresholds for when a quantitative analysis of greenhouse gas emissions is required. For instance, projects involving 10 acres of land or 5 million square feet of new construction must quantify the proposed action’s greenhouse gas emissions and projects smaller than that threshold must qualitatively examine climate change impacts. Projects that involve regional planning (i.e., the development of municipal solid waste management plans) should involve a more comprehensive life-cycle analysis. In other words, the more rigorous quantification methods should be required of projects that are more likely to have a substantial impact on climate change. Most public projects can be thoroughly addressed qualitatively. DEC should also consider that proposers of large developments that agree to meet Leadership in Energy and Environmental Design (“LEED”) silver certification requirements or local codes that require energy efficient design and construction practices are presumed to have no significant adverse impact on climate and thus further quantification is not required (such

⁴ If a lead agency undertakes scoping, impact areas might be targeted for review while others are screened out.

⁵ According to Section B of the GHG Guidance, there are an estimated 250 millions tons of carbon dioxide emitted each year in New York State; thus, 1000 tons, or .0004 percent, cannot be construed as material. 1000 tons of carbon dioxide is roughly: one small emergency diesel generator operating for two months per year; the operation of one heavy duty diesel truck for half the year; and less than a year of operation of one medium sized diesel truck.

proposers would discuss their climate change impacts qualitatively on how they expect to meet LEED silver certification or the requirements of the newly adopted local building code). The Committee believes that developers should be encouraged to design projects that incorporate green measures and the incorporation of such measures will have greater benefits to the public as compared to the quantification of emissions for public disclosure. The Committee also reiterates that it is not suggesting that such thresholds should be incorporated into any future SEQRA rulemaking. Instead, DEC should, on an ongoing basis, establish such thresholds in guidance that are then posted on the website so that DEC can take into account new information while also ensuring state-wide consistency.

Finally, it is unclear whether DEC intends the GHG Guidance to apply only to DEC-lead review, to all state agency-lead reviews, or to all SEQRA reviews, including New York City CEQR reviews or other local agency reviews. We suggest that the GHG Guidance apply only to state agency-lead reviews during an initial trial period, after which DEC can determine whether the scope of the GHG Guidance should be expanded.

2. Section C: Boundaries of the GHG Assessment in an EIS. The Committee agrees that for the larger development projects, the EIS should include a quantitative assessment of direct GHG emissions from on-site combustion and industrial units and vehicle traffic generated by a proposed action where relevant (i.e., in NYC a quantitative analysis is required where a proposed action will generate 50 vehicle trips per peak hour) based on current SEQRA practice.

The Committee disagrees with the need to examine emissions from off-site power plants, wastewater treatment plants or solid waste facilities because developers do not select individual power plants to provide them power or waste disposal facilities; instead, such selection is generally made by the local utilities and municipalities.⁶ Any mandate requiring every individual project to quantify off site emissions is likely to lead to a myriad of SEQRA lawsuits about the credibility of such off-site quantitative data.

In New York City and in most local jurisdictions, businesses and residences receive their electricity from the local utility (e.g., from Con Edison in New York City and Westchester County), which power comes from numerous local, upstate and out-of-state sources that connect to the power grid; residential waste is collected by the local sanitation department and is sent to any number of landfills or waste-to-energy facilities both in and out-of-state;⁷ and wastewater is sent to the local wastewater treatment plant. As stated in the Committee's cover letter, DEC can obtain whatever data it needs regarding all such power plants, solid waste facilities and waste water treatment plants. The GHG Guidance provides no explanation as to the benefit of each SEQRA EIS generating such information. As explained in comment 3 below, after a developer quantifies its expected energy use and tons of waste to be generated from a proposed action, the conversion to greenhouse gas emissions should be based on emission factors provided by DEC. It is just too burdensome for local agencies to create their own emission factors when they lack such expertise.

⁶ If the purpose of such requirement is to encourage developers to purchase renewable energy, that can simply be stated in an EIS. Likewise, a developer that installs solar panels will simply have less need for kilowatt-hours of electricity, and can simply disclose this in the EIS.

⁷ Commercial waste might be hauled away by private operators and not the municipality.

The Committee's concern is also directed at the use of the terms "direct" and "indirect" emissions. If DEC's goal is merely to have large developments assess their carbon footprint, then the GHG Guidance simply needs to call this "Quantifying Carbon Footprint." The use of direct and indirect emissions has other meanings within SEQRA and the use of such terms in this guidance is likely to lead opponents of public projects to raise numerous legal challenges to a proposed action's SEQRA determination. If DEC's goal is to treat an analysis of greenhouse gas emissions differently from the common SEQRA practice for other air pollutants, then using the title "Quantifying Carbon Footprint" or other similar term has the benefit of explaining why such analysis diverges from current SEQRA practice. In quantifying a carbon footprint, a large developer simply needs to quantify its greenhouse gas emissions from the proposed emissions units within the new development, emissions from new vehicle trips generated from the proposed project, and the MW-hours of electricity and annual tonnage of waste expected from the new development using emission factors provided by DEC. There is no need to define this as "direct and indirect emissions" which implies developers are expected to guess which power plants actually will supply the new development on a day to day basis or which landfill or waste-to-energy plant their waste actually ends up.

3. Section C: Calculations. The Committee agrees that a discussion of predicted energy use (i.e., expected kilowatts-hours per year), water needs and tonnage of waste for a proposed project should be calculated, as is already done in EISs, generally in the chapter entitled "Infrastructure." An analysis of alternatives that reduces kilowatt-hours of energy usage per year, water usage in millions of gallons per year, and tons of municipal waste sent to solid waste sites can be provided in an EIS without trying to estimate the greenhouse gas emission associated with such off-site infrastructure. Developers and local agencies can make decisions about designing energy efficient buildings just by comparing their energy use or tons of waste with and without the added energy efficiency measures without taking the next step to calculate greenhouse gas emissions. In other words, if the public reviews an EIS and it mentions alternative one would use 2 megawatt-hours of electricity per year and alternative two would use 1.5 megawatt-hours of electricity per year, the public understands the energy savings -- there is little public benefit for the EIS to include the additional 12,000 tons CO₂ to 9,000 tons CO₂ comparison. If such conversions are important to DEC, DEC should simply provide the conversion formulas (i.e., emission factors) because a court will grant deference to DEC's conversion factors whereas requiring each individual agency to establish such will subject important public projects to litigation, something our local governments cannot afford.
4. Page 4. The GHG Guidance states that DEC may decide when indirect GHG emissions from offsite sources or vehicle emissions must be included in an EIS. As stated above, the Committee believes that the GHG Guidance should not distinguish between direct and indirect emissions but simply should construe the quantitative analysis as calculating a proposed action's carbon footprint. And as stated above, DEC should provide the appropriate emissions factors. Here, DEC should also provide specific thresholds for when the quantification of greenhouse gas emissions is triggered in lieu of a qualitative analysis, recognizing that such thresholds will change over time. Leaving the decision as to which projects should require a quantitative analysis to individual DEC staff could result in inconsistent decisions among the different regions.
5. Pages 5 - 9. Various websites are referred to as a suggested means to calculate greenhouse gas emissions. The Committee asks that DEC provide the appropriate emission factors instead of directing small agencies to numerous different websites.

6. Sections F and G, Total GHG Emissions & Mitigation. The GHG Guidance provides no threshold for significance but nonetheless addresses mitigation measures. The Committee recognizes it is probably very difficult to define what should be a significant threshold given the long-term and international nature of the climate change problem (in fact, it is unlikely that many individual projects would have significant impacts). Nonetheless, the Committee suggests that DEC define some thresholds, such as a proposed action that results in an increase of a specific defined tonnage of carbon dioxide equivalent, which can be set at one percent of the current New York emissions inventory, is automatically significant. Mitigation would be required in those instances.

Finally, to address climate change, the measures included in the Section G list are really recommendations of how projects should be designed. The overall list is very encompassing and provides valuable information that should be considered by developers and local governments in designing new projects. This concern comes back to the issues raised in the Committee's cover letter: climate change must be addressed through state-wide and local planning. The measures included in Section G. should be added to local zoning and buildings codes, and should be made a part of a developer's thinking when designing new buildings. Even for very large developments, the public will benefit if the developer chooses to design a building to meet LEED standards or local codes that require energy efficient design and construction practices.

Overall, the GHG Guidance focuses too much on the quantitative collection of data on potential greenhouse gas emissions, and leaves the most important piece of the Guidance -- designing green buildings -- to the mitigation section even though very few projects would ever result in significant adverse impacts where mitigation would be imposed. Rather, all developers and agencies should be considering the elements provided in Section G and should be incorporating such elements as part of the design of proposed actions. In fact, the qualitative discussion of climate change impacts should really involve the local agency and developer committing to add a number of the green features included in Section G to ensure the new development is energy efficient and produces less waste. Therefore, the GHG Guidance should be revised to state that for the qualitative discussion of climate change impacts required of smaller projects, DEC recommends that the measures listed in Section G be considered by the lead agency and those measures that can appropriately be included in the design of the proposed action should be discussed in the EIS. Where local zoning and building codes have been updated to address green measures, the lead agency's role might be simply to ensure that the measures adopted by the local government have been incorporated into the design of the project. In sum, many of these measures should be part of the design of a new project and not be construed as "mitigation."

END OF ATTACHMENT