March 7, 2024

Reference Number: DEP-99: Proposed Rule-Making by the New York City Department of Environmental Protection ("DEP")

Re: **OPPOSITION to DEP's Repeal of the Existing Definition of "Adjacent" and Its Proposed, Narrower Replacement**

To Whom It May Concern:

New York Lawyers for the Public Interest and the New York Clean Air Collective writes in strong opposition to DEP's proposal to repeal its existing definition of "adjacent," 15 RCNY § 39-02, and replace it with a narrow rule that will throw up barriers to enforcing the Air Code, frustrate citizen participation in the Citizens Air Complaint Program, and gravely harm our health, our city, and our environment. DEP should not adopt this rule.

I. DEP's Proposed Rule Will Harm the Environment of New York City

The present rule is easy to understand and easy to administer: If a vehicle is stopped on any block with a school entrance or exit, it can idle for just one minute. **DEP's new rule would at least triple the toxic emissions permissible next to schools and thereby harm especially vulnerable New York City children, along with residents and passersby.** Under this imprudent proposal, trucks and buses would be permitted to idle for three minutes if they are across the street from a school or even one inch beyond a school property line. The proposed rule is not only unworkable but administratively unnecessary since the current rule works, and works well.

Rather than replace a time-tested, simple rule that works well with an inscrutable one that would let idlers escape accountability, DEP should instead expand the existing rule to reach parks. That is precisely what we propose in Exhibit A. Like the current rule, our proposal is straightforward, easy to administer, gives clear notice to would-be offenders, and safeguards the environment. DEP should strike its proposed rule and adopt this simple, workable expansion of 15 RCNY § 39-02.

Should DEP heedlessly decide to charge ahead with its proposed rule, it will face significant regulatory and litigative challenges. DEP has identified no sound basis to narrow the definition of "adjacent," never mind any environmental protection

grounds to adopt a rule that will make it *easier* for trucks and buses to pollute school zones. The Air Code, the City's governing environmental law, states that it "*shall be liberally construed* so as to effectuate the purposes described in this section." NYC Admin. Code § 24-102 (emphasis added). And as you know, New Yorkers recently approved an amendment that enshrines our right to clean air in the state constitution. The proposed rule turns the law on its head and does the exact opposite. What is more, DEP has failed to conduct and/or publish an environmental review.

II. Our Organizations Are Uniquely Positioned to Help DEP Craft a Better Rule on Adjacency than This Proposal

Founded in 1976, New York Lawyers in the Public Interest ("NYLPI") is a community-focused organization that advocates for equal access to healthcare, education, government services, housing, and a clean environment. NYLPI's history of advocacy within City government is unparalleled, and it stands ready to help DEP draft and pass a better rule than the current proposal.

New York Clean Air Collective ("NYCAC") is a non-profit organization dedicated to protecting New Yorkers' right to enjoy clean air, including through aiding participants in the Citizens Air Complaint Program. As a non-profit organization comprising active, engaged citizen complainants, NYCAC is uniquely positioned to provide expertise on the new adjacency rule. Its members leverage thousands of hours of experience recording, submitting, and defending air and dust complaints to the Citizen Air Complaint Program, all to defend the right of ordinary New Yorkers' to breathe clean air.

NYLPI and NYCAC stand ready to help the DEP craft a better rule, one that strengthens our air protections. We know what works, and we know what doesn't, when it comes to on-the-ground enforcement of the Air Code. The proposal we are attaching in Exhibit A works. This is the rule DEP should adopt.

III. The Current Rule Faithfully Implements the City Council's Intent to Protect Clean Air

The New York City Department of Environmental Protection has for years used a clear and workable rule to implement NYC Admin. Code 24-163(f)'s ban on idling for one minute "adjacent to" any school.

Specifically, 15 RCNY § 39-02 reads: "'Adjacent' shall mean on each and every street on which a school is located and has entrances and/or exits to such street. School shall include any building or structure, playground, athletic field or other property that is part of the school." At present, if a school has an entrance or exit on a block, this simple one-minute law applies on that block.

This rule is clear. This rule is unambiguous. This rule can be understood by citizen–complainants who gather the vast majority of evidence to report vehicle idling, by law enforcement—including DEP air inspectors who review tens of thousands of citizen complaints annually and are empowered to write their own summonses in the field—and by hearing officers at the Office of Administrative Trials and Hearings ("OATH").

In 2009, the City Council enacted a one-minute idling ban to protect schools in a bill introduced by now–State Senator John Liu that became Local Law 5 of 2009 ("LL5"). Children are among the most vulnerable of New Yorkers when it comes to the broad and significant effects of motor-vehicle pollution. Tailpipe emissions, in both its gaseous and particulate components, is extensively and causally tied to a wide array of serious health effects at every stage of life, from conception through old age, including lung cancer, asthma, and diabetes; increased risk of preterm birth and low birth weight; impaired neurological development and cognition in children; impaired cognitive function together with an increased risk of Parkinson's, Alzheimer's, and depression in adults; and early death from cardiovascular and respiratory causes, such as heart disease, stroke, influenza, and pneumonia. Children in New York City suffer from asthma at more than twice the average national rate, and some New York neighborhoods, such as the South Bronx, have among the worst urban air quality in the country. Rigorous scientific research has shown a consistent relationship between reducing air pollution concentrations and improving respiratory health in children and adults in communities that have reduced their levels of year-round particulate pollution.

Beyond children, many other New Yorkers benefit from the stricter enforcement standards around schools, which teach truck and bus operators the vital importance of turning off their engines when they are not needed.

IV. DEP's Proposed Rule Contravenes the City Council's Intent to Expand Environmental Protections

In April 2023, New York City Council enacted a bill that became Local Law 58 of 2023 ("LL58"), expanding the one-minute idling limit to include parks. Although LL58 went into effect last August, DEP failed to timely institute the rule to define adjacency to a park, rendering the law unenforceable. Now, rather than promulgate a workable definition to protect the environment, the Department instead weakens both the enforcement of LL58 and the existing law that protects school children by seeking to redefine and narrow the meaning of "adjacent."

There are two primary ways DEP's proposed new rule fails. First, it creates an untenable situation in which idling vehicles that are in every other meaningful sense adjacent to a school—and whose toxic emissions unquestionably reach schoolchildren—are not subject to the one-minute rule because they may be across the street, or an inch from a property line, or separated by a bike lane. Air pollution does not respect DEP's technical roadblocks. The current rule may not be perfect, and sometimes creates scenarios in which proximity to a school does not always subject nearby vehicles to the school-adjacent standard (e.g., when a vehicle is on the next block from a school located at an intersection); but the new rule multiplies those scenarios by an order of magnitude and relies on the false presumption that toxic pollutants will somehow obey traffic laws, lanes of traffic, and parcel boundaries. In some instances the new rule will result in a 99 percent reduction of frontage that is considered "adjacent" on a given block, effectively nullifying 24-163(f). Schoolchildren, of course, must walk to and from their schools and often congregate immediately outside or nearby at the beginning or end of each school day. The existing rule recognizes this commonsense reality; the proposed rule does not.

Second, DEP's proposed rule fails in that it seeks to replace a simple and clear-cut standard with a complex, abstruse rule that will not only shield trucks and buses from more stringent standards designed to safeguard children, but will also confuse parties at every stage of the idling enforcement process. What standards and procedures will apply when construction activity reroutes lanes and obscures lane markings? When schools are housed in buildings with property boundaries that are not visually apparent? When vehicles are double-parked? When vehicles are oriented perpendicularly across multiple lanes, as is commonplace with infrastructure crews? When sidewalks and other nonstandard areas are parked upon? Such everyday scenarios would seem to be effectively excluded from stricter enforcement. It is reckless and non-practicable to knowingly leave unresolved substantial ambiguities (the above body of questions is hardly exhaustive) to the

interpretation of DEP air inspectors or for the Environmental Control Board to divine intent.

Under the existing rule—which has been tested by time and the courts—none of these thorny questions require scrutiny: A "block" is a block, a definition that is straightforward and clear to ordinary New Yorkers who contribute the bulk of idling complaints, to the law enforcement officers who contribute a minority, to the administrative law judges who assess evidence of violations, and to vehicle operators. Under the new rule, the enforceability morass that DEP presumably sought to avoid in its original rulemaking for Local Law 5 by forsaking specific distance measurements will come to pass. No ordinary citizen will be able to parse the rule and know with confidence how to document an idling vehicle near a park or school. It effectively and comprehensively undermines the clear and laudable intent of Local Laws 5 and 58.

Comprehensive enforcement near schools and parks, under a robust one-minute rule, does much more than just shave off a few minutes of idling. It is also helpful to prevent knowing and extensive evasion of the law in sensitive locations by particularly bad actors. Citizen reporters have documented increasing vigilance by truck and bus operators—especially on school blocks—and arising specifically from efforts to evade detection and recording. For example, individuals have been posted as "lookouts" to either interfere with citizens' recording of idling vehicles or to warn the vehicle operators when a citizen reporter is nearby. Operators' countermeasures may enable them to run their engines all day, *except* when citizen reporters are around. But because such countermeasures are much more difficult to carry out within one minute, a robust adjacency rule protects vulnerable areas and encourages commercial vehicle operators to consistently avoid unnecessary idling if they wish to avoid an idling summons.

V. DEP's Proposed Rule Cannot Withstand Regulatory and Litigative Scrutiny

First, DEP has glaringly provided *no* basis for the new rule grounded in its mandate to protect the environment. Further, DEP has not disclosed that it undertook an environmental review before proposing this rule, despite the proposed rule's obvious propensity to directly harm the environment. In short, there is no CEQA compliance by DEP, the lead agency.

Moreover, DEP cannot successfully complete an environmental review that will withstand court scrutiny. The only fair reading of DEP's proposed rule is that it will cause obvious and specific environmental harm by increasing the time idlers are permitted to pollute on most school blocks. By failing either to undertake or to publicize any environmental review, or to even discuss the potential environmental effects, DEP is heavily implying that it *knows* its new rule will harm the environment—and simply doesn't want to say so.

Finally, the proposed rule is subject to obvious challenge under Article 19 of the New York State Constitution, which guarantees: "Each person shall have a right to clean air and water, and a healthful environment." A rule that would triple the amount of legal idling next to a school where the most vulnerable New Yorkers are compelled to learn and play invites serious questions of how it can comply with this guarantee.

VI. DEP Should Withdraw Its Present Proposal and Instead Implement a Simple Expansion of Its Current Rule to Include Parks

DEP should withdraw the proposed rule and use the new rulemaking proposal it received in a petition dated April 12, 2023. This petition was drafted by the concerned mother of a one-and-a-half year old toddler who was frequently exposed to harmful fumes in Minetta Playground. This citizen's proposal builds on the successful school adjacency definition rule DEP already uses every day—and has used for well over a decade—which reads:

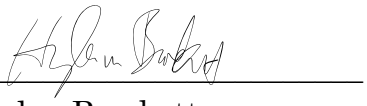
> "Adjacent" shall mean on each and every street on which a school or park is located and/or has entrances and/or exits to such street. School shall include any building or structure, playground, athletic field or other property that is part of the school. Park shall include any building or structure, playground, field, court, green space, forest, garden, square, plaza, mall, greenstreet, walkway, bikeway, beach, course, pier, promenade, trail, pool, museum, rink, or other property that is part of the park, other than parking lots.

DEP Senior Enforcement Counsel Russell Pecunies promised in an email dated June 14, in response to this proposal, to commence "adjacency" rulemaking "by August 11 at the latest." DEP's unexplained dilatory response—a full six-month delay—and its choice to instead propose an unworkable definition which threatens clean air progress and amplifies a wide range of health risks and disparities far

more harmful to the environment than the April 12, 2023, proposal, is inconsistent both with its mission to "enrich the environment and protect public health for all New Yorkers by…reducing air and hazardous materials pollution" and with New Yorkers' Constitutional right to clean air right.

In closing, we urge DEP to withdraw its proposed rule, which has serious legal infirmities and serves only to harm the environment. Instead of repealing the existing text of 15 RCNY § 39-02, DEP should adopt the simple expansion of the existing rule found in Exhibit A.

Sincerely,



Hayden Brockett,
New York Clean Air Collective
Founding Member

_____/s/_____
Justin Wood
New York Lawyers for the Public Interest
jwood@nylpi.org

Exhibit A

§ 39-02 Adjacent to Any Public or Non-Public School or Park
"Adjacent" shall mean on each and every street on which a school or park is located and/or has entrances and/or exits to such street. School shall include any building or structure, playground, athletic field or other property that is part of the school. Park shall include any building or structure, playground, field, court, green space, forest, garden, square, plaza, mall, greenstreet, walkway, bikeway, beach, course, pier, promenade, trail, pool, museum, rink, or other property that is part of the park, other than parking lots.