



## **Comments on DEC Program Policy - Permitting and Disadvantaged Communities Under the Climate Leadership and Community Protection Act**

On behalf of the NY Renews coalition, we thank you for the opportunity to comment with our concerns related to DEC guidance DEP-23-1. NY Renews, a multi-sector coalition of 320+ organizations, founded following the People’s Climate March, brings together organizations from across New York State to build sustained action for climate, jobs and justice. The NY Renews coalition championed the Climate and Community Protection Act (CCPA) to mandate a transition to a just and renewable economy in New York State, which ultimately became the Climate Leadership and Community Protection Act (CLCPA). Achieving the mandates of the CLCPA requires that the state simultaneously reduce emissions and increase climate justice funds and their proper allocation. Administrative approvals, permits and other materials must also be accessible to all New Yorkers in a way that is equitable and does not mishandle the direction of costs owed to low and moderate income (LMI) households or those located in disadvantaged and other environmental justice (EJ) communities. It must be made absolutely clear that every agency and entity of the state is legally required to act on and enforce obligations on climate and equity screening requirements under sections 7(1), 7(2), and 7(3) of the CLCPA. There must be clarity on **agency obligations** to abide by the provisions in regard to achieving the goals into law.<sup>1</sup> Enforcing and implementing key provisions within the CLCPA will require guidance and expert knowledge from state agencies and key players on the proper means and implementation of provisions and procedures based on the final scoping plan. These decisions must not increase the burdens on frontline communities and worsen climate calamities.

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One of (if not the most essential) objectives of the CLCPA is to ensure that New York’s transition to a clean energy economy addresses health, environmental, and energy burdens that have disproportionately impacted underrepresented or underserved communities (including people of color, indigenous populations, low-income individuals, and women) and find solutions to ease burdens. It is written and affirmed in the Climate Action Council’s scoping plan, along with the

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<sup>1</sup> Climate Leadership and Community Protection Act § 7(1) requires all state agencies to “assess and implement strategies to reduce their greenhouse gas emissions.” Section 7(2), the “climate screen,” requires all state agencies and other entities to consider whether the permitting actions, contracts and other decisions the agency makes will “interfere” with the state’s attainment of its GHG emissions goals and to identify alternative GHG mitigation measures, if a decision is deemed to interfere with the emissions targets. Finally, Section 7(3), the “equity screen,” provides that permits, contracts and other decisions cannot “disproportionately burden” disadvantaged communities; *see also Environmental Conservation Law (“ECL”) Section 7-0117.*

complexities that go into the environmental, energy, and economic transition.<sup>2</sup> In enacting the CLCPA, the legislature took note of “the vulnerability of disadvantaged communities, which bear environmental and socioeconomic burdens as well as legacies of racial and ethnic discrimination” while similarly acknowledging “[t]he complexity of the ongoing energy transition, the uneven distribution of economic opportunity, and the disproportionate cumulative economic and environmental burdens on communities.”

A fundamental objective of New York’s nation-leading climate law is to protect and not exacerbate harms that disadvantaged communities (DACs) and EJ communities are exposed to. New Yorkers need to see policies that mitigate disproportionate burdens.

### **I. Determining Scope of Covered Projects**

The scope of covered projects is not broad enough and should be expanded. The scope should be broadened to include all projects that produce GHG and co-pollutant emissions whether levels decrease, stay the same, or increase. Additionally, applicability should be expanded to include all facilities that need a permit or registration, not just facilities that need a full review because of increased or altered scope of emissions.

Currently, the draft policy applies only to projects including sources and activities associated with any new emission sources, permit renewals, or permit modifications that would result in actual increases of GHG and co-pollutant emissions. This approach is insufficient because “disadvantaged communities” are designated as such because of a legacy of racist and discriminatory policies and decisions that have culminated in historic, cumulative, or ongoing air, land, and water pollution. In other words, a disadvantaged community is defined as such because it already experiences disproportionate burdens like air pollution so any project going through a permit registration, renewal, or modification must be evaluated to determine whether it maintains, contributes to, or reduces the disproportionate burden in a DAC.

Section 7(3) requires that agency actions avert disproportionate burdens on disadvantaged communities and prioritize reductions of greenhouse gas emissions and co-pollutants in these communities. If DEC and agencies are to start proactively doing both, they must evaluate all projects associated with any new, modified, or renewed emission sources moving forward and determine on a case-by-case basis whether a project creates a disproportionate burden to a disadvantaged community. Furthermore, if agencies are to prioritize reductions of GHG and co-pollutant emissions and improve air quality in disadvantaged communities, agency permitting staff need to know if and when a project results in decreased emissions and air pollution in a disadvantaged community. Moving forward, agencies must evaluate every project and existing infrastructure and include permit renewals to ensure we are complying with Section 7(3) and

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<sup>2</sup> N.Y. State Climate Action Council, New York State Climate Action Council Scoping Plan 175 (Dec. 2022), <https://climate.ny.gov/resources/scoping-plan/> (hereinafter “Scoping Plan”)

preventing disproportionate burdens and prioritizing the reductions of GHG and co-pollutants emissions in disadvantaged communities.

**Key Provisions:**

- The scope should be broadened to include all projects that produce GHG and co-pollutant emissions whether levels decrease, stay the same, or increase.
- Applicability should be expanded to include all facilities that need a permit or registration not just facilities that need a full review because of an increased or altered scope of emissions.

**II. Preliminary Screening**

DEC’s preliminary screening should include a review of both projected emissions levels and air quality impacts of the project and all of its associated activities and operations. Using the best available emissions **and** air quality modeling is critical to accurately determine the projected GHG and co-pollutant emission impacts of the project under review, including the location of the impacts and associated health impacts.

Emissions modeling should be conducted for all projects to determine the level of GHG and co-pollutant emissions – same, decrease, or increase – associated with the project under review. DEC and other agencies need to make this determination independent of emissions information provided by the applicant. However, applicants should also be asked to submit information on any and all associated GHG emissions, co-pollutant emissions, and air quality impacts from the project at this stage of the process.

All projects under review should also be assessed for air quality impacts since exposure to air pollution is directly linked with negative health outcomes and will more clearly represent where those impacts would occur. When emissions mix with wind and other variables in the atmosphere, it results in air pollution, including secondary PM2.5. Consequently, air quality modeling will provide a fuller picture of air pollution and provide a better projection of health impacts on a DAC than emissions information alone. Moreover, air quality modeling conducted in parallel with the emissions modeling would help identify where and how the emissions associated with the project will mix and move in the atmosphere. Air quality modeling will especially be important when assessing off-site impacts and whether a project likely impacts a DAC.

Projects that show decreased levels of emissions may move forward in the permitting process independent of this draft policy. However, projects with decreased levels of emissions in or near a DAC (5 miles from the border of a DAC) should be highlighted and prioritized in the

permitting process independent of this draft policy to satisfy the Section 7(3) requirement that instructs agencies to prioritize emission reductions in DACs.

Projects in or near a DAC with constant or increased levels of emissions should advance to the next stage of this draft policy. Projects with constant or increased levels of emissions in a non-DAC, but have off-site emission or air quality impacts in or near a DAC should advance to the next stage of this draft guidance policy. Projects with constant or increased levels of emissions in a non-DAC and with no off-site air quality impacts in or near a DAC may go beyond this Section 7(3) scope, but should still be evaluated for CLCPA compliance.

### **Key Provisions:**

- Spatial data needs to include GHG and co-pollutant emissions and air quality modeling data in addition to the map of disadvantaged communities as defined by the Climate Justice Working Group.
- Perform GHG and co-pollutant emissions modeling to determine whether the project has projected increase, decrease, or same levels of emissions.
- Use source attributable modeling or best available technology to determine the project's air quality impacts, including downstream and off-site, and attribute air quality concentrations with specific facilities.
- All mobile and stationary sources of pollution related to a project's activities and operations and associated GHG emissions and co-pollutants should be included for both emissions and air quality modeling (e.g., tailpipe emissions from trucks related to a facility's operations).
- "Affects a DAC" should be defined as a project that produces any GHG and co-pollutant emissions that touch a DAC within its borders.
- "Likely to affect" should be defined as any off-site or downstream GHG and co-pollutant emissions and air quality that is produced from a facility that reaches a DAC within its borders or at least 5 miles from a DAC border.
- Emissions and air quality data from projects should be collected, monitored, and evaluated on an ongoing basis by DEC staff.

### **III. Determination of Disproportionate Burdens and Project Design Considerations**

Projects with constant or increased levels of emissions affecting or likely to affect a DAC should advance to the next stage of this draft policy, but we do not recommend a disproportionate burden report be the only requirement.

These projects will instead be required to submit project design measures that detail how the applicant will reduce its emissions. The current guidance on project design measures states that

an applicant **may** propose conditions on the project that would serve to address any disproportionate burden by prioritizing emission reductions in that community. Agency staff should only consider and count on-site improvements that lead to direct improvements in air pollution and emissions in a disadvantaged community compared to market-based and fossil fuel-dependent false solutions that applicants may present as a means to reduce GHG and co-pollutant emissions.

Project design measures need **explicit guardrails and protections**. In the DEP-23-1 draft policy, it states “where a proposed project results in a determination of disproportionate burden on a disadvantaged community, the disproportionate burden report must include project design measures that ensure that the project will not disproportionately burden the disadvantaged community.” However, the draft policy only provides design measures examples that applicants can propose that will not impact disadvantaged and EJ communities. There are no additional guardrails or guidelines to allow DAC residents and regulated parties to assess the “project design measure” to ensure it will not impact them adversely or that productively proposes a solution to the burdens.

In addition, putting **language** such as “disproportionate burdens” and “financial mitigation” does not guarantee any benefit to DAC residents without strict and clear guardrails. It is concerning that the proposed DEC program policy could be construed to allow permit applicants to avoid their obligations under the CLCPA to reduce greenhouse gas emissions through taking steps other than emissions reductions, such as addressing the housing, health and safety needs of impacted area disadvantaged communities. For instance, once approved by DEC as a "covered project" in the present language, applicants are required to develop and submit a "burden report" to show the “existing and potential benefits of the project to the community, including increased housing supply, [and] any essential environmental, health, safety needs of the disadvantaged community.” It is concerning that current policy asks the applicant to deal with the benefits or set benefits that, depending on the context, could allow the applicant to avoid its emissions reduction obligations. Such a policy would be unacceptable and contrary to the statute. The language should explicitly state that steps other than emissions reductions, like providing safe and affordable low- and moderate-income housing, cannot render a project that is otherwise non-compliant with the disproportionate burden requirement in compliance with the CLCPA. We welcome and encourage any design measures that alleviate issues like housing inequality and that safeguards municipal tax revenues for public schools, but such measures must be proposed and approved in parallel with direct emission reductions.

In addition, the proposed policy language in DEP 23-1 provides that it applies to major *permit* applications under certain specified statutory provisions. However, under section 7(3) of the CLCPA, in addition to permits, the requirement that DACs cannot be disproportionately burdened, applies to other agency practices, like “licenses, and other administrative approvals and decisions,” including the awarding of contracts by agencies and other state entities. DEC

should indicate its intention to issue a separate policy or guidance document indicating how the agency will address situations other than permits like grants, loans and contracts.

#### **IV. Enhanced Public Participation**

There needs to be more room for **public participation**. To ensure that the public, especially those that fall into consideration of DAC and EJ communities, have more robust opportunities to participate is a necessity so agencies can have a better understanding of regulations and the potential benefits, costs and harms, both quantitative and qualitative. Greater participation requirements and engagement can increase the extent to which people perceive the regulatory process; that can also allow for a more streamlined form of communication in outreach to accurately address needs and issue areas. In addition, part of what makes engagement successful is when people effectively understand the material being presented to them. While there are many frontline organizations and others who work to break down this information for communities and their members, an increased effort on the agency's part to ensure transparency on goals and intent is key. In this regard, the importance of early planning and communication to the public of what is happening and important dates can not be stressed enough, especially in managing limited time and sometimes even resources on the community level.

The draft policy states that for a permit subject to CLCPA Section 7(3), the applicant would be required to prepare and provide a Public Participation Plan under 6 NYCRR 621.3(a)(3) following the procedural guidance provided by CP-29. CP-29 or DEC's Environmental Justice and Permitting Policy is intended to ensure that DEC's environmental permit process promotes environmental justice, but a recent State Comptroller audit of the DEC's Air Pollution Control Permit Program found that oversight is lacking, especially the monitoring and enforcement of environmental justice requirements. It is, therefore, important for DEC to not only improve its implementation and enforcement of CP-29, but to expand on its requirements under draft DEP-23-1. We recommend that requirements be broadened to include the following:

- Identify and engage stakeholders in the proposed action site and in the areas where the project has off-site impacts. DEC should consider developing a database of organizations that have previously participated in permitting and other processes in regard to environmental justice, environment, and climate as well as community organizations that work on multiple issues (e.g., neighborhood associations and tenant associations) impacting on environmental justice communities and make this list available to applicants to assist them with developing effective participation plans. NY Renew's would be happy to assist with contributing to this database.
- Develop a clear outreach plan to maximize public awareness, input, and attendance.
- The outreach plan should indicate various methods of disseminating information about public sessions and the project in languages accessible to residents in the proposed action

site and in areas with off-site impacts. Alerting the public should not be limited to posting a notice on a few buildings, and should include methods like mailers, working with organizations based in the area, municipality, the region of the state and/or city and the municipality to inform residents, etc.

- Public sessions should include opportunities for public input on the preliminary screening, including data and information on associated GHG and co-pollutant emissions and air quality levels and locations, and any proposed design considerations and their associated benefits and/or harms.
- Present and provide GHG and co-pollutant emissions and air quality information to the public, as well as additional data on all other anticipated impacts to the community, such as health, truck traffic, etc. so the public has a fuller picture of the associated benefits and harms of the project to the community.
- In addition to including a report in the public participation plan submission on “all substantive concerns raised to-date and all resolved and outstanding issues,” the applicant should include information on how concerns and issues were addressed and why decisions were made.
- Any changes to a project or process must be clearly communicated to the public in advance for sufficient time for public input and review.

## **V. Guidance to Permit Applicants**

Where an action likely to affect a disadvantaged community is identified by the preliminary screen, Environmental Permits staff will provide notice to the applicant of the information required to satisfy the requirements of Section 7(3).

### *A. Disproportionate Burden Report*

If the project affects or is likely to affect a DAC and has the same or increased levels of emissions and air quality levels then it should be given a permit denial, with considerations for essential infrastructure operations, until the applicant outlines an implementation and financing plan in its project design considerations to not only reduce its emissions over time beyond the projected increased levels for a net-positive emissions approach. For projects that show a constant level of emissions, project design measures should show increasingly larger reductions over time. The applicant must identify measures that directly reduce emissions from their project and its operations on a timeline within 6 months. If the applicant fails to submit a plan with necessary reduction measures then the applicant should be subject to a fine high enough that an applicant doesn't simply pay it and ignore the plan requirement.

Projects that increase emissions or pollute at the same levels in or near a DAC should automatically be considered as creating a disproportionate burden on a DAC in lieu of a

disproportionate burden report requirement. A community is disadvantaged because it experiences the disproportionate burden of all types of pollution caused by government and corporate neglect and malice. The methodology to define DACs uses 45 indicators and includes disproportionate burden data. All the additional information from a disproportionate burden report is not needed to make this assessment and would be a cumbersome, redundant step.

Additionally, requiring a disproportionate burden without the adequate staff capacity to review, monitor, and track applicants and permits will create an undue, unnecessary administrative burden that will not help the State meet our CLCPA mandates and reduce our emissions more efficiently and quickly. The draft policy lists a handful of data points, but doesn't even describe how it would use all the data points for the comparative/proportion analysis that would be needed to assess if a project creates a disproportionate burden on a DAC. Creating another system for applicants to play accounting games will not help us undo the legacy of sickness and death caused by the higher levels of air pollution in communities of color and low-income communities.

### *B. Project Design Considerations*

Project design considerations should result in a reduction in GHG and co-pollutant emissions that is larger than the increases – not equivalent – of emissions from a project. For projects with the same levels of emissions, project design considerations should show increasingly larger reductions over time. The State also needs to make sure that in not perpetuating disproportionate burdens in disadvantaged communities that are currently defined as DACs that it does not create new ones.

### *C. Public Review and Comment*

As part of the materials the applicant shares, the applicant should provide all the materials shared and developed for the previous stakeholder and public engagement meetings. A permit should not be approved until all these steps have been taken.

## **VI. Lack of DEC staffing capacity and resources to ensure compliance and enforce the requirements of this and future guidelines issued for actions falling under the ambit of CLCPA Section 7(3).**

We recommend DEC identify and fill capacity needs and gaps to allow the agency to successfully review permitting applications and enforce these guidelines and ultimately Section 7(3). We are concerned with DEC's capability to monitor polluting facilities for compliance with regulations given Comptroller Thomas DiNapoli's recently released audit. This audit found that more than half of the state's 8,941 facilities may not have been operating in compliance with air



pollution control requirements because DEC hasn't addressed permits or registrations issued prior to 2013 – and are permits that do not expire.

The report also points to the lack of oversight of DEC's Air Pollution Control Permit Program, which also may pose an issue with the implementation of this guidance. If we are allowing applicants to design project considerations that commit to GHG and co-pollutant emission reductions, we must be confident that DEC will be able to monitor and enforce these commitments if permit approvals will be contingent on this. DEC needs to identify clear roles and responsibilities for oversight and implementation, build its staffing capacity, and get the resources needed to evaluate permit applications and enforce these requirements post-permit approval.

## **VII. Guidance needs to be developed and used for all agencies under Section 7(3) in addition to those of the Department of Environmental Conservation**

This guidance is specific to DEC permitting, but Section 7(3) clearly states that all agencies need to prevent disproportionate burdens and prioritize GHG and co-pollutant reductions for disadvantaged communities. Other State agencies need to quickly follow suit and develop their own Section 7(3) guidance. DEC should lead interagency coordination and provide strong, clear standardized guidance for agencies to follow and implement. DEC should take the role and responsibility of overseeing Section 7(3) and ensuring State agencies are complying.

NY Renews suggests that a central state entity or entities, like the Governor, or a combination of DEC and the New York State Energy Research and Development Authority (“NYSERDA”), issue general guidance to state agencies and other entities regarding CLCPA sections 7(2) (i.e., the CLCPA “climate screen”), CLCPA section 7(3), which provides that permits and contracts cannot disproportionately burden disadvantaged communities (i.e., the CLCPA “equity screen”), and CLCPA Section 8, which empowers and directs multiple state agencies to promulgate regulations to contribute to the achievement of the GHG emissions limits. This guidance should specify the specific steps agencies must take to implement and enforce these provisions. We note that DEC and NYSERDA are now proposing guidance for the investments and benefits provisions in the CLCPA. <sup>1</sup> The same rationale argues for guidance to be issued for sections 7 and 8.

## **Conclusion**

NY Renews recognizes the effort in this draft guidance that works to implement and enforce the CLCPA. However, in order for DEP 21-3 to be clear, effective and operate functionally without further damage to comply with Section 7 of the Climate Law, recommended **policy revisions**

include: permit guidance that is stricter and clear along with the type of data used; project design measures that are currently listed in the policy to ensure burdens can be remedied; updating potential EJ areas and DAC mapping; and further opportunity for public participation and CP-29 language to be further expanded to include areas in the draft policies like project design measures. This policy language needs to be more firm and specify the steps agencies must take to implement and enforce these provisions without creating opportunities for exception or oversight.

It is critical that state agencies and other entities work in tandem to implement and enforce the CLCPA, which was clearly the intent of the statute, including the provisions creating a Climate Action Council, guidance from the Climate Justice Working Group, and providing for the development of a scoping plan. DEC and NYSERDA, as co-chairs of the Climate Action Council, and DEC as New York's lead environmental agency, have broad expertise in the energy and climate fields and guidance by these agencies (or guidance issued by the Governor with strong input from DEC and NYSERDA) will make it far more likely that state agencies vigorously enforce the law and that policies across agencies are consistent with each other and are in accord with the statutory intent.

Sincerely,

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on behalf of the NY Renews coalition

*NY Renews endorses the comments on Draft DEC Program Policy DEP 23-1 of Citizen Action of New York, EarthJustice, New York Lawyers for the Public Interest, WEACT for Environmental Justice and South Bronx Unite; noting the varying views on disproportionate burden report.*