The Business Council

memo

TO:	Daniel Whitehead, Division Environmental Permits, NYS Department of Environmental Conservation
FROM:	Ken Pokalsky
SUBJECT:	Comments on "Draft DEC Program Policy - DEP 23-1, Permitting and Disadvantaged Communities Under the CLCPA"
DATE:	1/29/24

We appreciate the opportunity to submit comments on the draft DEP 23-1, which sets forth the Department's approach to applying CLCPA §7(3), which requires that state agencies, "in considering and issuing permits . . . shall not disproportionately burden disadvantaged communities . . . " and that agencies ". . . shall also prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities . . ."

We recognize that promoting environmental equity is one of the pillars of the CLCPA, in addition to mandating reductions in economy wide GHG emissions and promoting deployment of renewable energy production.

Addressing this mandate requires the introduction of new approaches and new criteria to evaluating projects and permit applications. In doing so, it is important that agencies adopt policies and guidelines that help clarify broad statutory provisions for the benefit of applicants, potential affected communities and the interested public alike.

In general, we believe draft DEP 23-1 can provide better guidance to applicants and Department staff by incorporating (1) definitions of terms used in the guidance to provide clarity and uniform implementation; (2) applicability thresholds and thresholds for determining disproportionate impact; (3) clarification on the requirements for the disproportionate burden report; and, (4) clarification regarding applicability of the policy and the requirements to facilities and actions that are outside of disadvantaged communities.

In presenting our specific comments below, we provide an annotated version of the draft policy, with provisions of concern highlighted, and our comments, concerns and recommendations provided immediately following in italics.

In these comments, we focus on areas where we believe this policy can provide more clear, precise, and complete guidance regarding the permit review process and requirements imposed on permit applicants, and more consistent application of the policy by Department staff, while assuring consistency with CLCPA and other statutory and regulatory provisions.

As always, we welcome any opportunity to discuss our concerns and recommendations with Department representatives.

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DEP 23-1 / Permitting and Disadvantaged Communities

I. Summary

This policy document, issued by the New York State Department of Environmental Conservation (DEC) Division of Environmental Permits (Environmental Permits), outlines the requirements for analyses developed pursuant to Section 7(3) of the Climate Leadership and Community Protection Act (CLCPA Laws of 2019, Chapter 106). This policy applies to permits subject to the Uniform Procedures Act (UPA), Article 70 of the Environmental Conservation Law (ECL).[1]

II. Policy

This policy is written to provide guidance for DEC staff when reviewing permit applications associated with sources and activities, in or likely to affect a disadvantaged community, that result in greenhouse gas (GHG), or co-pollutant emissions regulated pursuant to Article 75 of the Environmental Conservation Law (ECL).

> **Comment:** *The policy should provide a definition of co-pollutants. We believe that such definition should be the same as set forth in the CLCPA. The final policy should either incorporate the definition from, or specifically reference the definition in, ECL § 75-0101.3 ("co-pollutants means hazardous air pollutants produced by greenhouse gas emissions sources"), or reference the listing of hazardous air pollutants in regulation, 6 NYCRR Part 200.1(ag).*

III. Purpose and Background

The CLCPA went into effect January 1, 2020, and includes economy-wide requirements to reduce GHG emissions in New York State by 40% below 1990 levels by 2030, and 85% below 1990 levels by 2050. Section 7(3) of CLCPA requires the following of all state agencies:

"In considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, pursuant to article 75 of the environmental conservation law, all state agencies, offices, authorities, and divisions shall not disproportionately burden disadvantaged communities as identified pursuant to subdivision 5 of section 75-0101 of the environmental conservation law. All state agencies, offices, authorities, and divisions shall also prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities as identified pursuant to such subdivision 5 of section 75-0101 of the environmental conservation law."

The CLCPA also created a Climate Justice Working Group (CJWG) comprised of representatives from environmental justice communities and organizations, DEC, the Department of Health (DOH), the New York State Energy and Research Development Authority (NYSERDA), and the Department of Labor (DOL).

The CJWG established criteria to identify disadvantaged communities for the purposes of co pollutant reductions, greenhouse gas emissions reductions, regulatory impact statements, and the allocation of investments.[2]

IV. Responsibility

Environmental Permits is responsible for implementing the review and permitting procedures described in this policy, in consultation with the Office of Environmental Justice, Office of the General Counsel, and applicable DEC permit program areas. Environmental Permits is also responsible for updating this program policy.

V. Procedure

1. Applicability.

The permit application review process described in this policy applies to permit applications identified below that involve sources and activities that result in increases in direct or indirect GHG or co pollutant emissions pursuant to Article 75 of the ECL:

> **Comment:** For clarity and consistency, this sentence should be amended as follows, "The permit application review process described in this policy applies to permit applications identified below ~~that involve~~ for sources and activities that result in increases in direct or indirect GHG or co pollutant emissions pursuant to Article 75 of the ECL: "

a. All major permit applications made pursuant to the following sections of the ECL received by the Department after the issuance date of this Policy, and all pending permit applications to the extent feasible, including modifications or renewals to existing permits:

> **Comment:** *For clarity, we suggest this paragraph to be amended as follows:*
>
> > *All major permit applications made pursuant to the following sections of the ECL received by the Department after the issuance date of this Policy, including modifications or renewals to existing permits, and all pending permit applications to the extent feasible, ~~including modifications or renewals to existing permits~~:*
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> **Comment**: *The guidance should specify that it is incorporating the definition of and criteria for major and minor permit applications as set forth in 6 NYCRR Part 621.4.*
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> **Comment:** *To the extent that this policy, once finalized and adopted, establishes new or additional interpretations of existing statute, those new or additional provisions should be promulgated as regulation pursuant to the State Administrative Procedures Act, and should not be applied retroactively to permit applications already subject to Departmental review (related edit shown above).*

• Article 15, Title 15, and Article 17 for facilities withdrawing and using over 20 MGD of water for cooling purposes.

• Article 19, Air Pollution Control

• Article 23, Title 17, Liquefied Natural Gas and Petroleum Gas

• Article 27, Title 7, Solid Waste Management

• Article 27, Title 9, Industrial Hazardous Waste Management

b. In addition to the permit applications listed above under V.1.a, these procedures apply to any permit administered under the Uniform Procedures Act (UPA) for:

• projects involving construction of energy production, generation, transmission, or storage facilities;

> **Comment**: *It is unclear whether this "catch all" provision would apply to renewable generation facilities. Moreover, it is unclear how this analysis will be integrated with provisions of 6 NYCRR Part 487 regarding "Analyzing Environmental Justice Issues in Siting of Major Electric Generating Facilities Pursuant to Public Service Law Article 10."*
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> *Also, this policy should also recognize special concerns regarding projects addressing an electric system reliability concern identified by the NY Independent System Operator, as done in other DEC regulations*

(e.g., 6 NYCRR Part 227-3, which provides a temporary waiver from compliance with NOx requirements if necessary to resolve a reliability need.)

• projects with sources and activities that may result in GHG emissions or co pollutants, directly or indirectly; and

Comment: *This "catchall" provision is far too broad. Including all projects that "may" result in director or indirect emissions will capture virtually every project subject to Departmental review, which would render the list in Section V.1.a of this draft meaningless. Further, this provision seems inconsistent with Section V.2 which states that the policy only applies where the activity subject to the permit application would result in an actual increase in emissions of GHG and co-pollutants. As an alternative, this provision could apply to projects not otherwise included by other provisions of Section V.1 that are expected to result in direct or indirect increase in GHG or co-pollutants that would have more than a de minimis impact on a disadvantaged community. If this provision remains in the final policy, the term "may" should be deleted.*

• non UPA facility registrations, that fall under any applicable permit type listed in V.1.a of this policy, where DEC determines an analysis is necessary or appropriate to ensure CLCPA consistency such as projects with significant GHG or co-pollutant emissions.[3]

2. Determining Scope of Covered Projects

DEC staff may require an applicant to ensure the requirements of Section 7(3) are met and prioritize emission reductions in the impacted disadvantaged communities, as required by CLCPA Section 7. Projects subject to this policy include sources and activities of a continuing nature associated with any new emission sources, permit renewals, or permit modifications that would result in actual increases of GHG and co-pollutants. This includes emissions from stationary and mobile sources directly related to

Comment: *Section V.2 establishes an important applicability threshold which we support, i.e., this guidance and its DAC impact analysis only applies where the activity subject to the permit application would result in an actual increase in emissions of GHG and co-pollutants. However, as the Department's stated intent in issuing this draft guidance is to guide "DEC staff when reviewing permit applications," it is unclear what "projects" referenced here would be subject to this guidance if not subject to a Departmental permit. For clarification, the highlighted sentence could be amended as follows, "This requirement applies to activities related to a covered permit that are of a continuing nature and that would result in actual increases of GHG and co-pollutants."*

Further, "actual increases" should be defined consistent with DAR-21 and Department regulations, (actual emissions are defined as the highest 24- month average GHG/co-pollutant emissions during the five years preceding the date the permit application was received unless another period is more representative; and does not include increases solely related to demand growth.)

and essential to the proposed action, and those from existing equipment or facilities. Essential operating functions are those functions critical to the operation of a facility or project without which the facility could not operate.

Comment: *For clarification, this provision should be amended to say, "Stationary and mobile sources that are essential to the proposed action are those without which the facility could not operate and are under the direct control of the facility." For example, mobile sources (e.g., trucks) used to deliver products and equipment to and from the facility would be considered "essential" for the purpose of this policy while employee vehicles used to commute to and from the facility would not.*

3. Preliminary Screening

a. Upon receipt of a permit application subject to this policy, Environmental Permits staff[4] will conduct a preliminary screen to identify whether the proposed action is a covered project and is in, or likely to

> **Comment:** *We agree that this preliminary screen should be conducted by the Department; this preliminary screen includes any modeling necessary to assess potential impacts on DACs where the facility is located near but not in a DAC.*

affect, a disadvantaged community (e.g., where the permit involves a facility that is not located in the disadvantaged community but involves off-site GHG or co-pollutant impacts within a disadvantaged community in close proximity to the proposed action). DEP may request that the applicant provide additional information to indicate whether the project is located in, or likely to affect, a disadvantaged community.

b. Spatial data[5] will be used to determine whether the proposed action is located in, or likely to affect, a disadvantaged community.

> **Comment:** *The footnote to V.3.b references the state's map of identified disadvantaged communities, which are available through multiple state websites. It is unclear how these maps can be used to determine the potential impact of a permit applicant on a disadvantaged community in which it is not located, as referenced in Section V.3.c below, and of particular concern there is no indication in this draft guidance of how the Department would make such determinations. The result is likely to be significant uncertainty for applicants and communities alike, and significant inconsistencies in the application of this provision by the Department. We suggest that the final guidance provide specific steps and criteria that will be used to make this determination.*
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> *The language should also be revised to clarify that a determination of whether a proposed action that is located outside of a disadvantaged community will likely affect a disadvantaged community is based on emissions of GHGs and co-pollutants from the proposed action that are likely to adversely affect a disadvantaged community. This could be clarified by revising the language as follows: "...is located in, or <u>emissions of GHGs and co-pollutants from the proposed action are</u> likely to adversely affect, a disadvantaged community."*

c. The affected area of the proposed action includes the facility itself and areas reasonably expected to experience off-site impacts from GHGs, and co-pollutants associated with operation of the facility. Off-site impacts are those that a proposed action may have at a distance from the site based upon modeling. For example, a natural gas fired power plant may impact the air quality of an adjacent or nearby disadvantaged community.

> **Comment**: *The off-site area to be included in the "affected area" should be clarified to include only those off-site areas where a significant and adverse impact from GHGs and co-pollutants would be reasonably expected. We believe this could be accomplished with the following language: "…and areas reasonably expected to experience significant and adverse impacts from GHG and co-pollutants associated with operation of the facility."*

d. If no disadvantaged community is identified within the affected area, the proposed action is not likely to affect a disadvantaged community and the permit review process may continue independent of this policy.

> **Comment:** *If, as a result of the preliminary screen, it is determined that a permit application is not in or will not impact a DAC, the guidance should be more definitive in saying that for such applications the permit review process <u>shall</u> continue independent of this policy (i.e. that no further DAC analysis is required when a preliminary screen indicates that a proposed permit action will not affect a DAC).*

e. If a disadvantaged community is identified and is located within the affected area as determined above, the proposed action is considered likely to affect the disadvantaged community and the remainder of these procedures will be incorporated into the review process.

> **Comment:** *As mentioned earlier, it should be clear that permit applications that would not result in an increase in GHG or co-pollutant emissions are not subject to this policy, regardless of the location of the project. Moreover, as drafted, the policy would subject a permit application with any emission increase to its full review process and the requirements of this policy. The final policy should also exempt projects with de minimis emission increase or potential impact on a DAC.*

4. Determination of Disproportionate Burden and Project Design Measures

CLCPA Section 7(3) states that agencies' permit decisions "shall not disproportionately burden disadvantaged communities." Increases in GHG emissions or co-pollutants resulting from a project associated with any new, modified, or renewed emission sources, including those from stationary or mobile sources directly related to and essential to the proposed action, will require the preparation of a disproportionate burden report.

The disproportionate burden report must identify and address disproportionate burdens on the disadvantaged community. As part of a disproportionate burden report, an applicant may propose

conditions on the project that would serve to address any disproportionate burden by prioritizing reduction of emissions in that community. Likewise, the Department may impose conditions on the project or other measures that would serve to address any disproportionate burden in that community, including through the Department's obligation in Section 7(3) to prioritize reductions in GHGs and co-pollutants in disadvantaged communities.

> **Comment:** *We have several significant concerns regarding this provision, which in effect is the linchpin of this entire policy document and the impact analysis required under this draft policy. Most significant, it is totally unclear how the applicant is to determine what burdens are "disproportionate," as the guidance provides no criteria or process for making such determinations. This determination must be based on some conclusion other than the potential impacts in or on the DAC are simply different than those elsewhere. We recommend that this determination be based on a finding that a permit's impacts in or on a DAC would be significant and adverse from an environmental or public health perspective consistent with the criteria set forth in 6 NYCRR 487.10.c for assessing the environmental justice impacts of major electric generation projects under Article 10.*
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> *In addition, as the Department is aware, a host of criteria was considered during the process for designating disadvantaged communities that do not directly relate to the activities of permit applicants (e.g.., travel time to health care facilities, housing vacancy rates, agricultural land use, presence of and emissions from municipal facilities, etc.), it is unclear how an applicant would address disproportionate burdens based on such factors wholly unrelated to the permit, and wholly uncontrollable by the applicant.*
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> *Finally, the draft provision seems to imply that disproportionate burdens of any nature should be offset by applicant-proposed and/or Department-imposed conditions to reduce GHG or co-pollutant emission in the DAC. If the intent here is to simply require additional GHG or co-pollutant emission reductions when pre-existing disproportionate burdens are identified or would be caused or exacerbated by GHG and co-pollutant emission associated with the permit application, that should be more clearly stated.*

Any such project conditions or other measures proposed by an applicant or imposed by the Department, along with any input from members of the community regarding the proposed project, may be considered in the

ultimate determination of whether the project imposes a disproportionate burden on disadvantaged communities.

> ***Comment****: The final policy document should include a description of the review process it requires, including the timing of each step of the process and how the process intersects with the requirements of the uniform procedures act. For example, requirements for public input are set for in this draft policy under Section V.5 below, and community outreach is required regarding project design under Section V.6. It is unclear how these multiple rounds of public input are to be integrated in a timely fashion into this project review process.*

5. Enhanced Public Participation

In practice, most disadvantaged communities will also fall within a Potential Environmental Justice Area (PEJA) and the requirements of CP-29[6] may apply. Should a disadvantaged community fall outside of a PEJA, the application will be subject to the requirements of a public participation plan as per 6 NYCRR 621.3(a)(3) following the procedural guidance for a Public Participation Plan under CP-29, where CP-29 would otherwise apply. In addition to the requirements of CP-29, as part of the public participation plan, the applicant must solicit input from members of the disadvantaged community regarding the proposed project design considerations and existing and potential benefits of the project as identified by the applicant.

> ***Comment:*** *We disagree that "most" DACs fall within PEJAs, based on a review of overlapping DACs and PEJAs maps on the Department's online DECinfoLocator which shows significant noncongruent designations. In any case, the point of Section V.5 seems to be to apply the citizen participation planning provisions of CP-29 to permits subject to this DAC guidance document that are not located in a PEJA. To achieve this goal, we recommend this paragraph be re-written as follows:*
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> > *In instances where a disadvantaged community falls within a Potential Environmental Justice Area (PEJA), the requirements of CP-29 will apply, including its requirement for an enhanced public participation plan. As enhanced public participation is a key element of assuring fair treatment and meaningful involvement of communities in environmental decision-making, the Department will also apply the requirements of a public participation plan as per 6 NYCRR 621.3(a)(3) and follow the procedural guidance for a Public Participation Plan under CP-29 for projects in or affecting disadvantaged communities, where CP-29 would otherwise apply.*
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> *As an additional comment, there needs to be an assessment of the consistency of the enhanced public participation plan requirements set forth in CP-29 and this guidance, e.g., Section V.d of CP-29 states that "applicants are encouraged to consider implementing the public participation plan components prior to application submission," while under this draft guidance, an applicant will not know it is subject to the CP-29 provisions until after its application is subject to the Department's preliminary screening. Section V.d.1 of CP-29 states that the written public participation plan must be submitted as part of the permittee's complete application. In both cases, the CP-29 process seems out of step with the sequence of activities set forth in this draft guidance.*

6. 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). This may include notice that the applicant's project falls within or is likely to affect a disadvantaged community, guidance to comply with CP-29, and any other information relevant to the proposed action in preparing a disproportionate burden report.

COMMENT *– This provision should be revised to clarify that the preliminary screen is associated with emissions of GHG and co-pollutants from an action and whether they are likely to adversely affect a disadvantaged community.*

Also, If the Department has determined that an action is likely to affect a DAC, their submission should include the information it relied on to make its determination (so the applicant has an opportunity to review and perhaps challenge DEC's decision).

a. Disproportionate Burden Report

The applicant shall submit a written report to DEC. The report shall be submitted to DEC prior to completeness to be utilized by staff in making a finding of complete application, including a State Environmental Quality Review Act (SEQR) determination of significance.[7] The report shall include the following:

• an identification of GHG and co-pollutant emissions from the project affecting the disadvantaged community;

• relevant baseline data on existing burdens, including from relevant criteria used to designate the disadvantaged community potentially impacted by the project;

COMMENT – *The policy should clarify that Department staff will provide to the applicant the baseline data on existing burdens and environmental and public health stressors that is needed for the disproportionate burden report. Without such clarification, there would be confusion on the part of the applicant on what baseline data is acceptable for use in preparing the report, and from the Department on whether an applicant's baseline data is acceptable. The result would be significant costs and resources being borne by the applicant, wasted time on the part of the Department, and a lengthy permitting process.*

Moreover, it is unclear what exactly constitutes a "burden," or how an applicant can determine what "criteria" used for the designation of specific DACs are "relevant" for the purpose of this analysis. The "New York State Climate Justice Working Group Draft Disadvantaged Communities Criteria and List: Technical Documentation," or "Criteria Report" defines "burden" as

> *"Something that affects health or quality of life. An overburdened community is one with multiple stressors including both environmental and socio-economic. A community burden affects quality of life, and a pollution burden has the potential to affect health. DACs have a disproportionate burden of the negative environmental consequences (environmental exposure or indicators), characteristics related to increased vulnerability, and health outcomes relative to other communities."*

The Criteria Report indicates that overburdened communities are designated based on seven "factors" which encompass 45 "indicators," with three factors defined as measuring "environmental burdens and climate risks" and four factors defined as measuring "population characteristics and health vulnerabilities." We assume that "burden" would be assessed based on some or all of the eighteen "factors" characterized as "environmental burdens and climate risks" in the Criteria Report. If so, we assume that such data can be derived from the state's "Technical Documentation Appendix: Disadvantaged Communities Indicators Workbook" document, available on-line in xls spreadsheet format, or "DAC dataset", which includes the "burden score," "vulnerability score," and "combined score," and each individual component for these three compiled scores, for each designated disadvantaged community. If DEC intends to use a different definition of "burden," it needs to be articulated in this policy (and subject to additional public review and comment.)

• identification of any environmental or public health stressors already borne by the disadvantaged community because of existing GHG and co-pollutant burdens in the community;

> **COMMENT** – *It is unclear what constitutes an "environmental or public health stressor" in this context, or how an applicant could determine which of those stressors are caused by GHG or co-pollutants. The state's Criteria Report does not provide a definition of "stressor," but uses the term to help define what constitutes a "burden," (e.g., a burden is "Something that affects health or quality of life. An overburdened community is one with multiple stressors including both environmental and socio-economic.") From this, once could deduce that "stressor" refers to "factors" listed in the DAC dataset that measure potential pollution exposures, land use and facility siting and climate change risks (perhaps with the exclusion of the factors related to drive time to health care facilities and housing vacancy rates), but not the "population characteristics and health vulnerabilities." Additional guidance on implementing this requirement would be helpful.*

• the potential or projected contribution of the proposed action to existing pollution burdens in the community from GHG and co-pollutants;

• proposed project design considerations including a description of actions to be taken to reduce or eliminate disproportionate burdens associated with GHG or co pollutant emissions, including any proposed permit conditions (see below);

> **COMMENT** – *Section V.6.a sets forth the requirement of a "disproportionate burden report," but fails to provide any criteria or methodology for determining whether burdens on a DAC are "disproportionate." (We note that projects that would not result in an increase in GHG or co-pollutants should no longer be subject to review at this point in the process.)*
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> *Further, this provision should be clarified to require the applicant to address burdens caused by its project, not all burdens impacting a DAC.*

• existing and potential benefits of the project to the community including increased housing supply, any essential environmental, health, safety needs of the disadvantaged community, or alleviation of existing pollution burdens that may be provided by the project, as informed by input from members of the community through a Public Participation Plan; and

> **COMMENT --** *Several of the project effects listed in this bullet are comparable to the "social, economic and other considerations" that are considered in SEQRA decision-making and findings (as addressed in 6 NYCRR Part 617.11.d), and in a SEQRA setting, would be an important factor in a decision to approve a project. However, it is unclear how they would be employed in this analysis. For example, in the Criteria Report, high housing vacancy rates is a land-use "factor" used to calculate DAC "burdens." While increased housing supply may been seen as a community benefit, it is unclear how it would be applied as an offset to existing high vacancy rates. Other project factors could be assessed, e.g., a new health care facility would affect the "factor" related to drive time to a hospital or urgent care facility, a project that reduced emissions or eliminated a burden factor would improve a DAC's burden score. Even so, once these adjustments to a DAC's burden score are calculated based on these factors, this draft guidance provides no indication as to how that result would be used in determining whether to approve a permit application.*

• confirmation that a public participation plan has been completed, including any proposed changes to the project resulting from community outreach and participation.

b. Project Design Considerations

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. The availability of the disproportionate burden report will be an element of completeness under UPA.

Any project design measures that are used to support a final determination regarding disproportionate burden should result in measurable GHG emissions reduction, co pollutant emission reduction that is in addition to actions already required by law or regulation and that lessen the burden on the community that has been initially identified to be disproportionately burdened.

> **COMMENT**: *We have several concerns regarding this provision. First, it is unclear what is meant by "a final determination regarding disproportionate burden". We believe this should be amended to read, "Any project design measure that is proposed to address a disproportionate burden resulting from the permit application should result in reductions in GHG or co-pollutant emissions that would impact the DAC, or otherwise reduce the disproportionate burden on the DAC resulting from the project."*
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> *Second, it is unclear why co-pollutant reductions must be "in addition to actions already required by law or regulation," especially as hazardous air pollutant emission sources are often regulated by technology-based standards, e.g., NESHAPs based on maximum achievable control technology requirements, and by strict requirements of 6 NYCRR Part 212 and other state regulations. We recognize that CLCPA §75-0109.3.c requires DEC regulations to "prioritize measures to <u>maximize</u> net reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities" but CLCPA §75-0109.3.a requires those same rules to "minimize costs," so the "maximize" mandate is not absolute.*

Further, project design measures must be real, quantifiable, permanent, verifiable, and enforceable. Project design considerations should result in a reduction in GHG and co-pollutant emissions that is at least equivalent to the increases from the project. Accordingly, it may be necessary for the applicant to consider implementation of more than one design consideration.

> **COMMENT**: *It is unclear how an entirely new project requiring DEC permits could be approved under this criteria, if this guidance requires a net zero increase in GHG and co-pollutant emissions. (Note, as drafted, this provision does not specify that this net zero standard only applies to emissions in or impacting a DAC). As the review process set forth in this policy applies to "direct or indirect" emissions that could impact a DAC, even if a permit applicant committed to zero on-site GHG emissions, it could not achieve zero off-site emissions in a way that are permanent and enforceable In addition, this provision would seem to trigger the CLCPA's "alternative compliance mechanism" or "offset" provisions of § 75-0109.4, which could include the requirement that any such "project design consideration" show that on-site "compliance with the greenhouse gas emissions limits is not technologically feasible, and that the source has reduced emissions to the maximum extent practicable." Finally, it is unclear how the highlighted language requiring reductions at least equivalent to increases from the project would intersect with the potential design measures identified below. For example, while designing truck routes to avoid DACs would arguably reduce GHG and co-pollutant emissions it would be very difficult to quantify the benefits and satisfy the requirement that design measures be "real, quantifiable, permanent, verifiable, and enforceable."*

Most projects subject to Section 7(3) of the CLCPA will also be subject to Section 7(2). Information provided as part of the Section 7(2) analysis can be similarly used to identify project design measures, that also address Section 7(3), as part of the disproportionate burden report.

In no specific order, examples of potential project design measures include, but are not limited to:

• Use of electric powered equipment instead of fossil fuel powered equipment, including electric vehicles;

> **Comment:** *Given the newly adopted mandate in Energy Law §11-104.6.b that new buildings are prohibited from the installation of fossil-fuel equipment and building systems (effective 12/31/25 or 12/31/28 depending on the building size), even if an applicant incurred the additional costs of complying with the zero emission building mandate, this is an example of an emission reduction measure mandated by law, whose emission reduction impacts would be, in effect, dismissed under this draft policy.*

• Use of lower emission technologies;

• Use of alternative process technologies that would reduce or eliminate GHG emissions or co-pollutants;

• Financial mitigation, such as providing funds for GHG or co-pollutant emissions reduction projects in the local disadvantaged community;

• Operational mitigation, such as limitations on the amount of fossil fuel combusted at the project or the allowable hours of operation for the project;

• Designing truck travel routes that avoid, or minimize impact to, disadvantaged communities;

• Adding electric vehicle charging stations at the facility or in the local disadvantaged community; and

• Physical mitigation, such as the planting and upkeep of trees, green infrastructure, or other means of carbon sequestration.

c. Public Review and Comment

The Disproportionate Burden Report, and any additional materials provided by the applicant to satisfy the requirements of Section 7(3) of the CLCPA, will be made available for public review and comment as per 6NYRR Part 621.7 of UPA. Relevant public comments, the permit application, supporting materials, including information provided to satisfy the requirements of Section 7(3) of the CLCPA, must be considered when making a final decision on a permit application.

Footnotes:

1. On December 31, 2022, New York Governor Kathy Hochul signed a cumulative impacts bill into law, amending the State Environmental Quality Review Act (SEQRA) and the Uniform Procedures Act (UPA) to require consideration of the effects of disproportionate pollution impacts on a disadvantaged community (DAC). The law goes into effect January 1, 2025. Environmental Permits staff will subsequently update this policy to take into consideration the new law plus any regulations DEC implements pursuant to that law.

2. On March 27, 2023, the Climate Justice Working Group identified criteria for disadvantaged communities pursuant to ECL 75-0111(see the internet link in footnote 5).

3. The Department may require a facility to obtain an applicable permit for projects with significant GHG or co pollutant emissions.

4. In the case of a non-UPA registrations, the appropriate program would be responsible for implementing this policy

5. A map of identified disadvantaged communities is available on the Climate.ny.gov website: Disadvantaged Communities Map (https://climate.ny.gov/en/Resources/Disadvantaged-Communities-Criteria)

6. See Commissioner Policy 29, Environmental Justice and Permitting - NYS Dept. of Environmental Conservation

7. See 6 NYRR Part 617.7(b).