December 18, 2023

Via email

New York State Department of Environmental Conservation
Division Environmental Permits
625 Broadway
Albany, NY 12233-3254
Comment.DEP-23-1@dec.ny.gov

Re: Comments on Draft DEP 23-1/Permitting and Disadvantaged Communities

Dear Commissioner Seggos and Director Whitehead,

WE ACT for Environmental Justice, South Bronx Unite, Earthjustice, New York Lawyers for the Public Interest, along with the other undersigned organizations submit the following comments on the Draft DEC Program Policy DEP 23-1 regarding Permitting and Disadvantaged Communities. We thank DEC for a thoughtful approach to this essential policy guidance and appreciate the opportunity to comment on the draft. While we endorse many aspects of the draft policy, there are several important elements that must be revised to ensure DEC permitting decisions fully comply with Section 7(3) of the New York Climate Leadership and Community Protection Act ("CLCPA"). DEC must revise the policy to: (1) include renewal permits that allow continued emissions of greenhouse gases ("GHGs") and co-pollutants, even if there is no increase from the permitted activity's existing emissions levels; (2) provide additional guidance about when disproportionate burden reports are necessary and what data can be used for those reports; (3) ensure more opportunities for robust public participation; and (4) add guardrails for project design measures listed in the draft policy to ensure they adequately remediate burdens.

CLCPA Section 7(3) is a critical element of the state climate law and the provision's implementation is necessary to effectuate the statute's equity goals and mandates. Agency

decisions are often a determining factor exacerbating inequality in the distribution of benefits and burdens of regulated activities, and Section 7(3) seeks to break that pattern. The subsection requires agencies to consider and avoid any potential disproportionate burdens on disadvantaged communities ("DACs") that could result from those decisions. It is important to note that while Draft DEP 23-1 applies only to certain DEC permitting decisions, Section 7(3) applies broadly to a wide range of agency decisions not limited to permits, but also "other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts."[1] Within Draft DEP 23-1, DEC should acknowledge that this policy guidance does not cover the entire scope of the agency's obligations under Section 7(3), and in the future DEC should develop additional guidance that would apply to the broader set of actions covered by Section 7(3). Promulgation of additional guidance is particularly important because other agencies are likely to look to DEC, the primary agency responsible for implementing the CLCPA, for guidance on how to apply Section 7(3) to non-permitting decisions.

I. THE EQUITY SCREEN IS REQUIRED FOR ALL RENEWALS AND MODIFICATIONS OF COVERED PERMITS

The equity screen requirements of Section 7(3) are mandatory for all covered decisions and approvals. To that end, the draft policy should clarify two things: first, that for covered permits, DEC *shall* require an applicant to ensure that the requirements of 7(3) are met.[2] Second, a 7(3) analysis is required for all renewals and modifications of applicable permits, even where there is no *increase* of GHG or co-pollutant emissions. Section 7(3) is not discretionary, and it does not exempt certain types of permits, including straightforward permit renewals.

[1] 2019 Sess. Laws of N.Y. Ch. 106 (S. 6599) § 7(3) (hereinafter "CLCPA").
[2] See the first sentence of Section V(2) on page 3 of the draft policy, which should be revised to clarify that for all applicable permits, DEC staff *shall* require an applicant to ensure the requirements of Section 7(3) are met.

Draft DEP 23-1 would require only those permit renewals or modifications that result in increased emissions of GHGs and co-pollutants to undergo a review of potential disproportionate burdens on DACs.[3] This narrowly drawn scope of covered projects violates both the letter and the spirit of the CLCPA. Under the plain language of the statute, Section 7(3) applies to all agency "approvals and decisions" and is not confined to new permits or permit decisions that result in an emissions increase. On the contrary, the CLCPA requires a rapid *decrease* of GHG emissions in New York. Allowing facilities to continue to renew permits at current GHG emissions levels without scrutiny under CLCPA Section 7 would not comply with the Legislature's intent or the plain requirements of the law.

Moreover, the CLCPA was enacted in part to halt, reverse, and remedy the siting of polluting infrastructure in DACs.[4] The statute obliges DEC to "*maximize* net reductions of ... co-pollutants in disadvantaged communities ... and encourage early action to reduce ... co-pollutants."[5] Section 7(3), in particular, in addition to requiring agencies to avoid disproportionate burdens on DACs in their permitting and other decisions and approvals, also requires agencies to "prioritize *reductions* of greenhouse gas emissions and co-pollutants" in DACs.[6] By declining to apply Section 7(3) to permit renewals that continue business as usual, DEC would leave polluting infrastructure in DACs rather than removing or mitigating emissions sources. The final DEP 23-1 should clarify that the equity screen is required for all permitting

[3] Draft DEP 23-1 Section V(2).
[4] *See, e.g.*, CLCPA § 1(7) (recognizing that DACs "bear environmental and socioeconomic burdens as well as legacies of racial and ethnic discrimination" and providing that "[a]ctions undertaken by New York state to mitigate greenhouse gas emissions should prioritize the safety and health of disadvantaged communities"); *id*. § 1(11) (citing "the disproportionate cumulative economic and environmental burdens on communities"); *id*. § 7(3) (prioritizing emissions reductions in DACs); ECL § 75-0103(14)(d) (same); *id*. § 75-0109(4)(b) (same).
[5] *See* ECL § 75-0109(3)(d) (emphasis added).
[6] CLCPA § 7(3) (emphasis added).

decisions related to applicable permits as set forth in the policy, including renewals or modifications where emissions and pollution levels will remain the same as in previous permits.

II. ADDITIONAL GUIDANCE IS REQUIRED ON PREPARING DISPROPORTIONATE BURDEN REPORTS

The final version of DEP 23-1 should provide more guidance regarding 1) when a disproportionate burden report is required, and 2) the information used to prepare a disproportionate burden report.

Under Draft DEP 23-1 "[i]ncreases 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."[7] As discussed in Section I, a disproportionate burden report should be required for any applicable permitting decision, including permit renewals and modifications that continue to allow existing levels of GHG or co-pollutant emissions. Additionally, the final version of DEP 23-1 should recognize that Section 7(3)'s broad directive that agencies "shall not disproportionately burden disadvantaged communities" encompasses burdens other than air pollution.

In enacting the CLCPA, the Legislature took note of the "the vulnerability of disadvantaged communities, which bear environmental and socioeconomic burdens as well as legacies of racial and ethnic discrimination."[8] The statute's legislative findings similarly acknowledge "[t]he complexity of the ongoing energy transition, the uneven distribution of

[7] Draft DEP 23-1 Section V(4).
[8] CLCPA § 1(7).

economic opportunity, and the disproportionate cumulative economic and environmental burdens on communities."[9] The Climate Action Council Scoping Plan affirms that:

> A fundamental objective of New York's nation-leading climate and energy agenda 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 to remedy the structural causes that underpin these burdens.[10]

Additionally, criteria used to determine whether a community is "disadvantaged" include multiple types of health, climate risk, and environmental burdens, from the presence of brownfields to extreme heat projections and wastewater discharges.[11]

DEP 23-1 must therefore cover pollution burdens on DACs other than GHG and co-pollutant air emission burdens. For example, DEP 23-1 applies to State Pollutant Discharge Elimination System Permits "for facilities withdrawing and using over 20 [million gallons per day] of water for cooling purposes," such as power plants with cooling water intake structures.[12] These power plants with cooling water intake structures burden surrounding communities with both air pollution and discharges of pollutants into water.[13] Under Section 7(3), DEC must ensure that any DACs located near these facilities are protected from harmful air and water pollution as well as impacts like excess noise or odors. Accordingly, the final version of DEP 23-1 should state that, for the purposes of Preliminary Screening, the "affected area of the proposed action includes the facility itself and areas reasonably expected to experience off-site impacts

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[9] *Id*. § 1(11).
[10] N.Y. State Climate Action Council, New York State Climate Action Council Scoping Plan 5 (Dec. 2022), https://climate.ny.gov/resources/scoping-plan/ (hereinafter "Scoping Plan").
[11] *See* New York State's Disadvantaged Communities Criteria (Sept. 2023), https://climate.ny.gov/-/media/Project/Climate/Files/Disadvantaged-Communities-Criteria/LMI-daccriteria-fs-1-v2_acc.pdf.
[12] Draft DEP 23-1 Section V(1).
[13] *See, e.g.*, Kathiann M. Kowalski, *Harmful Lake Erie Algal Blooms Worsened by Power Plant Pollution*, Energy News Network (Jan. 25, 2016), https://energynews.us/2016/01/25/harmful-lake-erie-algal-blooms-worsened-by-power-plant-pollution/.

from GHGs, co-pollutants, *and other pollution burdens* associated with operation of the facility."[14] Disproportionate burden reports should also assess potential burdens resulting from pollution other than air pollution, such as water contamination, noise, and odor.

Additionally, the policy should provide more guidance on the use of data in a disproportionate burden report. Draft DEP 23-1 provides that a disproportionate burden report should include relevant baseline data on existing burdens and environmental or public health stressors already borne by the disadvantaged community.[15] Some Commenters have observed through their experience with community air monitoring efforts that standardizing data collection is crucial. Applicants should also use robust data that provides information at the community scale where feasible. Specifying clear standards for the type of data that can be used, such as requiring that data are collected by government sources, nonprofit academic institutions, community-based organizations, and/or from sources that are peer-reviewed, will ensure the integrity and accuracy of disproportionate burden reports.

III. ROBUST PUBLIC PARTICIPATION IS CRITICAL TO ENSURING EQUITY

Empowering communities to "participate as equal partners at every level of decision-making" is a pillar of environmental justice.[16] Because Section 7(3) is key for resolving the uneven distribution of economic opportunity and the cumulative economic and environmental burdens in communities, public participation in implementing Section 7(3) is critical. DEP 23-1 should expand on the public participation process provided by the Department's Environmental Justice Permitting Policy (CP-29) with a renewed emphasis on community engagement.

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[14] *See* Draft DEP 23-1 Section V(3)(c). Commenters request that the DEC include the italicized text to the final version of DEP 23-1.
[15] *Id*. Section V(6).
[16] First Nat'l People of Color Env't Leadership Summit, Principles of Environmental Justice (1991), *available at* https://www.ejnet.org/ej/principles.html.

Providing for robust public participation is even more important in light of the New York State Comptroller's recent audit of the DEC's air permitting program, which found that the Environmental Justice Permitting Policy is often not enforced. The Comptroller reported that:

> Gaps in the [Environmental Justice Permitting] Policy create a risk that the Department's air permitting process is not adequately allowing residents, particularly low-income and minority communities across the State within potential EJ communities, to access information about the harmful effects of pollution emitted in their communities and limiting opportunities to address concerns about their community's air quality, which could disproportionately impact residents of EJ areas.[17]

The audit further found that DEC staff do not always enforce the Environmental Justice Permitting Policy, and that many facilities are deemed exempt under exceptions in the Policy.[18]

Under Draft DEP 23-1, for a permit subject to CLCPA Section 7(3), the applicant would need to prepare a public participation plan under 6 NYCRR 621.3(a)(3) following guidance provided by CP-29.[19] Draft DEP 23-1 would also require applicants to "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."[20] Commenters agree that DEP 23-1 should expand on CP-29 and that community input into project design measures is critical.[21] In order to ensure meaningful public participation and fulfil the promise of

[17] Office of the N.Y. State Comptroller, Rep. 2021-S-41, Department of Environmental Conservation: Monitoring of Air Quality 12 (Sept. 2023), https://www.osc.state.ny.us/files/state-agencies/audits/pdf/sga-2023-21s41.pdf.
[18] *Id*. at 14.
[19] Draft DEP 23-1 Section V(5).
[20] *Id*.
[21] While community input into potential project benefits is valuable, benefits should not be considered in a disproportionate burden report. As DEC recognizes, any burden must be mitigated with design measures that achieve emissions reductions equivalent to the emissions attributable to the project. *See* Draft DEP 23-1 Section V(6)(b). A burden cannot be allowed on the basis that a project might also produce a benefit.

Section 7(3), Commenters recommend that the final DEP 23-1 include the following requirements:

(1) The applicant will hold public hearings to ensure that the public can comment on three key aspects of the process: the preliminary screen for whether the project impacts a DAC, the disproportionate burden report, and design measures meant to avoid or redress any disproportionate burdens;

(2) Public sessions must take place after business hours to increase attendance by residents;

(3) Public notices must be written in, and public sessions must be held in, the top five languages spoken in the region;

(4) The agency or applicant/project proponent must publicly disseminate a complete description of the application or request that is understandable at the 8th grade proficiency level, and which is made available at least one week in advance of any public session as well as at the public session;

(5) The applicant/project proponent or agency must respond to public comments in a timely manner and justify why they are or are not changing their proposal based on the public comments;

(6) The DEC must determine if the public comment session was adequate and if the response to public comments was adequate, and if not, require the applicant to extend the public comment process;

(7) The public participation process must allow members of the potentially affected DAC the opportunity to provide meaningful input on potential project design measures.

IV. GUARDRAILS ARE REQUIRED TO ENSURE THAT PROJECT DESIGN MEASURES ARE EFFECTIVE AND ADVANCE EQUITY

The final version of DEP 23-1 must clarify that any "project design measures" proposed by the project proponent or DEC must be commensurate to the disproportionate burden resulting from the project, and thereby ensure that a project will not disproportionately burden the disadvantaged community. The draft policy guidance states that "[w]here 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."[22] It helpfully specifies that project design measures must be "real, quantifiable, permanent, verifiable, and enforceable."[23] However, Draft DEP 23-1 does not include any additional guardrails or guidelines to allow regulated parties and residents of DACs to assess the sufficiency of a "project design measure." Instead, the draft policy provides a non-exhaustive list of "examples" of project design measures that applicants can propose to ensure that a project will not disproportionately burden a DAC.[24]

The final version of DEP 23-1 must include actual guardrails to ensure that "project design measures" completely remedy disproportionate burdens that would otherwise result from a proposed project or activity. Commenters are concerned that merely providing a list of "examples," rather than an exhaustive list of appropriate types of "project design measures," leaves the door open to applicants to propose design measures that will not fully address disproportionate burdens. Furthermore, specific design measures listed in Draft DEP 23-1 are manifestly inadequate for redressing the disproportionate burdens that will arise as a result of projects covered by DEP 23-1. For example, "physical mitigation, such as the planting and

[22] *See* Draft DEP 23-1 Section V(6)(b).
[23] *Id*.
[24] *Id*.

upkeep of trees" will not reduce co-pollutants even if it could contribute to greenhouse gas reductions over the long term. In addition, simply adding electric vehicle charging stations without any commitment to use electric vehicles at the permitted facility similarly is not guaranteed to eliminate a project's GHG and co-pollutant emissions that contribute to disproportionate burdens. Furthermore, without strict guardrails, "financial mitigation" would simply allow applicants to "pay to pollute" and externalize the harms to disadvantaged communities. There is no dollar amount that can undo the damage done to a DAC resident's cardiovascular system by exposure to PFOA from an incinerator, or to that resident's lungs by NOx emissions from a peaker plant. Allowing such harm to DACs would undermine the CLCPA's goal of remedying environmental injustice and addressing pollution hotspots.

Accordingly, the final version of DEP 23-1 should provide clearer guidelines for developing project design measures including:

(1) Requiring applicants to develop an implementation and monitoring plan to ensure that the mitigation measures are fully implemented.

(2) Requiring that project design measures are included in permits as enforceable conditions.

(3) Requiring applicants to completely remedy disproportionate burdens. Section 7(3) unambiguously states that DEC cannot disproportionately burden a DAC, and it follows that the statute requires disproportionate burdens to be eliminated rather than only partially mitigated. For example, if a project is expected to increase the amount of PM 2.5 in a DAC by 5 $\mu g/m^3$ during a 24-hour period, then the "project design measure" must ensure that PM 2.5 is reduced by at least 5 $\mu g/m^3$ during the 24-hour period in the DAC. A project design measure that reduces PM 2.5 by only 4 $\mu g/m^3$ during the 24-hour period

would still allow a project to result in a disproportionate, albeit smaller, burden on the DAC. Additionally, because Section 7(3) requires agencies to prioritize *reductions* of greenhouse gas and co-pollutant emissions in DACs, DEC should encourage applicants to implement project design measures that would reduce pollution in the affected DAC below the existing baseline wherever feasible.

(4) Requiring that applicants timely implement project design measures to ensure that no disproportionate burdens occur. If a burden stemming from a project will cause DAC residents irreparable harm, this means the project design measure must prevent the burden in the first place. If a burden stemming from a project is reparable, then the project design measure must fully remedy the burden within a reasonable period of time.

(5) Specifying that project design measures must directly correspond to the disproportionate burden resulting from the project. In other words, the burdens addressed by the project design measure must be the same in kind as the burdens resulting from the project. For example, if the project contributes to NOx emissions in a DAC, an appropriate project design measure would be one that reduces NOx in that DAC. Similarly, if a project is likely to release PFOA in a DAC, then an appropriate project design measure would be one that reduces PFOA levels in the DAC. By contrast, it would not be appropriate to address the aforementioned NOx and PFOA pollution burdens with a project design measure that does not address those pollutants—such as a measure that would reduce GHG emissions through the planting of trees.

(6) Specifying that alternative process technologies that do not reduce *both* GHG emissions and co-pollutants, such as hydrogen combustion that creates high NOx emissions, are not sufficient project design measures to alleviate burdens on DACs. Similarly, carbon

capture and sequestration, which does not reduce co-pollutant emissions, should not be an allowable measure to alleviate disproportionate burdens from any project that emits co-pollutants.

(7) Ensuring that project design measures do not create or contribute to burdens in the impacted DAC or any other DAC, for example, by using methods of reducing GHGs that result in non-GHG pollution.

(8) Disfavoring financial mitigation, except as a last resort where it would be effective. The project proponent must show that: a) it would be impossible for the proponent to directly implement the project design measure, and b) such financial mitigation will result in a complete, timely, and in-kind remedy for the disproportionate burden resulting from the project on the DAC. Such financial mitigation would require that the applicant, rather than the disadvantaged community, be responsible for the proper disbursement of funds. For example, if the applicant allocates funding to the DAC for the installation of equipment meant to reduce a co-pollutant such as NOx in the community, the applicant must ensure that the funds are disbursed in a manner that allows for the timely installation of any new equipment to fully eliminate NOx resulting from the project.

V. CONCLUSION

We appreciate DEC taking an initial step to provide guidance on Section 7(3), a critical provision of the CLCPA that seeks to remedy historical injustices and protect and promote equity in New York's clean energy transition. While we support many aspects of the draft policy, several deficiencies must be addressed when DEP 23-1 is finalized, including: (1) expanding the policy to expressly cover all permit modifications and renewals; (2) providing additional guidance about when disproportionate burden reports are necessary and about appropriate data for those

reports; (3) allowing for meaningful and robust public participation; and (4) creating guardrails to ensure that project design measures are effective and equitable. DEC should also acknowledge that Section 7(3) applies to all agency decisions—not only to permitting decisions—and DEC should develop additional guidance in the future that would apply to the broad range of agency actions that fall under Section 7(3).

Respectfully submitted,

Alliance for a Green Economy

Bronx Council for Environmental Quality

Bronx Institute for Urban Systems

Campaign for Renewable Energy

Center for Sustainable Urban Development Columbia Climate School

Citizens' Climate Lobby Brooklyn

CIV: Lab

Clean and Healthy NY

Community Action Services

Cooper Square Committee

Dayenu

Earthjustice

FrackbustersNY

HabitatMap

Harlem River Working Group

Jewish Climate Action Network NYC

The Point CDC

Kinetic Communities

Long Island Progressive Coalition

Nancy E Anderson Associates

Natural Resources Defense Council

New Yorkers for Clean Power
New York Lawyers for the Public Interest

North American Climate Conservation and Environment

NY Renews Coalition

PUSH Buffalo

Red Hook Initiative

Regional Plan Association

Riders Alliance

Sierra Club Atlantic Chapter

South Bronx Unite

The Climate Reality Project Western New York Chapter

The Climate Solutions Accelerator of the Genesee-Finger Lakes Region

Third Act Upstate New York

Tompkins County Climate Protection Initiative

Vote SolarWaterfront Alliance

WE ACT for Environmental Justice

350NYC.org

350Brooklyn