May 7, 2025

Via Email to SEQRA617@dec.ny.gov

New York State Department of Environmental Conservation
Division of Environmental Permits
625 Broadway
Albany, NY 12233-1750

Re: Comments on Proposed Part 617 Regulatory Changes

Earthjustice and New York Lawyers for the Public Interest submit the following comments on behalf of WE ACT for Environmental Justice, Riverkeeper, South Bronx Unite, Environmental Advocates of New York, Clean & Healthy New York, and Natural Resources Defense Council (collectively, "Cumulative Impacts Coalition" or "Coalition"). The Cumulative Impacts Coalition worked to enact the Environmental Justice and Siting Law ("EJSL") and appreciates the opportunity to submit comments on New York State Department of Environmental Conservation's ("DEC's") first phase of rulemaking under the law. The proposed regulations at issue in this phase pertaining to the State Environmental Quality Review Act ("SEQRA") have the broadest applicability of all the changes mandated by the EJSL and are critical to prevent further pollution burdens and help reduce pollution impacts in overburdened and vulnerable communities.

The Cumulative Impacts Coalition appreciates the effort DEC put into crafting this regulatory framework, including detailed guidance for project applicants and lead agencies. Most projects in New York, even if they have adverse impacts on the environment or human health, do not require a permit from DEC. However, many such projects are subject to SEQRA, which provides the only opportunity for communities to understand these impacts, have a voice in the approval process, and advocate for avoidance and/or mitigation of environmental harms. Because implementation of SEQRA is distributed across many agencies and municipalities, clear regulations and guidance are critical for lead agencies and project applicants across the state to be able to properly assess impacts on disadvantaged communities ("DACs").

The Coalition strongly supports these regulations but believes they should be improved to better clarify and incorporate two key principles at the heart of the EJSL: first, that DACs experience disproportionate pollution burdens due to having the highest levels of pollution in the state and/or being most vulnerable to health impacts of the pollution they experience; and second, that pollution from proposed projects can interact with these existing stressors in a way that exacerbates existing burdens and vulnerabilities, making that pollution more harmful in many DACs than it would be in other, less burdened communities.

First, while DEC's goal in developing the Disadvantaged Community Assessment Tool ("DACAT" or the "Tool") to create an easy-to-use tool for project applicants to determine

cumulative burden makes sense, the Tool itself, by drawing a bright line between "more comparatively burdened" and "less comparatively burdened" DACs, may have unintended consequences such as concentration of additional environmental burdens in DACs designated as comparatively less burdened. Instead, all DACs should be presumed to have disproportionate pollution burdens due to their high levels of pollution as compared to the rest of the state and/or the interaction of their pollution burdens with the high levels of population vulnerability they experience. New York has already done a comprehensive screen for cumulative and disproportionate pollution burdens and designated DACs pursuant to the Climate Leadership and Community Protection Act ("CLCPA").

Additionally, as DEC notes in its guidance, a lead agency's SEQRA analysis should focus on whether and to what extent the project will contribute additional pollution to an area that already bears a disproportionate pollution burden. DEC should make clear in the environmental assessment forms ("EAFs") and its guidance that where a project has some pollution impact, that impact should be considered *more likely to be significant* if it affects an area with a disproportionate pollution burden.

Finally, DEC must also ensure that the SEQRA regulations do not create confusion for the permitting provisions of the EJSL, for future regulations under those provisions, or for the CLCPA. Many projects will be reviewed under CLCPA Section 7(3), the EJSL changes to SEQRA, and the EJSL permitting provisions. While review can and should be streamlined, regulations and guidance must not confuse standards under SEQRA regarding the likelihood of significant impact with thresholds for requiring a burden report under the permitting provisions of the EJSL or the standards in the law for denying permits.

The Coalition appreciates that these regulations—while making only minor changes to the regulatory text—represent an effort to fundamentally shift the way state agencies and municipalities across the state consider environmental harm under SEQRA. By enacting both the CLCPA and the EJSL, the legislature put New York on the vanguard of a more comprehensive and equitable approach to environmental impact assessment and decision-making. The Coalition looks forward to continuing to collaborate with DEC on these and future regulations as it works to implement this new approach.

I. THE EJSL REGULATIONS ARE ESSENTIAL TO PREVENT EXACERBATION OF DISPROPORTIONATE BURDENS IN DACS AND PROTECT HEALTH.

The EJSL's legislative findings and intent states:

> The legislature . . . declares that there has been an inequitable pattern in the siting of environmental facilities in minority and economically distressed communities, which have borne a disproportionate and inequitable share of such facilities. As a result of the inequitable pattern in the siting of environmental facilities, minority and economically distressed communities bear a greater environmental health burden due to the cumulative pollution exposure from multiple facilities.[1]

[1] 2022 N.Y. Sess. Laws Ch. 840 (S. 1031B) § 1 (as amended by 2023 N.Y. Sess. Laws Ch. 49 (A. 1286).

A robust body of scientific and sociological research supports this declaration. Moreover, the regulations can serve to remedy a pattern of prior decisions under SEQRA that minimized the impact of additional pollution in overburdened communities.

A. Certain communities bear disproportionate cumulative environmental and other stressors, and science demonstrates that pollution from multiple sources and existing stressors interact to cause greater harm.

The EJSL and the proposed regulations are grounded in robust scientific and sociological research demonstrating that: a) certain communities across the United States and New York bear a disproportionate share of polluting facilities and other environmental harms, along with health conditions and other stressors, due to past and present discriminatory practices; and b) multiple environmental and health stressors combine to create a higher total environmental burden in those communities, an interaction environmental justice advocates and scientists call "cumulative impacts."

"Multiple legacies of discrimination, including redlining and land use decision-making, have shaped" policy decisions that have led to "locations of emissions infrastructure, including roads, rail lines, industrial facilities, ports, and other major sources of pollution."[2] In regions described as "sacrifice zones," residents often live "immediately adjacent to heavily polluted industries" creating "some of the most polluted and poisoned places in America."[3] People of color and those with lower incomes are more likely to live in or near heavily polluted areas and are more likely to die of environmental causes.[4] Overall, African Americans are 75% more likely than their White counterparts to live near commercial facilities producing noise, odor, traffic, or emissions that directly affect the local population.[5] Children living in poverty are more likely to live in communities filled with heavily polluting industries, hazardous waste sites, and contaminated water and soil; in old housing with deteriorating lead-based paint; and with limited access to healthy food, among other harmful conditions.[6]

New York's own state actions, including supporting redlining and targeting certain communities for polluting public infrastructure projects like highways or wastewater treatment

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[2] Haley M. Lane et al., *Historical Redlining is Associated with Present-Day Air Pollution Disparities in U.S. Cities*, 9 Env't Sci. & Tech. Letters 345, 345 (2022), https://doi.org/10.1021/acs.estlett.1c01012. *See also* Danielle Vermeer, *Redlining and Environmental Racism*, University of Michigan School for Environment and Sustainability (Aug. 16, 2021), https://seas.umich.edu/news/redlining-and-environmental-racism.

[3] Robert D. Bullard, *Sacrifice Zones: The Front Lines of Toxic Chemical Exposure in the United States*, 119 Env't Health Persps. A266 (June 2011), https://doi.org/10.1289/ehp.119-a266. *See also* Paul Mohai & Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, 10 Env't Rsch. Letters 115008, 2, 16–17 (2015), https://doi.org/10.1088/1748-9326/10/11/115008; Manuel Pastor, Jim Sadd, & John Hipp, *Which Came First? Toxic Facilities, Minority Move-In, and Environmental Justice*, 23 J. Urb. Aff. 1 (Dec. 2016), https://doi.org/10.1111/0735-2166.00072.

[4] Aneesh Patnaik et al., Princeton University, *Racial Disparities and Climate Change*, The Princeton Student Climate Initiative (PSCI) (Aug. 15, 2020), https://psci.princeton.edu/tips/2020/8/15/racial-disparities-and-climate-change.

[5] *Id*.

[6] Shava Cureton, *Environmental Victims: Environmental Injustice Issues that Threaten the Health of Children Living in Poverty*, 26 Revs. on Env't Health 141 (Sept. 13, 2022), https://doi.org/10.1515/reveh.2011.021.

plants, have led to higher levels of pollution in low-income communities and communities of color within the state. As a prominent example, highways in New York have been used to divide and disenfranchise communities of color in the Bronx, Buffalo, and Syracuse, causing pollution burdens associated with transportation to fall along racial lines.[7]

The impacts of redlining and highway siting are reflected in the current disproportionate exposure to air pollutants from motor vehicles, one of the largest sources of air pollution in New York. A recent analysis found that Asian, Latino, and Black New Yorkers are exposed to higher levels of particulate matter from cars, trucks, and buses than White New Yorkers.[8] 74% of New York's Black population and nearly 80% of the State's Asian population live in areas where on-road particulate matter concentrations attributable to transportation exceed State averages. Asian New Yorkers are exposed to twice as much particulate matter pollution from vehicles compared to White New Yorkers, while Latino and Black New Yorkers are exposed to 81% and 72%, respectively, more particulate matter pollution from vehicles compared to White New Yorkers.[9] Emissions of nitrogen dioxide from diesel traffic—a precursor to ozone, which can cause cardiovascular and respiratory illness—also disproportionately harm people who are Black, Hispanic or Latino, Asian, and Native American in New York City.[10]

The concentration of pollution, the resulting health disparities, and other socioeconomic vulnerabilities in certain communities—known as "cumulative impacts"—leave these communities more at risk of harm from pollution. The U.S. Environmental Protection Agency ("EPA") defines cumulative impacts as "the totality of exposures to combinations of chemical and nonchemical stressors and their effects on health and quality-of-life outcomes."[11] As the National Environmental Justice Advisory Council (2004) has stated, "disadvantaged, underserved, and overburdened communities come to the table with preexisting deficits of both a

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[7] *See* Deborah N. Archer, *"White Men's Roads through Black Men's Homes": Advancing Racial Equity Through Highway Reconstruction*, 73 Vanderbilt L. Rev. 1259, 1264–65, 1269, 1275, 1277–78, 1292–93 (2020), https://scholarship.law.vanderbilt.edu/vlr/vol73/iss5/1; Omar Freilla, *Burying Robert Moses's Legacy in New York City*, in *Highway Robbery: Transportation Racism and New Routes to Equity*, 77–80 (Robert D. Bullard, Glenn S. Johnson & Angel O. Torres eds., 2004); Angelica A. Morrison, *Expressway Seen as a Symbol of Racial Inequity, Health Problems*, WBFO (Jan. 15, 2018), https://www.wbfo.org/local/2018-01-15/expressway-seen-as-symbol-of-racial-inequity-health-problems.

[8] Union of Concerned Scientists, *Inequitable Exposure to Air Pollution from Vehicles in New York State* 1 (2019), https://www.ucsusa.org/sites/default/files/attach/2019/06/Inequitable-Exposure-to-Vehicle-Pollution-NY.pdf.

[9] *Id.* at 1.

[10] Mary Angelique G. Demetillo et al., *Space-Based Observational Constraints on NO_2 Air Pollution Inequality from Diesel Traffic in Major Cities*, 48 Geophysical Rsch. Letters 3–4 (2021), https://doi.org/10.1029/2021GL094333. The New York State Prevention Agenda 2019-2024 notes the "[e]xtensive evidence" linking ozone with respiratory and cardiovascular illness and death and establishes a goal to "[r]educe exposure to outdoor air pollutants," with an emphasis on vulnerable groups. *See* N.Y. State Dep't of Health, *New York's State Health Improvement Plan: Prevention Agenda 2019–2024*, at 72–73 (updated Sept. 2, 2021), https://www.health.ny.gov/prevention/prevention_agenda/2019-2024/docs/ship/nys_pa.pdf.

[11] EPA, *Interim Framework for Advancing Considerations of Cumulative Impacts* 2 (Nov. 2024), https://www.epa.gov/system/files/documents/2024-11/epa-interim-cumulative-impacts-framework-november-2024.pdf.

physical and social nature that make the effects of environmental pollution more, and in some cases unacceptably, burdensome."[12]

There is a developing scientific consensus that consideration of cumulative impacts and cumulative risk in environmental decision-making is necessary to protect human health.[13] More than a decade ago, the National Academy of Sciences ("NAS") suggested that the EPA consider chemical and non-chemical stressors as well as how these stressors work in concert to promote adverse health outcomes.[14] More recently, the NAS called on agencies to "move beyond source-by-source and pollutant-by-pollutant research and risk assessment and toward a fuller characterization of the cumulative and potentially synergistic health risks from multiple environmental and social stressors that disproportionately impact communities of color and the poor."[15] EPA's Children's Health Protection Advisory Committee has recommended addressing cumulative impacts across EPA, including by adding new indicators in the *America's Children and the Environment Report*, an EPA administered report on children's environmental health.[16]

These proposed amendments to 6 NYCRR Part 617 are thus necessary to ensure New York's environmental review process helps undo legacies of discrimination, as set forth in the EJSL's legislative intent. As the EPA has recently noted, when decisions including environmental policy, review, or permitting "are made without considering the lived experience and the totality of impacts communities face, they can perpetuate or exacerbate the disproportionate concentration of environmental burdens and the lack of environmental benefits in communities with environmental justice concerns."[17]

B. Prior to the EJSL, some polluting projects in DACs have evaded full environmental review.

Over the past several decades, despite the collection of evidence on cumulative impacts and overburdened communities, polluting projects in DACs in New York have sometimes managed to evade preparing a full Environmental Impact Statement ("EIS") under SEQRA. Even after DEC adopted internal policies like Commissioner's Policy 29 ("CP-29") to require enhanced attention to environmental justice and a full EAF for unlisted projects affecting

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[12] National Environmental Justice Advisory Council, Ensuring *Risk Reduction in Communities with Multiple Stressors: Environmental Justice and Cumulative Risks/Impacts* 23 (Dec. 2004), https://www.epa.gov/sites/default/files/2015-02/documents/nejac-cum-risk-rpt-122104.pdf.

[13] Nicolle S. Tulve, et al., *Challenges and Opportunities for Research Supporting Cumulative Impact Assessments at the United States Environmental Protection Agency's Office of Research and Development*, 30 Lancet Reg'l Health–Ams. 100666 (Feb. 2024), https://doi.org/10.1016/j.lana.2023.100666.

[14] National Academy of Sciences, *Science and Decisions: Advancing Risk Assessment*, 9–10, 219–23 (2009), https://nap.nationalacademies.org/catalog/12209/science-and-decisions-advancing-risk-assessment.

[15] National Academy of Science, Engineering, and Medicine, *Transforming EPA Science to Meet Today's and Tomorrow's Challenge*s 35 (2023), https://doi.org/10.17226/26602.

[16] EPA Children's Environmental Health Protection Advisory Committee, Comments on America's Children and the Environment Report 4 (Feb. 2023), https://www.epa.gov/system/files/documents/2023-03/Future%20Direction%20of%20the%20Americas%20Children%20and%20the%20Environment%20Report.%20prepublication.pdf.

[17] EPA, *Interim Framework for Advancing Consideration of Cumulative Impacts* 9 (Nov. 2024), https://www.epa.gov/system/files/documents/2024-11/epa-interim-cumulative-impacts-framework-november-2024.pdf.

Potential Environmental Justice Areas, many polluting projects in DACs continued to be deemed unlikely to have significant adverse impacts.[18] In some cases, where an area was already highly polluted, lead agencies might even conclude that the addition of more pollution would not have a significant impact *due to the existing industrial or polluted nature of the area*.[19] The EJSL and proposed SEQRA regulations are meant to ensure this does not happen and that, on the contrary, a project's contribution to an existing pollution burden is one of the criteria in determining whether the project is likely to have significant impacts.

Many large state and municipal polluting infrastructure projects have been sited in disadvantaged communities in New York City without full environmental impacts review. For example, the North River Sewage Treatment Plant in Harlem received a Finding of No Significant Impact under the National Environmental Policy Act, the federal equivalent of SEQRA, in 1979 and again with respect to modifications of the facility in 1993.[20] The environmental assessment focused primarily on the plant's improvements to water quality in the Hudson River and failed to take into account air pollution and odors that would be experienced by the neighboring community.[21] Similarly, the New York Power Authority ("NYPA") sited 11 gas-fired electric generating plants in New York City and Long Island—nearly all in environmental justice communities—evading review under the Public Service Law by promising to limit the generation capacity of each to just under the threshold for review, and similarly issued a negative declaration under SEQRA.[22] Courts later found that the negative declaration was arbitrary and capricious because NYPA didn't properly consider particulate matter impacts, but the facilities were already mostly constructed and continue to operate today.[23] The town of North Tonawanda recently determined that the establishment of a cryptocurrency mining operation at a gas-fired power plant—which would keep the plant running far more than it had been, resulting in a significant increase in air pollution, greenhouse gas emissions, and noise—was unlikely to have a significant impact and did not require a full EIS.[24]

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[18] DEC, *Commissioner Policy 29, Environmental Justice and Permitting* (Mar. 19, 2023), https://dec.ny.gov/regulatory/guidance-and-policy-documents/commissioner-policy-29-environmental-justice-and-permitting.

[19] *See Tolbert v. Ohio Dep't of Transp.*, 992 F. Supp. 951 (N.D. Ohio 1998) (plaintiffs challenged as racially discriminatory the determination in EIS that no sound barriers were necessary along portion of highway in majority-Black neighborhood because there was already high industrial noise from other sources), rev'd, 172 F.3d 934 (6th Cir. 1999); *see also* U.S. Department of Housing and Urban Development, Letter of Findings of Noncompliance with Title VI and Section 109 *Southeast Environmental Task Force, et al. v. City of Chicago* Case No. 05-20-0419-6/8/9 (July 2022), https://www.hud.gov/sites/dfiles/Main/documents/Letter_of_Finding_05-20-0419_City_of_Chicago.pdf; NYC Mayor's Office of Climate & Environmental Justice, *EJNYC: A Study of Environmental Justice Issues in New York City* (2024), https://climate.cityofnewyork.us/wp-content/uploads/2024/04/EJNYC_Report_FIN_20240424.pdf.

[20] Vernice D. Miller, *Planning, Power and Politics: A Case Study of the Land Use and Siting History of the North River Water Pollution Control Plant*, 21 Fordham Urb. L. J. 707, 713 (1994), https://ir.lawnet.fordham.edu/ulj/vol21/iss3/12.

[21] *Id.*

[22] *See* Rebecca M. Bratspies, *Public Housing, Private Owners: Sustainable Development Lessons from the Fight to Shut the Poletti Power Plant*, SSRN 5–6 (May 6, 2020), http://doi.org/10.2139/ssrn.3593946.

[23] *Matter of UPROSE v. Power Auth. of State of N.Y.*, 285 A.D.2d 603, 606-07 (2nd Dep't 2001); *Matter of Silvercup Studios v. Power Auth. of State of N.Y.*, 285 A.D.2d 598 (2nd Dep't 2001).

[24] Verified Petition at 7, *Sierra Club et al. v. City of North Tonawanda*, No. E176242/2021 (Sup. Ct. Niagara Cnty. 2021) ECF No. 1.

In 2011, the New York City Industrial Development Authority ("NYCIDA") determined that building a new warehouse for FreshDirect food delivery service—which would bring up to a thousand new diesel truck trips each day through neighborhoods in the South Bronx with some of the highest childhood asthma levels in the state—was not likely to have a significant impact on the environment pursuant to SEQRA. The NYCIDA found that the project would not significantly increase traffic or other impacts above what had been contemplated in a generic EIS for the site that was completed in 1993 without considering additional residents in the surrounding neighborhood since that date, the impacts on sensitive populations, or the cumulative impacts.[25]

These examples demonstrate that these regulations are needed to ensure that projects with potential pollution impacts on DACs receive thorough environmental review. This is especially important because mitigation of impacts under SEQRA is typically addressed only in a full EIS.

II. DEC MUST START WITH THE PRESUMPTION THAT DACS HAVE DISPROPORTIONATE POLLUTION BURDENS.

DEC should strengthen the SEQRA regulations by revising the definition of "disproportionate pollution burden" and incorporating that definition and the legislative intent of the EJSL into the regulatory text. First, DEC should amend the regulatory text to include the legislative intent of the EJSL as well as a definition of "disproportionate pollution burden." Second, it should revise its proposed definition of "disproportionate pollution burden" to better explain that communities with higher combined stressors are more vulnerable to the impacts of additional pollution and should clarify that all census tracts designated as DACs should be presumed to have a disproportionate pollution burden.

A. DEC should incorporate in the SEQRA regulations the legislative intent of the EJSL.

The legislature made clear that its intent in enacting the EJSL was to actively reduce disproportionate pollution burdens that have resulted from a decades-long practice of inequitable siting of polluting facilities and infrastructure in minority and lower-income communities. DEC should expressly incorporate the legislative findings and purpose of the EJSL in SEQRA Rules, 6 NYCRR Part 617.1 (Authority, intent, and purpose).

Specifically, the legislature, in enacting the EJSL, emphasized that the law's purpose was to actively reduce the preexisting disproportionate vulnerabilities of DACs:

> The legislature further declares that there has been an inequitable pattern in the siting of environmental facilities in minority and economically distressed communities, *which have borne a disproportionate and inequitable share of such facilities. As a result of the inequitable pattern in the siting of environmental facilities, minority and economically distressed communities bear a greater environmental health burden due to the cumulative pollution exposure from*

[25] *See Matter of South Bronx Unite!*, 115 A.D.3d 607 (1st Dep't 2014).

> *multiple facilities*. Consistent with its commitment to providing equal justice for its citizens, the state has a responsibility to establish requirements for the consideration of such decisions by state and local governments in order to *ensure no community bears a disproportionate pollution burden, and to actively reduce any such burden* for all communities. 2024 N.Y. Sess. Laws (S. 1317) § 1, (emphases added).

Incorporating this intent into the SEQRA regulations will demonstrate to lead agencies, the regulated community, and courts that the EJSL amendments are core to the overall purpose of SEQRA.

B. DEC should adopt a presumption that DACs bear disproportionate pollution burdens for the purpose of the EJSL.

In designating DACs pursuant to the CLCPA, the Climate Justice Working Group ("CJWG") incorporated many criteria related to pollution burdens and population vulnerability and selected as DACs those that had the highest combined levels within the state. The communities designated as DACs have combined environmental, health and socioeconomic stressors higher than 65% of communities in the state. Based on the rigorous work of the CJWG identifying the outsized share of environmental harms within the state borne by DACs, as well as those communities' higher vulnerability to these harms, DEC has ample grounds for a presumption that DACs have disproportionate pollution burdens compared to the rest of the state.

The CJWG, tasked with developing criteria to identify DACs, is composed of representatives from rural and urban environmental justice communities statewide and representatives from the DEC, NYSERDA, and State Departments of Health and Labor.[26] After thorough public review, including a 235-day comment period, the CJWG approved the DAC criteria based on 45 indicators, identifying 35% of New York census tracts with the highest environmental burdens, vulnerabilities, and stressors.[27] The CJWG met 36 times before adopting the final DAC criteria.[28] The DAC criteria and identification factors were carefully chosen to

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[26] New York State, *Climate Justice Working Group*, https://climate.ny.gov/Resources/Climate-Justice-Working-Group (last visited Apr. 30, 2025); Affidavit of Alanah N. Keddell-Tuckey in Support of Respondents' Cross-Motion to Dismiss the Petition at ¶ 8, *Matter of Town of Palm Tree v. Climate Justice Working Group*, No. 20 CV-907000-23 (3d Dep't Oct. 13, 2023).

[27] DEC & NYSERDA, *New York State's Disadvantaged Communities Criteria*, https://climate.ny.gov/-/media/Project/Climate/Files/Disadvantaged-Communities-Criteria/LMI-daccriteria-fs-1-v3_acc.pdf (last visited Apr. 30, 2025). Because the CLCPA directs the CJWG to consider "groups that have historically experienced discrimination on the basis of race or ethnicity," the CJWG included race and ethnicity as a factor in its DAC identifying criteria. That factor has six indicators: percentages of Black, Latino/a or Hispanic, Asian, and Indigenous residents and people with limited English-proficiency, and historic redlining. Affidavit of Alanah N. Keddell-Tuckey in Support of Respondents' Cross-Motion to Dismiss the Petition at 5, *Matter of Town of Palm Tree v. Climate Justice Working Group*, No. 20 CV- 907000-23 (3d Dep't Oct. 13, 2023).

[28] Climate Act, *Climate Justice Working Group*, https://climate.ny.gov/Resources/Climate-Justice-Working-Group (last visited May 5, 2025); Affidavit of Alanah N. Keddell-Tuckey in Support of Respondents' Cross-Motion to Dismiss the Petition at ¶ 14. *Matter of Town of Palm Tree v. Climate Justice Working Group*, No. 20 CV- 907000-23 (3d Dep't Oct. 13, 2023). In consultation with data analytics experts, the CJWG considered over 170 potential indicators and narrowed the indicators chosen based on whether the data for that indicator was reliable and available, accurately represented an aspect of disadvantage identified by the CLCPA, and whether it was duplicative or highly correlative of another indicator. *Id.* at ¶¶ 18, 25–32, 29–30.

reflect environmental, climate, health and socioeconomic stressors that contribute to cumulative impacts, based on extensive scientific evidence and public review.

Other states and municipalities have also attempted to designate areas that have high cumulative impacts for the purpose of implementing legislation similar to the EJSL. While they have used somewhat different methodologies, jurisdictions like New Jersey and Chicago followed a similar approach to the CJWG of identifying multiple environmental, health and socioeconomic stressors; tallying up the burdens and comparing them with the rest of the jurisdiction; and selecting those areas with the highest combined stressor burden. In New Jersey, areas with the highest combined stressor burden are designated as overburdened communities,[29] and areas with the highest levels of stressors in Chicago are designated Environmental Justice Neighborhoods.[30]

Unlike New York, New Jersey and Chicago did not already have a cumulative impacts screening tool in place when enacting cumulative impacts legislation, so they needed to start from scratch. In New York, because the CJWG had already identified DACs pursuant to the CLCPA, the legislature decided to use the pre-designated DACs as the indicator of communities that are overburdened and need additional protection. The term "Disadvantaged communities" in the EJSL has the same meaning as defined in ECL 75-0101, the definitions of the CLCPA.[31] There is no need for DEC or lead agencies to perform additional complex analysis to determine whether communities have a disproportionate pollution burden. Instead, in accordance with the legislature's intent and the CJWG analysis, DEC should clarify that all DACs should be presumed to experience disproportionate pollution burdens.

It is also crucial to ensure that lead agencies and project applicants cannot rebut a presumption of a disproportionate pollution burden by pointing out that a DAC has low levels of a specific type of pollutant associated with their project. The concept of cumulative impacts requires assessment of the full environmental health burden on a community, which includes pollution, other environmental burdens, health stressors and socioeconomic stressors. The CJWG incorporated all these stressors into its analysis identifying those communities designated as DACs as those with the highest total burden compared to the rest of the communities in the state.

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[29] New Jersey created a two-step process for identifying overburdened communities with adverse cumulative stressors because New Jersey's initial screen for overburdened communities was solely based on community demographics. *See* N.J. Stat. Ann. § 13:1D-158(2). *See also* New jersey Department of Environmental Protection, *Guidance Document for Environmental Justice: New Rule N.J.A.C. 7:1C and Online Mapping Tool* (Apr. 12, 2023), https://dep.nj.gov/wp-content/uploads/ej/docs/njdep-ej-technical-guide.pdf.

[30] Chicago Department of Public Health, *Chicago Cumulative Impact Assessment: Chicago Environmental Justice Index Methodology* 3 (2023), https://Www.Chicago.Gov/Content/Dam/City/Depts/Cdph/Environment/Cumulativeimpact/2023-Nov/CIA_Chicagoenvironmentaljusticeindexmethodology_Updated_11.21.2023.Pdf.

[31] ECL § 70-0118(1)(a).

C. DEC should clarify its definition of existing disproportionate pollution burden in the regulations and guidance.

The definition of "disproportionate pollution burden" is a key element of the EJSL, and DEC should clarify it and incorporate it into the regulatory text. DEC mentions disproportionate pollution burdens in the draft regulations and multiple accompanying documents but defines the term only in interim guidance Question 6, defining it as pollution within the subject DAC that "is, or would be, significantly greater than that same burden in comparable non-disadvantaged communities, as a result of the proposed action."

This definition nods at the concept of cumulative impacts but is not explicit. Based on this definition, regulated parties may not understand why the burden of pollution in a DAC would be greater than *that same burden* in a non-DAC. The definition should clarify that a disproportionate pollution burden is "a level of environmental and other stressors that are higher in comparison to communities in the rest of the state, which makes the DAC more vulnerable to additional pollution than non-DACs."

DEC should make clear in its definition that causing or contributing to a "disproportionate pollution burden" means adding or perpetuating pollution in DACs, which are vulnerable to pollution because of a combination of environmental and socio-economic inequities that is higher than the rest of the state. As described above, the DAC criteria and identification factors already assess the disproportionate burdens experienced by certain communities. The definition of disproportionate pollution burden should incorporate the CJWG's determination and make clear that new pollution may interact with the existing burdens in DACs to cause increased harm. In this way, the law incorporates the concept of cumulative impacts—that new pollution interacts with existing burdens in a way that can amplify and exacerbate those burdens. The definition of disproportionate pollution burden should clearly reflect the intent of the law. [32]

DEC should also remove the term "significantly" from the definition of disproportionate pollution burden as it introduces additional subjective analysis. It also introduces potential confusion, since "significance" is a legal standard for assessing whether an EIS should be prepared pursuant to SEQRA and assessing whether DEC can approve a permit renewal or modification under the EJSL.

[32] While not directly at issue in the current proposed regulations, the Coalition notes that the permitting provisions of the EJSL rely on a presumption that DACs have disproportionate pollution burdens. If DEC does not presume that DACs have a disproportionate pollution burden, permit applicants may argue in every application that the affected DAC does not have a disproportionate pollution burden, and thus they do not have to prepare a burden report or receive increased scrutiny of their permit application. This would make the process more difficult for DEC and undermine the purpose of the EJSL.

III. DEC'S PROPOSED TOOL COMPARING DAC BURDEN LEVELS IS UNNECESSARY AND MAY SKEW DECISION MAKING.

As part of the guidance for implementing these regulations, DEC created the Disadvantaged Community Assessment Tool ("DACAT") which is "intended to be an initial screening tool to identify DAC census tracts that may warrant further consideration, analysis, and community input."[33] The DACAT and its accompanying maps distinguish between DACs that have so-called "comparatively higher burdens or vulnerabilities" and those that have "comparatively lower burdens or vulnerabilities," indicated in orange and blue respectively on the maps. The DACAT explains that in "orange" DACs there is "an increased likelihood that a proposed action may have a moderate to large impact on the DAC" and in "blue" DACs there is "a decreased likelihood that a proposed action may have a moderate or large impact on the DAC."[34] Approximately 54% of DACs are categorized as orange or yellow,[35] while 46% are categorized as blue. These categories are incorporated in DEC's proposed changes to the Short and Full Environmental Assessment Form ("SEAF" and "FEAF") that lead agencies complete as part of the SEQRA process.[36] Question 19(a) on the FEAF and Question 12 on the SEAF specifically ask if the DAC impacted by the project is "identified as having comparatively higher burdens or vulnerabilities" according to the DACAT.[37] If so, the lead agency checks the "[m]oderate to large impact may occur" box, and if not, the lead agency checks the "[n]o, or small impact may occur" box.[38] The lead agency then uses that answer in its evaluation of significance and evaluation of project impacts that decide whether it will do an EIS.

The Coalition has concerns about the DACAT's use in the environmental impact assessment process as well as in other contexts. Designating nearly half of all DACs as having "comparatively lower burdens or vulnerabilities" risks skewed outcomes and less protection of those DACs. The Coalition appreciates that DEC developed the DACAT with good intentions of providing non-subjective guidance to lead agencies on determining significance that incorporates total cumulative stressors. However, presuming that all DACs have disproportionate pollution burdens similarly sets a non-subjective standard and obviates the need for an additional

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[33] DEC, *State Environmental Quality Review Act (SEQR) Regulatory Revisions: Proposed Amendments to 6 NYCRR Part 617*, https://dec.ny.gov/regulatory/regulations/proposed-emergency-recently-adopted-regulations/state-environmental-quality-review-act-regulatory-revisions (last visited Apr. 30, 2025).

[34] DEC, *Disadvantaged Community Assessment Tool Methodology 6 NYCRR 617*, at 1 (2025), https://dec.ny.gov/sites/default/files/2025-01/part617risdactoolappa.pdf.

[35] The DACAT denotes Indigenous lands in yellow and automatically includes them in the comparatively higher burdens or vulnerabilities category. These comments include Indigenous lands in the "orange" DAC category for ease of reference.

[36] *See* DEC, *Draft Full Environmental Assessment Form*, https://dec.ny.gov/sites/default/files/2025-01/draftfeafchanges.pdf (last visited Apr. 30, 2025). The FEAF is designed for Type I actions, meaning that it is more likely that the agency will need to prepare an EIS. *See* DEC, *Full Environmental Assessment Form (FEAF) Workbook*, https://dec.ny.gov/regulatory/permits-licenses/seqr/eaf-workbooks/feaf#:~:text=When%20to%20Use%20the%20Full,being%20a%20Type%20I%20Action (last visited Apr. 30, 2025).

[37] *Draft Full Environmental Assessment Form*, *supra* note 36. DEC, *Draft Short Environmental Assessment Form* https://dec.ny.gov/sites/default/files/2025-01/draftseafchanges.pdf.

[38] *Id.*

screening tool. If DEC decides to finalize the DACAT, the agency should make clear that it is meant for use only in the SEQRA process and clarify that "less comparatively burdened" DACs still have higher burdens than surrounding non-DACs and merit protection under the EJSL and other laws.

A. By creating two tiers of DACs, the DACAT is likely to skew decision-making.

While the Coalition acknowledges not all DACs have the same level of overall burden, the Coalition has concerns about the implications of creating a bright line distinction between two tiers of DACs. The DACAT designates roughly 50% of DACs as higher burdened and roughly 50% as lower burdened. DEC states that the purpose of the DACAT is to identify which DACs may require increased scrutiny by the lead agency in the SEQRA process, but the inverse will also be true: that lead agencies will give less consideration to projects in those DACs designated as less comparatively burdened. The implication of the DACAT and associated guidance is that regardless of the type of project or its specific pollution impacts, blue DACs are less likely to need EISs and are less likely to be significantly impacted by pollution.

The proposed changes to the EAFs confirm that impacts in blue DACs are considered to be less significant regardless of the project's potential pollution. The framing of questions 19(a) in the FEAF and 12 in the SEAF can allow lead agencies to downplay the impacts of a project on a "blue" DAC or simply rely primarily on the project affecting a blue rather than an orange DAC to conclude there is unlikely to be a significant impact—even where the type or amount of pollution from a project may be significant. This could have the unintended consequence of applicants siting more projects in "blue" DACs than "orange" ones, placing more burdens on already disproportionately burdened communities because DEC has signaled they are not burdened *enough*.

Densely populated areas with multiple DACs in both tiers highlight the problem of bright-line categorization of DACs. In densely populated areas throughout the state, each census tract covers a very small area. Pollution travels. In an urban neighborhood, it is likely that a proposed project will affect both blue and orange DACs. For example, the Brooklyn neighborhood of East New York is entirely made up of both blue and orange DACs and has an area of just under two square miles.[39] Given the size of the neighborhood, it is highly likely that any project located within it will have pollution impacts on both blue and orange DACs and that the overall pollution burden on the neighborhood would increase if any polluting project were sited there–regardless of whether it was sited in an orange or blue DAC.

The DACAT and the proposed changes to the EAFs give no guidance about how lead agencies should handle a situation like East New York where a project may impact both types of DACs. Project applicants could seek to avoid increased scrutiny by siting a project in a less

[39] NYSERDA, *Disadvantaged Communities*, https://www.nyserda.ny.gov/ny/Disadvantaged-Communities (last visited May 1, 2025); DEC, *DAC Assessment Tool Maps - RIS Appendix B*, https://dec.ny.gov/sites/default/files/2025-01/part617risdactoolappbmaps.pdf (last visited May 1, 2025).

comparatively burdened DAC, even if it is directly adjacent to a DAC with higher comparative burdens. That would still increase the overall pollution burden in a disproportionately burdened neighborhood, but the applicant would have avoided increased scrutiny of the project.

The DACAT also fails to account for variance within DACs. Especially in geographically larger DACs, there are likely areas that have more concentrated pollution or where sensitive receptors are more likely to be impacted than other areas of the DAC.[40] For a project sited in a blue DAC, the lead agency can check the box for "smaller impact" without exploring whether the project is sited in a part of the DAC where increased pollution will have larger impacts. While DEC says the DACAT isn't the end of the inquiry, there is no guidance about how to incorporate analysis of this kind of nuance into the EAF or the significance determination. If DEC keeps the DACAT in place, it must provide additional guidance for further inquiry into impacts on the surrounding community regardless of whether the affected DAC falls into a blue, orange, or yellow category.

B. DEC should not rely on the DACAT.

The Coalition recommends that instead of the DACAT, lead agencies be required to start from the premise that all DACs have disproportionate pollution burdens. *See* section II *supra*. Lead agencies must then, with the assistance of the EAFs and the guidance in the SEQRA handbook, look at the magnitude and impacts of pollution from the proposed project and determine whether and to what extent it will increase the total burden on affected DACs. To the extent a project applicant or lead agency wishes to demonstrate that even though pollution from its project may affect a DAC, it would not cause or contribute to a disproportionate pollution burden on the DAC, it can use existing tools, such as the Disadvantaged Communities Criteria Maps on the NY Climate website.[41] Like the DACAT, the NY Climate DAC maps identify DACs and their population vulnerabilities and pollution burdens. The real difference between the two tools is that the DACAT creates two tiers of DACs. Since lead agencies are already required to take a hard look at the potential impacts of proposed projects, with the NY Climate maps available, they should not need the DACAT to take that hard look. In that case, however, DEC should include guidance clarifying that lead agencies cannot rebut a presumption of disproportionate pollution burden simply by showing that the type of pollution from their project is not experienced at high levels within the DAC. Instead, the total cumulative burden must be the baseline for analysis.

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[40] DEC, Draft SEQR Workbook Guidance - RIS Appendix C (2025), https://dec.ny.gov/sites/default/files/2025-01/part617risguidanceappc.pdf; DEC, *Appendix C State Environmental Quality Review Act Environmental Justice Siting Law Amendments Draft SEQR Guidance* (2025), https://dec.ny.gov/sites/default/files/2025-01/part617risguidanceappc.pdf.

[41] *See* New York State, *Disadvantaged Communities Criteria*, https://climate.ny.gov/Resources/Disadvantaged-Communities-Criteria (last visited May 7, 2025).

C. In the alternative, DEC should improve the DACAT and clarify guidance to ensure its use is limited.

While we strongly recommend that DEC incorporate into its regulations a presumption that all DACs have disproportionate pollution burdens and adjust the EAFs to give greater weight to a project's pollution impacts on DACs rather than finalizing the DACAT, if DEC decides to include the DACAT or a similar tool in the final rule, then DEC should make the following improvements and provide the following guardrails.

First, the DACAT maps should be updated on the same timeline as DAC maps. The CLCPA requires that the underlying DAC maps be reviewed every year and updated as needed to reflect new data or scientific findings.[42] DEC should thus update the DACAT if there are any revisions from the CJWG. This will allow the DACAT to reflect the latest census data and any changes to the burdens and vulnerabilities in individual DACs. When updating the DACAT, DEC must not adjust its thresholds simply to maintain the existing distribution in which approximately 50% of DACs fall in the orange category and 50% of DACs in the blue category. While any tool like the DACAT needs to set a threshold somewhere, when updating maps DEC should maintain thresholds for each comparative burden level and be willing to include more or fewer census tracts in each category based on new data.

In addition, DEC should periodically review the DACAT over time to ensure both that a) if the EJSL is effective at reducing burdens in certain communities, those communities do not suddenly lose protection by being re-designated as "blue" DACs; and b) that the EJSL and DACAT are not incentivizing perverse outcomes. For example, if the DACAT encourages *more* projects to be sited in DACs designated as having lower comparative burdens, those communities could over time become higher burdened. As communities change over time, DEC should adjust the tool and guidance around its use to prevent a perpetual cycle of DACs flip-flopping between the two categories as pollution increases or decreases.

DEC should also address the problem of contiguous DACs within the same neighborhood falling into different tiers, a problem that is particularly pronounced in densely populated areas. When Chicago created its Environmental Justice Index, it designated as Environmental Justice Neighborhoods census tracts that scored just below the threshold, but were contiguous with a census tract above the threshold to qualify as Environmental Justice Neighborhood.[43] By adding the contiguity criteria, Chicago sought to avoid confusion and potential for facilities to be sited in the non-Environmental Justice portions of overburdened neighborhoods. DEC should adopt a similar approach to urban DACs if it does keep the DACAT. Such an approach will ensure that project applicants cannot propose a project in an overburdened neighborhood and escape increased scrutiny just because they proposed it in a census tract that is comparatively lower burdened than the census tract next door.

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[42] ECL § 75-011(3).

[43] Chicago Department of Public Health, *supra* note 30, at 6.

In its guidance and EAF questions, DEC should make clear that if the project impacts any orange DACs, that should set the standard for project evaluation overall. In other words, if pollution from a project may impact an orange DAC, even if it is not located in an orange DAC, all aspects of the project should be deemed more likely to have significant impacts.

DEC guidance must also clearly emphasize that: a) DACs with lower comparative burdens can still have disproportionate pollution burdens, and b) identification of a DAC as blue or orange is not the end of the inquiry of a project's potential impacts on a DAC. Regardless of what category the affected DAC falls in, lead agencies must still look at the specific pollution impacts of the project on affected DACs and determine whether the project is likely to have a significant impact. Such inquiry must be based on the specific impacts of the project and a holistic look at the impacted community or communities. Lead agencies cannot simply conclude that because the project's effects are on a blue DAC, the impacts are not significant. Just as many projects that do not affect DACs will still require a full EIS, many projects that affect only less comparatively burdened DACs will still be likely to have significant impacts and require an EIS.

Finally, given the potential implications of the DACAT for other provisions of the EJSL, the CLCPA and any other legal frameworks, DEC should restrict the DACAT's use to review of significance under SEQRA. Otherwise, there is a danger that the DACAT will be used to undermine protections intended for DACs under the CLCPA and other provisions of law. The DACAT should exist only as a part of the SEQRA Handbook and DEC must make clear that designation as a less comparatively burdened DAC does not affect a community's protection under ECL70-0118 or Section 7(3) of the CLCPA, its prioritization under any other provisions of ECL Article 75, or any other legal protection afforded to DACs.

IV. DEC SHOULD ADJUST THE SHORT AND FULL EAFS AND EXPAND GUIDANCE TO INSTRUCT LEAD AGENCIES TO GIVE GREATER WEIGHT TO A PROJECT'S POLLUTION IMPACTS ON DACS.

The EJSL instructs lead agencies to consider any increase of pollution to a disproportionate pollution burden on a DAC in its determination of whether a project is likely to have significant impacts. DEC should revise its EAFs and guidance to make clear that pollution affecting a DAC is *more likely to have significant impacts* than if the pollution affects a non-DAC area with low existing pollution burdens. In other words, a small amount of pollution from a project in an area without existing pollution burdens may not be significant to the environment or community. But, in line with scientific findings, that same small amount of pollution, when added to an existing high pollution burden and/or population vulnerability, is more likely to have a significant impact.

A. Questions about DAC impacts should be incorporated throughout the EAFs.

DEC's Draft SEQRA Workbook Guidance set forth in RIS Appendix C provides helpful detail for lead agencies to assess the presence and magnitude of pollution impacts from a project.

The guidance helpfully focuses on the type of impacts that fall under the definition of "pollution" in the EJSL, rather than other topics reviewed in an environmental assessment such as socioeconomic impacts or whether a project is in line with community "character." The Coalition has two suggestions for better incorporating analysis of pollution impacts on DACs into the regulatory framework to effectuate the intent of the EJSL. First, DEC should incorporate questions related to the project's contribution of pollution to a disproportionate burden in a DAC into the substantive pollution-related questions in the EAF, rather than putting questions related to impacts on DACs in a separate section at the end. Second, DEC should instruct lead agencies to give greater weight to the level and/or impact of pollution from a project when it contributes to a disproportionate pollution burden on a DAC than when it affects a non-DAC.

To better incorporate this understanding in the EAFs, DEC should incorporate sub-questions about whether pollution impacts will affect DACs in the substantive existing questions related to pollution impacts. For example, the Short EAF ("SEAF") includes questions for the project applicant about wastewater generation and treatment (question 11) and hazardous waste remediation at the site (question 20). Later, in question 21, the SEAF separately asks about pollution impacts that may occur in a DAC, including wastewater or hazardous waste management. The existing questions about pollution like 11 and 20 should include sub-questions asking whether pollution associated with those impacts will affect a DAC. In the Full EAF ("FEAF"), there are many detailed questions related to pollution impacts. Each of these questions must also include a sub-question asking whether such pollution may impact a DAC. This will make the consideration of impacts on DACs a more integrated part of the overall environmental assessment and flag for lead agencies that impacts on DACs must be considered at every stage. Because the existing questions on the SEAF do not cover all possible pollution impacts however, there is still a need for a broader question at the end identifying any additional pollution impacts that might affect a DAC, including noise and odors.

Similarly, Part II of the SEAF and FEAF should include an additional column for the lead agency to indicate, next to each relevant question related to potential pollution from the project, whether that impact will affect a DAC. Again, this will integrate consideration of the impacts on DACs throughout the overall assessment of whether the project's impacts may be significant.

B. DEC should expand the radius for the initial screen for DAC impacts and clarify guidance on whether a project outside the radius will impact a DAC.

In addition, DEC should, when asking whether a project will affect a DAC, ask whether the project is within 1 mile of a DAC rather than within ½ mile. While the radius is not the only question—and it is important for DEC to keep the follow-up question included in the draft EAFs about whether the project could impact a DAC even if the project is not within that radius—for the initial screening question, a 1-mile radius is appropriate. A 1-mile radius is often used in

environmental proximity analysis studies for distance-based analyses of proximity to environmental hazards and health outcomes,[44] so it is appropriate for DEC to use in the EAFs.

Whether the radius is 1 mile or ½ mile, DEC should provide more guidance on determining whether a project outside the radius might impact a DAC. DEC already has permitting guidance on CLCPA 7(3) that it can use as a model, which states that modeling can be used to look at off-site impacts from proposed actions and the distance at which those impacts can be reasonably expected.[45] The 7(3) permitting guidance also makes clear that projects can affect DACs despite not being located in a DAC.[46] For example, it is well known that air pollutants travel and affect air quality outside of the communities in which the polluting source is located.[47] This is also the case with other types of pollution,[48] so it is important that DEC provide guidance on how to analyze impacts at a greater distance than the designated radius from a DAC.

C. Guidance should specify that *any type of* pollution in a DAC can have a more significant impact than it would in a less burdened community.

Finally, DEC's guidance should make clear that lead agencies, when reviewing all factors from the environmental assessment to determine whether a project is likely to have a significant environmental impact, should consider pollution impacts on DACs as more likely to be significant. Specifically, the guidance should explicitly state that lead agencies and permit applicants must consider the total cumulative burden on the community, as measured by the CJWG criteria, rather than any specific environmental issue or pollutant. Lead agencies should not determine that there will only be a likelihood of significant impacts when the pollution from the project is of the same nature as the predominant type of pollution the community is already experiencing. The entire purpose of the EJSL is to ensure that total cumulative burden is considered in the environmental review and permitting processes. Therefore, if a proposed project would only emit air pollutants and the impacted DAC has relatively moderate air pollution indicators but instead a high concentration of waste facilities, legacy soil contamination and water pollution, the lead agency cannot dismiss the increased likelihood of significant impacts on the community. Even if the specific pollutant a project would add is not present at high levels in the community, its impact may be higher because it will interact with and add to an already existing high pollution burden from other pollutants and vulnerabilities.[49]

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[44] *See* Jean Brender et al., *Residential Proximity to Environmental Hazards and Adverse Health Outcomes*, 101 Am. J. Pub. Health S37 (Dec. 2011), https://doi.org/10.2105/AJPH.2011.300183.

[45] DEC, *DEP 24-1: Permitting and Disadvantaged Communities Under The Climate Leadership And Community Protection Act* 3 (May 8, 2024), https://dec.ny.gov/sites/default/files/2024-05/prgrmpolicy24dash1.pdf.

[46] *Id.*

[47] *See, e.g.*, EPA, *What is Cross-State Air Pollution?*, https://www.epa.gov/Cross-State-Air-Pollution/what-cross-state-air-pollution (last updated Sept. 30, 2024).

[48] *See e.g.*, Melissa Denchak, *Water Pollution: Everything You Need to Know*, NRDC (Jan. 11, 2023), https://www.nrdc.org/stories/water-pollution-everything-you-need-know.

[49] In the case of Indigenous Nations, the assessment of relevant impacts must include the Nations' particular circumstances. For example, existing environmental burdens that stem from the long history of state actions that have caused environmental degradation and public health stressors, including: limiting access to and contaminating

V. TO AVOID CONFUSION, DEC SHOULD DISTINGUISH KEY TERMS IN THE SEQRA REVISIONS FROM THOSE USED IN THE PERMITTING PROVISIONS OF THE EJSL OR IN OTHER STATUTES.

As noted above, New York has enacted several statutes requiring assessment of impacts on DACs, notably the CLCPA and the EJSL. The EJSL contains sections: revisions to SEQRA and revisions to DEC permitting under the Uniform Procedures Act ("UPA"). DEC chose to enact its EJSL regulations in phases, and the currently proposed regulations implement only the EJSL's revisions to SEQRA. To minimize confusion and maintain clear standards under both SEQRA and the UPA, DEC must clearly distinguish between each statute's terms and requirements in guidance.

A. CLCPA Section 7(3) and SEQRA

The Coalition recognizes that lead agencies will potentially review projects under both CLCPA 7(3) and the EJSL simultaneously, and there are real benefits to streamlining review. To ensure that lead agencies comply with their obligations under both statutes, DEC must clearly state the two laws' different requirements in guidance to lead agencies.

The CLCPA applies to projects with greenhouse gas emissions and requires that projects "shall not disproportionately burden" DACs.[50] The CLCPA's "shall not" language is mandatory, meaning that projects cannot be approved if they disproportionately burden DACs. By contrast, the EJSL's SEQRA provisions require consideration of "whether [a project] may cause or increase a disproportionate pollution burden on a DAC."[51] The project's impacts on DACs are not, in the SEQRA context, dispositive of whether the project is approved or even if an EIS is required.

DEC should make sure agencies understand that a project could, in some cases, not require an EIS under the EJSL but still not be allowed under CLCPA 7(3) because it disproportionately burdens a DAC. An agency can, under SEQRA, weigh the increase of a disproportionate pollution burden on a DAC alongside other adverse impacts of a project and against a project's benefits and then use that balancing to determine whether an EIS is required. However, if the project is subject to the CLCPA, the "shall not" language is clear and does not allow for agencies to approve projects that disproportionately burden DACs, regardless of the project's benefits.

DEC must clarify the difference between these two statutes and their requirements so that lead agencies are compliant with both the EJSL and the CLCPA. Clear guidance is needed to remind lead agencies that their EJSL obligations should be layered with their CLCPA obligations and do not replace them.

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treaty-protected resources; encroaching onto Indigenous Nations' territories; violating Nations' sovereignty and treaty rights; and dispossessing ancestral lands and sacred sites.

[50] CLCPA § 7(3), 2019 N.Y. Sess. Laws Ch. 106 (S. 6599).

[51] ECL § 8-0109(2)(k). ECL § 70-0118.

B. SEQRA regulations and ESJL permitting provisions

DEC must also be cautious that these SEQRA regulations and guidance do not create confusion about the forthcoming regulations implementing the permitting provisions of the ESJL in ECL 70-0118. DEC must ensure that project applicants understand that SEQRA terms and standards are not identical to the terms used in the permitting section of the EJSL.

The permitting provisions of the EJSL require permit applicants to prepare an existing burden report if the project "may cause or contribute more than a de minimis amount of pollution to any disproportionate pollution burden on a [DAC.]"[52] When the Department is considering the permit application, including the existing burden report, for new projects it "shall not issue . . . [a] permit . . . if it determines that the project will cause or contribute more than a de minimis amount of pollution to a disproportionate pollution burden" on a DAC.[53] For permit renewals and modifications, DEC "shall not" issue a permit "if it determines that the project would significantly increase the existing disproportionate pollution burden" on a DAC.[54] By contrast, SEQRA uses the term "significant" regarding the magnitude of a project's impact as the threshold for when an EIS must be prepared. The EAFs classify potential project impacts as "small" or "moderate/large" for the agency to consider as part of its significance determination. SEQRA does not attach numerical thresholds to "small" or "moderate/large", and the importance of the impacts are very project-dependent.

DEC must clarify that impacts designated as "small" on an EAF for the purpose of review under SEQRA are not equivalent to the "de minimis amount of pollution" that is the standard for requiring a burden report under the permitting provisions in the EJSL. Nor can significance under SEQRA be conflated with the EJSL's threshold for denying a renewal permit, of whether the project would "significantly increase" pollution. Neither "de minimis" nor "significantly increase" are defined in the EJSL, and DEC did not propose to define those terms in the current phase of regulations. While we hope and expect that DEC will propose fulsome definitions for both of those terms in subsequent rulemakings, the EJSL is in effect now, and DEC's proposed SEQRA regulations are the only guidance permit applicants currently have for compliance. DEC must therefore make clear that the threshold for SEQRA significance and the preparation of an EIS is not the same as any of the thresholds in the permitting provisions of the EJSL. Specifically, while most projects that require a new permit covered by the EJSL will also require a full EIS, it is possible that a lead agency will determine that such a project has no significant impact for the purpose of SEQRA. DEC must let applicants know that a negative declaration under SEQRA does not mean that a burden report is not required for a permit under the EJSL, since the threshold for submitting a burden report is anything above a de minimis amount of pollution.

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[52] ECL § 70-0118(2)(b).
[53] ECL § 70-0118(3)(b).
[54] ECL § 70-0118(3)(c).

VI. DEC SHOULD EXPAND PUBLIC PARTICIPATION OPPORTUNITIES.

A. Public Participation in this Comment Period

The Coalition appreciates DEC holding an extended comment period and four public hearings, both virtual and in person, in multiple locations, for this first phase of EJSL regulations. It is crucial that the public, especially members of DACs, have robust opportunities to engage with the proposed amendments to effectively implement a law intended to reduce their inequitable burdens. One of the reasons disproportionate pollution burdens exist in DACs is a legacy of exclusion of people in these communities from meaningful participation in government decision making processes. Deeper public involvement can improve how people perceive the regulatory process and allow for more effective communication that accurately addresses their needs and concerns.

For public participation regarding the SEQRA regulations to be meaningful, the public must be able to understand the material being presented to them. On the DEC website, the amendments to the EJSL are listed under the title "State Environmental Quality Review Act (SEQR) Regulatory Revisions" and the heading "Proposed Amendments to 6 NYCRR Part 617." People unfamiliar with these terms would not associate it with the EJSL or the Cumulative Impacts Law and may not explore the site further. Also, the amendments are placed under the "Rulemaking Documents" section but are not clearly labeled as proposed amendments; rather, they are listed as "Express Terms." This labeling is confusing to lay people and could deter meaningful input from the people most impacted by the regulations. Each document under the SEQRA "Rulemaking Documents" section should include a brief summary outlining the main points and implications in simple, easy-to-understand language at the 8th grade proficiency level. DEC should provide clear and straightforward information so the public can easily understand the proposed amendments, voice their concerns, and contribute to more effective decision-making regarding the SEQRA regulations. The purpose and methodology behind the DACAT is particularly confusing and should be made more understandable.

B. Public Participation in the SEQRA Process

DEC should provide detailed guidance regarding public participation in the SEQRA process, ensuring transparency and meaningful public input on project designs and assessments, which will help foster public trust in the project and the involved agencies and respect by the applicant and lead agencies for the public's needs and concerns. DEC's approach in the SEQRA process could adopt the principles established in DEC Commissioner Policy 29 as a baseline for meaningful public participation.[55]

In general, applicants should provide thorough, clear, and easily accessible information about the project online, covering the project purpose, all potential impacts, all relevant documents, studies and reports on the issues involved, proposed mitigation measures, and

[55] *Commissioner Policy 29, Environmental Justice and Permitting*, *supra* note 18.

comments received to date. This user-friendly database should be made available in a timely manner via email, mailers, local papers, and posting in frequently accessed public spaces, at least one week in advance of any public session as well as at the public session. Applicants should develop email contact lists of interested stakeholders to keep them informed and expand the list with help from local government, organizations, civic and religious groups, businesses, and any stakeholder expressing interest in the project. This email list should include not just organizations that are based in the local community or communities impacted by a project, but local environmental, environmental justice, and social justice organizations. DEC should provide guidance to project applicants to help develop contact lists, such as the contact information for these organizations. All documents should be translated into languages commonly spoken by people from each DAC or environmental justice community, and all meetings should provide translation as needed. Applicants should have a public liaison available to respond to and track questions and concerns from the public in a timely manner.

To maximize accessibility of information particularly for those who communicate less online, DEC should also provide information to stakeholders through automated phone messages, flyers, highly visible signage at the proposed site, and publications within the DAC, ensuring that all materials are understandable and translated to all the primary languages spoken within the DAC.

The applicant should hold hybrid public hearings to ensure that the public can comment on at least three key aspects of the SEQRA process: the preliminary screen for whether the project impacts a DAC, the scoping process, and the draft EIS stage. To protect against abuse of the public participation process to unreasonably delay a project at the preliminary screen stage, DEC should require lead agencies to hold a public hearing when at least five community members or an organization representing the community request the hearing. For any Type I or Unlisted Actions that may impact a DAC, DEC should require that a public comment period as well as a dedicated public hearing (with appropriate community notice) be held in the DAC. DEC should also require enhanced public engagement and notice for the final EIS in a manner consistent with meaningful community engagement principles.

Finally, the SEQRA scoping process requires lead agencies to provide descriptions of mitigation measures and reasonable alternatives to be considered. Effective and meaningful public participation in assessing mitigation measures and reasonable alternatives is critically important in DACs. Mitigation measures and reasonable alternatives must be included in the lead agency's final written scope under SEQRA. The final scoping document should be easily accessible online. These measures and alternatives should clearly prioritize the avoidance of environmental burdens first. Where avoidance is not possible, the project design should minimize environmental impacts as much as possible and only under appropriate circumstances should net environmental benefits be considered. Any mitigation approach should avoid contributing to any pre-existing environmental burdens and avoid using "offsets" in place of feasible avoidance or minimization of burdens. In considering reasonable alternatives, DEC should include a requirement that lead agencies publicly propose alternative siting both outside

of the DAC and in an area of the DAC that is less likely to impact residential, school, recreational areas, or areas with high foot traffic.

VII. CONSIDERATIONS FOR FUTURE ESJL RULEMAKINGS

Many of the comments raised here also implicate future rulemakings to implement the permitting provisions of the EJSL. As DEC develops its proposed rules for those provisions, the Coalition wishes to highlight several additional considerations. Looking ahead, in future regulations DEC should:

- Set highly protective definitions for the "de minimis" and "significant" pollution thresholds;
- Ensure all applicants for applicable DEC permits that meet the "de minimis" threshold and might impact DACs prepare a burden report, including applicants for permits that would ordinarily be administratively continued or renewed, with early notice to the community where no burden report will be required and a limited exemption for "essential" facilities;
- Provide clear standards and requirements for the content of the burden report, including a list of credible data sources, requiring evidence to back up claimed benefits of a project, and stringent standards for operational changes to the facility to reduce pollution that could be implemented in the permit itself;
- Give authority to Office of Environmental Justice ("OEJ") to make the final determination of whether a burden report is complete, and to make a recommendation to the permitting division on whether the permit should be denied or granted and with what conditions;
- When analyzing burden reports and making permitting decisions for renewal permits, use a baseline for measuring "significant increase" that assumes the permit expires and isn't renewed;
- Ensure operational changes that are a condition of granting permits are incorporated as permit conditions, monitored, and enforced;
- Incorporate the affected community into the decision-making process and ensure transparency at all stages of the process; and
- Align with other mandates including Section 7 of the CLCPA and CP-29.

The Coalition appreciates the opportunity to submit these detailed comments on the first phase of rulemaking under the EJSL. These regulations are a critical step towards a more holistic and scientifically accurate assessment of environmental impacts in overburdened communities, and key to preventing exacerbation of existing inequitable burdens. The Coalition looks forward to working with DEC to implement these regulations, and to commenting on future proposed regulations for the permitting sections of the EJSL.

Respectfully Submitted,

Niki Cross, Staff Attorney
New York Lawyers for the Public Interest
151 West 30th Street
11th Floor
New York, New York 10001-4017
212-244-4664
ncross@nylpi.org

Rachel Spector, Deputy Managing Attorney
Marissa Lieberman-Klein, Associate Attorney
Earthjustice
48 Wall Street, 15th Floor
New York, NY 10005
(212) 845-7376
rspector@earthjustice.org
mlieberman-klein@earthjustice.org

On behalf of WE ACT for Environmental Justice, Riverkeeper, South Bronx Unite, Environmental Advocates of New York, Clean & Healthy New York, and Natural Resources Defense Council.