# Assessment of Public Comments

on the

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Proposed Rule Making for

6 NYCRR Part 621, Uniform Procedures

with Conforming Changes to

6 NYCRR Part 421 (Mined Land Reclamation Permits) and
6 NYCRR Part 601 (Water Withdrawal Permits)

August 31, 2023

## Background

The New York State Department of Environmental Conservation ("Department" or "DEC") has prepared this responsiveness summary to address the comments that were received on the proposed revisions to 6 NYCRR Part 621 ("Part 621"), Uniform Procedures and conforming changes to 6 NYCRR Part 421, Mined Land Reclamation Permits, and 6 NYCRR Part 601, Water Withdrawal Permitting.

The proposed revisions to the regulations were published for public review and comment in the Environmental Notice Bulletin (ENB) on August 17, 2022. Notice of the proposed rule making was also published in the State Register on August 17, 2022, Vol. XLIV, Issue 33. The original comment deadline announced in the notice was October 28, 2022, which was extended to November 14, 2022, providing 89 days for the public to comment. In addition, virtual hearings on the proposed rule making were held at 2:00 p.m. and at 6:00 p.m. on October 20, 2022.

This responsiveness summary addresses the comments received on the proposed revisions to Part 621. The comments and DEC's responses have been organized to follow the sequence of the proposed Part 621 regulations. General comments are addressed at the beginning of the responsiveness summary, followed by comments related to specific sections of Part 621.

An appendix is also provided that contains copies of the comments received. Each comment letter is annotated with a letter designation and marginal numbering of the salient comments that are addressed in this document. Following each of the comments excerpted and placed into this document, the annotated letter designation and comment are provided in parentheses to indicate the source of the comment. [For example, the first comment is taken from the New York Reliable Infrastructure Coalition (letter "K") and is annotated as comment "1", within that letter, so the parenthetical reference is "K-1".]

**List of Sections and "Bookmarks"**

## General Comments

1. **Comment**: The DEC should acknowledge the federally defined limits on its authority to use a state law, including the Climate Leadership and Community Protection Act ("CLCPA)," to deny or substantially encumber a permit application or renewal for a FERC-jurisdictional interstate natural gas pipeline facility. The DEC should recognize that it may not use the permit review procedures to deny or substantially encumber permits or permit renewals for FERC-jurisdictional projects. The Coalition urges the DEC to recognize that the DEC is subject to an important constraint on its authority to apply Section 7(2) of the CLCPA or other proposed permit application review procedures to interstate natural gas facilities that are subject to the jurisdiction of FERC. Specifically, the Department may not use these authorities to deny permit applications for such projects, or otherwise encumber permits issued by the DEC in a way that is inconsistent with the project's FERC certificate or authorization. Such application of the DEC's authorities would be preempted by the Natural Gas Act ("NGA"). (K-1)

   **Response:** The proposed rule does not modify federally defined limits on DEC's authority to review and make decisions on applications for projects that are subject to the FERC jurisdiction.

2. **Comment:** The DEC should revise other proposed requirements in the Proposed Rule to make them more proportional, clear, and consistent with the legal and practical realities of infrastructure permitting. Some of the proposed new requirements are excessive, unclear, or inconsistent with the legal or practical realities of permitting infrastructure projects. Given the important role that natural gas plays in ensuring affordable and reliable energy for New York, it is particularly important to ensure that the permitting process for natural gas infrastructure is clear, reasonable, and predictable. (K-8)

   **Response:** Comment noted. Article 70 of the ECL and 6 NYCRR Part 621 (Uniform Procedures Act) are not tailored to any specific industry or activity but instead establishes consistent review and decision-making requirements for a broad range of regulated activities. Specific concerns about DEC's proposed rule making are addressed in this document.

## 621.1 – Applicability

3. **Comment:** The Department proposes to include Incidental Take Permits issued pursuant to 6 N.Y.C.R.R. Part 182 under the list of permits explicitly governed by the UPA. As the Department is aware, 6 N.Y.C.R.R. 182.9 sets forth the procedure for

an applicant to request a determination from NYSDEC as to whether an Incidental Take Permit is required. The Amendments do not provide applicants with any right to request a reconsideration or appeal of that determination, notwithstanding the fact that the UPA generally subjects decisions made by the Department to review in an adjudicatory proceeding. Accordingly, GCEDC recommends that the Department establish that a determination made by the Department that an action is subject to Part 182's permitting requirements is subject to an adjudicatory hearing at the request of an applicant. (C-2, D-2)

**Response:** As an initial matter, jurisdictional determinations merely identify what activities are regulated and are subject to the application review process and, therefore, do not constitute final agency decisions. The procedures for requesting and obtaining a jurisdictional determination pursuant to 6 NYCRR Part 182 are set out in section 182.9 of DEC's implementing regulations; they do not include procedures for appealing a jurisdictional determination. There are, in fact, no DEC jurisdictional determinations pertaining to UPA permits that are subject to appeal procedures. There is no right to an adjudicatory hearing under 6 NYCRR Part 624 on a jurisdictional determination (see section 624.1).

## 621.2 - Definitions

4. **Comment:** Proposed 6 NYCRR 621.2(u): The definition of "minor project" removes the language stating that Type II actions are minor actions. Although the language regarding projects "not likely to have a significant impact" remains, we think it is helpful to leave the Type II language in as it would make clear that those projects are (unless otherwise listed) minor projects. (J-1)

   **Response:** Removing State Environmental Quality Review Act (SEQR) "Type II" actions from the definition of "minor project" eliminates ambiguity created when such actions exceed the thresholds specifically identified in section 621.4 for major or minor projects. For example, the construction of a single-family home on an approved lot is a SEQR Type II action [section 617.5(c)(11)], yet the project could exceed one or more of the thresholds contained in section 621.4(i) pertaining to construction within regulated wetlands or wetland adjacent areas. The proposed change eliminates this ambiguity without materially affecting the nature of "minor projects". In addition, the statutory definition of "minor project" in ECL section 70-0105(3) does not include the SEQR classification of an action.

5. **Comment:** We believe that elimination of Type II actions' list from the "Minor Project" definition may create a confusion with filing of applications in New York City. The NYC December 2021 CEQR Technical Manual references Type II actions outlined in 6 NYCRR Part 617.5(c). We trust that consistency in use of Type II action

list would be beneficial for the applicants in understand the type of the permit application required for their project. (E-1)

**Response:** See Response 4. In addition, the designation of "minor project" under Part 621 does not affect the classification of actions pursuant to SEQR (6 NYCRR Part 617) or the implementation New York City Environmental Quality Review (CEQR) procedures.

6. **Comment:** Proposed 6 NYCRR 621.2(al): the clarification that a variance is granted via a permit mod or new permit, subject to Part 621 procedures, is helpful, however further clarification should be provided on whether a variance request submitted with a permit application, modification or renewal is its own permit application. Those steps would be unnecessary if other permit applications are being considered, as they would be reviewed at the same time. The language would be clearer if it explicitly stated, "granted by means of a permit modification or new permit, if it is the only request submitted to the Department." (J-2)

   **Response:** Several permit programs subject to Part 621 contain provisions requiring requests for variances to be incorporated into a permit application, for example State Pollutant Elimination System (SPDES) permits [section 750-1.7(f)], Coastal Erosion Management permits [section 505.13], Solid Waste Management permit [ section 360.10(b)], and Wild, Scenic, and Recreational River permits [section 666.9(a)]. This reflects that permits either specify the scope of the authorized activities, the applicable regulatory provisions by reference, the applicable regulatory provisions by special conditions, or one or more of those items. As a result, variances are granted, in practical effect, through the terms and conditions of the associated permit and the definition of variance specifies this. Such requirements apply to applications for both new permits and modifications of existing permits. In addition, a request for a variance would have to be accompanied by a permit application that corresponds to the program under which the variance is sought, regardless of whether applications for permits under different programs are submitted.

## 621.3 – General Requirements for Applications

7. **Comment:** The proposed requirement that applicants submit all operational plans and engineering documents as part of applications are overly burdensome and does not address that these materials that may be protected for security reasons or otherwise considered confidential business information.

   The Coalition supports providing information to the DEC that describes the operation and maintenance of natural gas pipelines and related infrastructure to the extent

necessary and pertinent to the Department's review. However, the proposed requirement that the applicant supply all operating manuals, plans, and engineering documents is excessive. The DEC has failed to demonstrate why such extensive documentation is necessary for conducting a review of a permit application or renewal. In particular, we do not see any need to apply this requirement to a renewal application.

Furthermore, many manuals, plans, and engineering documents contain confidential information that does not belong in a public permitting record, such as detailed drawings of critical infrastructure and facilities. Similar information is regularly protected in other agency proceedings from public disclosure. At the Federal level, permitting agencies—including FERC, Department of Homeland Security (DHS), PHMSA and the EPA—recognize protections under the Freedom of Information Act (FOIA) and restrictions for Security Sensitive Information and Critical Energy/Electric Infrastructure Information. New York state regulations also safeguard records containing trade secrets, confidential commercial information, or information about critical infrastructure from public disclosure.

For these reasons, we urge the DEC to revisit and revise the proposed engineering and operations- related documentation requirement in Section 621.3(a)(1)(iv) to ensure that it is proportional to the Department's actual permit review needs and respectful of valid confidentiality concerns. At a minimum, the DEC should strike the word "all", make the requirement subject to federal and New York State's provisions for labeling records confidential, and exclude renewal applications. (K-10)

**Response:** The proposed rule at section 621.3(a)(1)(iv) limits the need for operational manuals, plans, and engineering documents to those "…necessary to describe the full scope of regulated activities and the environmental controls necessary to meet the relevant pollution control limits, including any information that may be required in specific program implementing regulations." Further, as noted in the comment, the provisions of the New York State Freedom of Information Law (Article 6 of the Public Officers Law or FOIL) except from disclosure documents that contain confidential business information or would jeopardize public safety if released. FOIL applies to all submitted permit application documents, including those provided in support of renewal applications. In DEC's implementation of FOIL, it provides for protection of certain kinds of confidential information, including the types of information noted in the comment (6 NYCRR 616.7).

8. **Comment:** Very often, Landowner is not a Permit Applicant/Owner or a Facility Operator. A requirement for the Landowner to give the DEC staff permission to enter the facility site does not seem to be accurate or appropriate. We believe it should be addressed by the Permittee, who would have an agreement with the Landowner for use of the property. (E-2)

**Response:** The provision in section 621.6(b) addressing site inspections by DEC staff currently exists and the proposed rule reinforces the need for DEC to obtain proper permissions before entering a site that is the subject of a permit application. In most instances this will be provided by the property owner's signature on the required application forms, in addition to the signature of any non-owner permit applicant ("lessee" or "operator"). To the extent a party other than the landowner provides access permission for DEC staff, acceptable documentation could be provided to show that their authority to do so is derived from the owner's explicit written delegation or assignment of that authority.

9. **Comment:** Requiring applicants to submit landowner permission information at the time of the application submittal adds undue burdens to Coalition members and other proponents of linear projects and does not adequately follow or consider the practicalities of the interstate natural gas pipeline permitting process.

As a threshold matter, the DEC has not provided a rationale for this change to its procedures. The DEC has not provided any evidence that its existing authority to conduct environmental reviews is insufficient. Adding an unnecessary, duplicative, and burdensome requirement to the permitting process is unwarranted. We respectfully request that the DEC remove the multiple references to this requirement from the Proposed Rule.

The Proposed Rule should clarify that DEC access to the parcels via an easement or right-of-way, survey permission, or as a result of judicial proceedings satisfies the respective permission and consent requirements for purposes of permitting.

The DEC should also provide for an alternative approach. Under this alternative approach, if the permit applicant is not the fee owner of property or does not otherwise have the right to access the property at the time of the application, the applicant may satisfy the access requirements if it: (1) documents reasonably good faith efforts to obtain landowner permission; and (2) provides desktop data in lieu of site-specific review. Desktop data includes scientific information, development statistics, and other similar data that is sufficient for the Department to declare a permit application complete and begin its review, pending permission for access. Failure of an applicant to obtain access, where the applicant has made reasonable efforts to obtain such access and desktop data is otherwise available, should not stop the DEC from declaring a permit application complete for purposes of beginning to process that application. To do otherwise would unreasonably delay much needed infrastructure. (K-11)

**Response:** See Response 8. As reflected in section 621.6(b), site inspections are often a necessary part of assessing the conditions of a site that is the subject of a permit application, and such conditions may be relevant to determining whether the application is complete. For example, the extent of regulated wetlands and,

therefore, the scope of regulated activities that must be addressed in a permit application, is often only determined through a DEC staff site inspection to delineate or confirm the wetland boundary shown in the application materials.

10. **Comment:** NAC generally supports enhanced public participation and awareness opportunities, including the development of public participation plans and any other relevant information that can be provided by the applicant during permitting in order to address environmental justice concerns. (A-2)

    **Response:** Comment noted.

11. **Comment:** The Department proposes to require that applicants prepare, submit, and carry out the public participation plan prior to a determination that an application is complete. As the Department is aware, Commissioner Policy 29 provides for enhanced public participation requirements for proposed projects in environmental justice areas identified by the Department. Initially, we note that requiring the completion of a public participation plan prior to a determination of application completeness appears to be contradicted later in the proposed new subsection 6 NYCRR 621.3(13), which provides that the submission of the plan itself is sufficient to render an application complete. In addition, this new requirement is both inconsistent with the existing UPA structure for public participation and detrimental to the efficient processing of permit applications. The UPA timeline for public participation is structured such that public notice and comment periods follow a determination by the Department that an application is complete and the issuance of a notice of complete application. A public comment period then follows pursuant to the UPA. Requiring an enhanced public participation plan to be completed prior to the issuance of a notice of complete application would force applicants and members of the public to meet and consult on permit application details without the benefit of a draft permit for review and discussion. In other words, until the Department has issued a notice of complete application complete with a draft permit, any public participation in the permitting process is premature. Accordingly, the Department should revise the Amendments to remove the requirement that an enhanced public participation plan be completed prior to a determination of completeness for an application. (C-4, D-4)

    **Response:** The proposed rule would not require submission of an enhanced public participation plan in every case. It provides DEC with discretion to do so in cases where early input from community members is deemed necessary to inform the scope of the proposed regulated activities and identify potential measures to address impacts before the development of DEC's tentative determinations regarding draft permits. Where an enhanced public participation plan is required, implementation of the plan will also be required before an application is complete to achieve these benefits.

**12. Comment:** The Department is proposing to amend Section 621.3(a)(3) to read: The department may require the applicant to **submit and carry out** a public participation plan that would include the applicant conducting public participation meetings **before an application is determined or deemed complete.** The public participation plan is intended to enhance community awareness of the project. It may include various means of communication with the affected public through different media, and local outreach actions, including distributing project information in the community, and conducting public project information meetings in appropriate languages. (Emphasis added)

Alliance members have two comments on this proposed amendment. First, we suggest that the proposed rule be revised to indicate that the Department will not impose new, duplicative public participation requirements on applications for activities of a continuing nature, specifically permit renewals with no modifications or renewals with minor modifications. The Department's current regulations already provide an opportunity for public comment on air and water permit renewals (see 6 NYCRR 621.7), and the Department itself determined long ago that these types of permit actions have no significant environmental impacts (see 6 NYCRR 617.5[c][32]). The proposed rule, if left unchanged, would impose an unnecessary new requirement that would delay securing a decision required to maintain energy and utility operations, without providing any benefit to the public, who already have an opportunity to comment on applications for permit renewals. Accordingly, we request that the proposed express terms be revised [621.3(a)(3)] as follows: …"This paragraph shall not apply to applications for permit renewal that (i) are subject to public notice and comment pursuant to section 621.7 and (ii) propose no material change in permit conditions or the scope of permitted activities."

This revision proposed by the Alliance would also align with the construct already existing in Commissioner Policy 29 - Environmental Justice and Permitting (CP-29), Section V.A.2, wherein public participation plans are expressly not required in the context of permit renewals. (G-1)

**Response:** See Response 11. Although enhanced public participation for renewal applications would typically not be required, DEC will retain its discretion to require enhanced public participation for renewal applications treated as "new" pursuant to section 621.11.

**13. Comment:** Proposed 621.3(a)(3): Enhanced public participation: Despite the Climate Leadership and Community Protection Act (CLCPA) and other statutes adding in disadvantaged community requirements, the Uniform Procedures Act (UPA) is intended to provide "fair, expeditions and thorough administrative review of regulatory permits," with "reasonable time periods for administrative agency action

on permits." These mandates, the very purpose of the UPA, should not be dismissed in carrying out enhanced public participation. (J-3)

**Response:** See Response 11. DEC agrees that one of the statutory purposes of UPA is to ensure the "fair, expeditious, and thorough administrative review of regulatory permits [ECL 70-0103(1)]." However, in addition to CLCPA, other statutes modify DEC's obligations in permitting actions subject to the UPA including the State Environmental Quality Review Act, State Historic Preservation Act, and the Waterfront Revitalization of Coastal Areas and Inland Waterways. To date, these other statutes have been implemented alongside UPA in a manner that has neither detracted from UPA's purpose nor dismissed other statutory requirements. DEC expects the same to continue with CLCPA.

**14. Comment:** More information is needed regarding the proposed public participation requirements, both general requirements and those related to environmental justice.... we respectfully request that the DEC provide more information for developers to meet this potential requirement. Specifically, the Proposed Rule should provide additional detail about who must be included in the community outreach. In addition, the DEC should calibrate the extent of the public participation requirement to the size and scope of the project.

Furthermore, the DEC should take note that, for projects subject to FERC approval, FERC already requires extensive public engagement pursuant to the Natural Gas Act (NGA). The FERC- required NGA processes should satisfy the DEC's public participation needs; additional requirements would be redundant. Any permitting requirements should be scaled to the scope of the project and be consistent with existing applicable Federal notification requirements, including FERC requirements.

To the extent required, the DEC should provide procedures and timeframes for reviewing and approving public participation plans for consistency and to avoid delays. A public participation plan shall be deemed approved within thirty (30) days of the application submission unless the DEC requires supplemental information or revisions from the applicant. DEC should also define a time period for instances where it will require applicants to carry out public participation plans. This approach would establish consistency and predictability in energy infrastructure development.

The Coalition respectfully requests that the DEC provide additional guidance about the public participation plan requirements and its interaction with the public participation plan development requirements of 621.3(a)(3). The general public participation plan appears to be at the discretion of the DEC, while the environmental justice plan appears to be required as part of the permitting process. (K-13)

**Response:** See Responses 1 and 11. In addition, DEC recognizes the need to continually develop and improve guidance materials on implementation of Environmental Justice and Disadvantaged Communities policies, including Commissioner's Policy on Environmental Justice and Permitting (CP-29), among others. Also, DEC would exercise its discretion to consider whether an enhanced public participation plan implemented under another federal or state review framework is adequate for the purposes of CP-29 and DEC requirements.

15. **Comment:** The Department proposes to require that applicants submit applications for all permits associated with a project simultaneously. This new requirement ignores the real-world business considerations that drive permit application timing. While GCEDC appreciates that a project applying for all permits and approvals simultaneously (with subsequent, simultaneous decisions on such permits) would be administratively cleaner from a permit-processing perspective, the reality of project development is such that rarely do project design details line up so perfectly as to allow for fulsome applications for complex projects to be made across various permitting areas at the same time. (C-5, D-5)

    **Response:** While the proposed rule includes revisions for clarity, the requirement to submit all necessary DEC permit applications for a single project is not new. It has been required pursuant to section 621.3(a)(4) since at least 1996 [previously numbered 6 NYCRR 621.3(a)(3)] and is supported by the legislative intent contained in ECL Article 70 for "comprehensive project review" (70-0103). At the same time, the provision has also contained a long-standing opportunity for applicants to demonstrate "good cause" not to submit all necessary applications, which is an opportunity that the proposed rule retains.

16. **Comment:** CVEC does not agree, however, with the inclusion at this time of the proposed amendments that would require applicants to provide information pursuant to New York's Climate Leadership and Community Protection Act (CLCPA) in order for a permit application to be considered complete. As detailed in this letter, CVEC believes that the inclusion of these provisions is premature and, therefore, recommends removing them from the proposed rule or modifying them to take effect after the effective date of NYSDEC policies and required regulations that will clarify what information is required and how it will be used. Paragraphs 621.3(a)(11) and (13) of the proposed amendments contain the phrase "where applicable" which indicates that the specified information may not be required for all applications. Unlike the Community Risk and Resiliency Act (CRRA) cited in Paragraph 621.3(a)(12), however, the CLCPA and the proposed Part 621 amendments do not define which applications require this information, or what information is required, in order for an application to be deemed complete. (B-2)

**Response:** CLCPA is only the most recent legislation that has been adopted that affects or modifies DEC's obligations in permitting actions subject to the Uniform Procedures Act. Other statutes have long been recognized and accepted to require consideration in DEC's permitting activities, including the State Environmental Quality Review Act, State Historic Preservation Act, and the Waterfront Revitalization of Coastal Areas and Inland Waterways. See also response 13.

The requirements of CLCPA, including Section 7, are currently in effect and have been since January 1, 2020. CLCPA Section 7(2) mandates that state agencies, including DEC, consider whether the issuance of permits are "inconsistent with or will interfere with the attainment of the statewide greenhouse gas emission limits established in Article 75 of the environmental conservation law" [CLCPA section 7(2)]. CLCPA Section 7(3) also mandates that in considering and issuing permits state agencies, including DEC, "shall not disproportionately burden disadvantaged communities". Therefore, it is appropriate that the proposed rule includes mechanisms to obtain the information necessary for DEC to address these statutory requirements. As noted in the comment, CLCPA establishes a process and schedule for developing and adopting related rules, including the designation of disadvantaged communities[1] and the establishment of statewide greenhouse gas emission limits (6 NYCRR Part 496). Regardless, none of these or other required CLCPA deliverables are prerequisites to the requirements to apply Section 7 to permit applications.

In addition, agency guidance will continue to be developed or revised to address the implementation of CLCPA and its rules in decision-making. For example, on December 14, 2022, DEC finalized important updates to Commissioner's Policy on "Climate Change and DEC Action" (CP-49) and finalized the Division of Air Resources program policy entitled "The Climate Leadership and Community Protection Act and Air Permit Applications" (DAR-21). Also, on December 19, 2022, the Climate Action Council finalized the Scoping Plan, which provides recommendations for how New York will reduce greenhouse gas emissions and achieve the required Statewide greenhouse gas emission limits, increase renewable and emissions-free energy use, and ensure all communities equitably benefit in the clean energy transition.

The proposed rule includes mechanisms to address DEC's obligation to collect application information necessary to ensure its obligations pursuant to CLCPA and CRRA can be met, while also providing the flexibility to allow the development of more specific CLCPA and CRRA rules and guidance over time. DEC expects that to the extent those future rule makings and guidance documents can inform further revisions to Part 621 to provide additional clarity and predictability additional Part 621 rule making(s) will occur.

[1] On March 27, 2023, the Climate Justice Working Group voted to adopt final criteria for the designation of Disadvantaged Communities.

17. **Comment:** Current NYSDEC regulations and policies do not specify what projects will require an applicant to submit the information listed in paragraphs 621.3(a)(1) and 621(a)(13) of the proposed amendments or what specific information will be required. Since consistency with the CLCPA emission limits depends on compliance with the future regulations required by Environmental Conservation Law (ECL) section 75-109, information submitted by an applicant concerning a project's consistency with the limits before these regulations are promulgated will be speculative and subject to change. CVEC therefore suggests that paragraphs 621.3(a)(1) and 621.3(a)(13) in the proposed amendments to 6 NYCRR 621 be modified to state that the information is required for a complete application after the effective date of the CLCPA implementing regulations and DEC policies concerning its submission. (B-3)

    **Response:** See Response 16. The DEC policies noted above (CP-49 and DAR-21), among other things, identify the permit applications and project types to which they apply.

18. **Comment:** The Department proposed to add a requirement to 6 NYCRR 621.3 that applicants must provide information to explain whether the project will be inconsistent with, or will interfere with, the attainment of statewide GHG emission limits. The Department further proposes to require that applications for major permits must demonstrate that future physical climate risk has been considered. GCEDC respectfully submits that the Department should clarify that these requirements apply to applications for air permits regulated by the UPA rather than every permit regulated by the UPA. (C-6, D-6)

    **Response:** See Response 16 and Response 17. In addition, part of the focus of CLCPA, as reflected in both sections 7(2) and 7(3), is on greenhouse gases and co-pollutants. While it is true that DEC's role in air pollution control permitting is a central part of addressing these pollutants, CLCPA does not limit consideration to specific permitting programs. As reflected in DEC Commissioner's Policy CP-49, a number of different types of activities and permit decisions may involve greenhouse gas and co-pollutant emissions that require consideration under CLCPA. Moreover, CRRA requires that all UPA major permit applications demonstrate that future climate risk has been considered.

19. **Comment:** The proposal would add new paragraphs (11) and (12) to section 621.3 to specify the information needed to comply with the requirements of the Climate Leadership & Community Protection Act (CLCPA) and the Community Risk & Resiliency Act (CRRA), respectively. Each provision is incomplete and out of sync with guidance recently proposed by the Department. Proposed paragraph (11) would require that "where applicable, the applicant must provide information to explain

whether the project will be inconsistent with, or will interfere with, the attainment of statewide GHG emission limits." This is far less than the Department requires in draft air guidance (DAR-21), which calls for an objective analysis of project emissions and, where emissions would increase, requires a description of proposed alternatives or mitigation measures.

It would be preferable to include the specific minimum information needed to demonstrate CLCPA compliance in section 621.4 ("Requirements for specific permit applications."), which "identifies the minimum information" needed to determine completeness of permit applications covered by the Uniform Procedures Act. In fact, this is the approach contemplated under the Act: ECL section 70-0107(2) provides that the regulations adopted pursuant to the Act "shall govern the review by the department of applications for permits…"

Inclusion of information needed for permit reviews in part 621 also appears to be the approach the Department is taking for CRRA compliance. Draft Commissioner's Policy CP-49 ("Climate Change & DEC Policy") states, with regard to compliance with the CRRA: The Division of Environmental Permits shall, in consultation with the Office of Climate Change, Office of General Counsel and Program divisions, establish permit application review procedures to ensure compliance with the CRRA." Proposed section 621.3(12) does not meet this standard. We also note that, in the event general CLCPA information requirements remain in section 621.3, that CP-49 would also require climate impact analyses for energy-related projects and for permits applicable to sources and activities that result in GHG emissions, directly or indirectly.

The requirements of the CLCPA and CRRA for permit reviews are already law, but fragmented and incomplete procedural requirements could serve to delay or frustrate their effective implementation. Given the urgency of the climate situation, any delays in adopting the enhanced permit review procedures that are required to ensure the attainment of statutory targets and to initiate protections against extreme weather events would be inexcusable. We urge the Department to ensure that its regulations and guidance are properly executed to avoid creating loopholes or confusion. (F-1)

**Response:** See Responses 16, 17, and 18. The statute passed by the Legislature sets out a schedule for CLCPA rulemaking that anticipates regulations being adopted in 2024. At or after that time, Part 621 may be updated to more specifically address CLCPA requirements.

**20. Comment:** Alliance members submitted comments on both draft DAR-21 The Climate Leadership and Community Protection Act and Air Permit Applications and draft CP-49 Climate Change and DEC Action, requesting clarification on issues critical to our ability to accurately respond to the requirements of permit applications

and renewals addressed in the Part 621 proposed revisions. Given neither a guidance document nor implementing regulations have been finalized, the Department could impose unspecified and arbitrary information requirements on an ad hoc basis before it makes a determination that an application is complete. Accordingly, the draft guidance documents are directly relevant to the public's ability to provide meaningful comments on proposed changes to Part 621 relating to permit renewal and the requirements of the CLCPA (e.g., proposed Section 621.3(a)(11) and (13)). Proposed Section 621.3(a)(11) reads: " The Climate Leadership and Community Protection Act (CLCPA) requires the department to consider whether its permitting decisions subject to this Part are inconsistent with, or will interfere with, the attainment of the statewide greenhouse gas (GHG) emission limits established in Article 75 of the ECL and reflected in Part 496 of this Title. Therefore, where applicable, **the applicant must provide information to explain whether the project will be inconsistent with, or will interfere with,** the attainment of statewide GHG emission limits. An application is incomplete until such information is provided to the department." (Emphasis added)

Proposed 621.3(a)(13) reads: "The Environmental Justice Act of 2019 and CLCPA require the department to consider environmental justice concerns in permitting decisions subject to this Part and provide enhanced public participation opportunities. Therefore, where applicable, an application is incomplete until the following information is provided to the department: (i) **an enhanced public participation plan**; and (ii) **additional information deemed necessary** by the department to evaluate and, where necessary, mitigate environmental impacts on the identified environmental justice area(s) or disadvantaged communities." (Emphasis added)

We express the same concerns about uncertainty in response to draft Part 621 as we identified in our comments on DAR-21 and CP-49. It is unfortunate we are unable to react to any changes or updates to these directly relevant guidance documents in our comments on this rulemaking; we resubmit and incorporate those comments into these comments and await the opportunity to comment on the Department's proposed regulations implementing these laws. (G-4)

**Response:** See Responses 11-14 and Responses 16-18. On December 14, 2022, DEC finalized important updates to Commissioner's Policy on "Climate Change and DEC Action" (CP-49) and finalized the Division of Air Resources program policy entitled "The Climate Leadership and Community Protection Act and Air Permit Applications" (DAR-21).

**21. Comment:** Finally, consistent with our comments above on the requirements for a public participation plan, we request that both subdivisions [621.3(a)(11) and (13) be further revised to state that "additional information and an enhanced public

participation plan will not be required for applications for permit renewal with no material change in permit conditions or the scope of the permitted activities." (G-5)

**Response:** See Response 12.

**22. Comment:** DEC has issued for public comment a proposed rulemaking to revise Part 621. The Regulatory Impact Statement ("RIS") for the proposed rule indicates that the regulation would implement provisions of the CLCPA.

The regulation would require permit applications to include certain information required by the CLCPA to be deemed complete by DEC. Specifically, the proposed rule would require applications to include an explanation of whether the project will be inconsistent with, or will interfere with, the attainment of statewide GHG emission limits and an evaluation of the need for mitigation of environmental impacts on environmental justice ("EJ") areas and disadvantaged communities. The proposed rule does not include specific provisions for how the DEC will implement these requirements.

The RIS does not discuss why DEC is proposing these changes in advance of the completion, by the end of this year, of the Council's Scoping Plan recommending measures to implement the CLCPA and the requirement that DEC implement the Council's recommendations via the 2024 Implementing Regulations as discussed above. It also does not acknowledge the pending Division of Air Resources Guidance DAR-21, entitled "The Climate Leadership and Community Protection Act and Air Permit Applications," which would apply to all types of DEC air permitting, including new, modified, and renewed Title V permits, and the proposed revisions to the DEC Commissioner's Policy ("CP-49") - Climate Change and DEC Action, both of which would implement Section 7 of the CLCPA. Also, it does not refer to the draft criteria and map for what constitutes a disadvantaged community, as discussed below, in terms of the draft rule's EJ-related language. (H-1)

**Response:** See Responses 11-14 and Response 16. On December 14, 2022, DEC finalized important updates to Commissioner's Policy on "Climate Change and DEC Action" (CP-49) and finalized the Division of Air Resources program policy entitled "The Climate Leadership and Community Protection Act and Air Permit Applications" (DAR-21). Also, on December 19, 2022, the Climate Action Council finalized the Scoping Plan, which provides recommendations for how New York will reduce greenhouse gas emissions and achieve the required Statewide greenhouse gas emission limits, increase renewable and emissions-free energy use, and ensure all communities equitably benefit in the clean energy transition.

In addition, information about the designation of disadvantaged communities is available at https://climate.ny.gov/en/Resources/Disadvantaged-Communities-Criteria . This website includes information about designation criteria and an

interactive map of communities that meet the draft disadvantaged communities' criteria.

**23. Comment:** "IPPNY's Recommended Changes to Part 621 on GHG Emission Reductions. Below are our specific recommended language changes shown in upper case bold text. (11) The Climate Leadership and Community Protection Act (CLCPA) requires the department to consider whether its permitting decisions subject to this Part are inconsistent with, or will interfere with, the attainment of the statewide greenhouse gas (GHG) emission limits established in Article 75 of the ECL and reflected in Part 496 of this Title. Therefore, where applicable AND ON AND AFTER THE EFFECTIVE DATE OF REGULATIONS TO BE PROMULGATED BY THE DEPARTMENT PURSUANT TO SECTION 75-0109 OF THE ECL TO IMPLEMENT PART 496, the applicant must provide information to explain whether the project will be inconsistent with, or will interfere with, the attainment of statewide GHG emission limits. ON AND AFTER THE EFFECTIVE DATE OF THE ADOPTION OF REGULATIONS TO IMPLEMENT PART 496, an application is incomplete until such information is provided to the department. PRIOR TO THE ADOPTION OF REGULATIONS TO IMPLEMENT PART 496, AN APPLICATION BY AN APPLICANT SUBJECT TO PARTS 242 AND 251 OF THIS TITLE WOULD BE COMPLETE UPON THE PROVISION OF INFORMATION TO THE DEPARTMENT THAT DEMOSTRATES COMPLIANCE WITH THOSE REGULATIONS." (H-2)

**Response:** See Responses 11-14,16, and 22.

**24. Comment:** IPPNY is recommending these revisions to the proposed Part 621 rule to ensure DEC's permit application procedures implementing the CLCPA's Section 7(2) and 7(3) have clarity and do not unreasonably and unduly burden applicants seeking permits, especially permit renewals. It is imperative that DEC's permit procedures do not burden new and existing electric generation that is needed to provide safe and reliable service, given the ongoing and recent findings of the NYISO about the shrinking capacity reserve margin and the looming threat to electric system reliability.

The DEC needs to be able to process and approve permits in a coordinated manner to continue to provide the proper investment signal for necessary investment in generation and ultimately in DEFRs [fully dispatchable emission free resources], which are critically needed to maintain the reliability of the State's electric system as the State moves to achieve the requirements of the CLCPA and reliably transitions to a zero-emissions generation fleet. In addition, some zones are expected to become winter peaking by 2032. If sufficient fossil-fueled generators are unable to be operated because they cannot receive Title V air permits: electric system reliability will be harmed; customers' service will be interrupted, and their costs will

be increased; and the confidence in achieving the goals of the CLCPA in a reliable manner will be thwarted. (H-4)

**Response:** See Responses 11-14 and Response 16. In addition, many of the energy projects noted in the comment are often subject to the review procedures of, and authorization by, other State or federal authorities (e.g., Federal Energy Regulatory Commission, New York State Public Service Commission, New York State Office for Renewable Energy Siting), and may not be subject to UPA. To the extent such authorities are state agencies, they are also obligated by the requirements of CLCPA, including Section 7 as part of their administrative reviews.

25. **Comment:** The City recognizes and supports compliance with and the goals of the CLCPA and the Environmental Justice Act. But the proposed revision offers insufficient guidance to applicants on addressing these issues. The Climate Action Council is developing a framework for the implementation of the CLCPA, but this work is still in the beginning stages. The City, along with many other municipalities and stakeholders, submitted detailed comments on the Climate Action Council's Draft Scoping Plan in July 2022. As there are not yet established regulations implementing the CLCPA, a permit applicant does not have the necessary prior notice of how to "demonstrate whether the project will be inconsistent with or will interfere with the attainment of statewide GHG emission limits" as required by proposed revision to Section 621.3(a)(11). Similarly, the applicant has no prior notice of the potential "additional information deemed necessary" to evaluate a project's impact on identified environmental justice areas or disadvantaged communities as required by the revision to Section 621.3(a)(13)(ii). The City understands the need for a project applicant to address the CLCPA and the Environmental Justice Act, but without regulations setting standards for a project's compliance, the addition to the UPA is premature.

    On page 2 of the Regulatory Impact Statement, DEC explains that the changes proposed are intended to be procedural in nature. However, the changes in Section 621.3(a) (11) and (13) cannot be characterized as merely procedural. The vagueness of the proposed application requirements would create significant confusion for permit applicants. Without regulations providing standards for the preparation of analyses, applicants will be required to engage in guesswork, potentially resulting in inefficient feedback loops, delays, and unanticipated costs. (I-1)

    **Response:** See Responses 11-14,16 and 22.

26. **Comment:** Part 621.3(a) (11)-(13): CLCPA and Community Risk and Resiliency Act (CRRA) additions: the additional information on consistency, mitigation measures, climate risk, disproportionate or inequitable burdens violate due process and allow

DEC to arbitrarily determine when they believe they have sufficient standards. These statutes provide no guideposts on what type of information, or at what point, sufficient information is provided. Allowing the Department to hold up completeness on the basis of an arbitrary, standardless standard, contradicts the notion of fair notice and the regulated community knowing what standards they have to meet to get a permit. Now, the regulated community will know only that their permits are at the complete discretion of DEC and satisfaction of DEC's viewpoints on this, without limit, and even for existing facilities. This is exacerbated by not allowing a project to reach completeness until the Department is satisfied, as it would prevent hearings or litigation in nearly all cases, unless the applicant waits for the Department to determine the application should be returned for failure to provide a response. (J-7)

**Response:** See Responses 11-14, 16 and 22.

**27. Comment:** The DEC should explain the legal and technical basis for requiring permit applicants to provide information on consistency with attainment of CLCPA emission limits before the DEC's valid promulgation of regulations to implement the CLCPA. Citing Section 7(2) of the CLCPA, the Proposed Rule would require any applicant for one of the covered permits to "provide information to explain whether the project will be inconsistent with, or will interfere with, the attainment of statewide GHG emission limits." The DEC should provide an explanation of the legal and technical basis for requiring permit applicants to supply Section 7(2) "consistency" information before the DEC's valid promulgation of regulations required to implement the CLCPA. Absent such basis, the DEC should delete references to Section 7(2) from these procedures until the Department has promulgated such regulations. (K-2)

**Response:** See Responses 11-14, 16 and 22. It is appropriate for the rule making incorporate requirements under CLCPA and CRRA because those statutes are in effect [*see Danskammer Energy*, LLC v. DEC, 76 Misc.3d 196 (Sup. Ct. Orange Co. 2022)] (holding that CLCPA Section 7 "by its plain language, is of immediate effect" and that there is no basis to support the suggestion that DEC's authority is somehow currently limited pending the promulgation of additional regulations at some later date).

**28. Comment:** The Proposed Rule's requirement for Section 7(2) "consistency" information is premature because it sidesteps the CLCPA's currently ongoing process for establishing attainment regulations. Section 7(2) of the CLCPA calls for a determination of whether a project "is inconsistent with or interferes with the attainment" of the state-wide emission limits (emphasis added). The CLCPA is clear that the mechanism for "attainment" is the suite of regulatory measures that the DEC will promulgate after it reviews and considers the final Scoping Plan. Under the process outlined in the CLCPA, there are still a number of steps to go before these

attainment regulations are in place. It is the regulatory measures promulgated by the DEC at the end of this process that will determine any individual facility's required relative contribution to attaining the 2030 and 2050 emission limits. Absent such measures, it is far from clear that the DEC has a legal basis for mandating that an applicant supply information on whether a proposed project (or permit renewal) at a particular facility interferes with or is inconsistent with "attainment" of the state-wide emission limits. (K-3)

**Response:** See Responses 11-14,16, 22 and 27.

**29. Comment:** The DEC itself has previously acknowledged that CLCPA prohibits the Department from prematurely determining permissible emission levels for individual sources. It is difficult to square the DEC's Proposed Rule with the express language of the CLCPA, or with its intent and structure. In a prior proceeding, the DEC itself acknowledged that the CLCPA prohibits the Department from prematurely determining permissible emission levels for individual emission sources or other facilities. In its Fall 2020 rulemaking to establish the 2030 and 2050 statewide emission limits, the Department rejected comments arguing that the rule should also set regulatory limits on emissions of individual GHGs. In its response to commenters, the Department explained that such an approach would be inconsistent with the CLCPA: "[T]he CLCPA contemplates that the Climate Action Council (Council) will make recommendations as part of the Scoping Plan regarding measures to achieve the statewide emission limits, including subsequent rulemaking by the Department or other State agencies. Both the Council's recommendations in the Scoping Plan and future substantive rulemaking by the Department and other State agencies must include measures that impose enforceable requirements on individual sources of greenhouse gases. At this preliminary stage in the overall implementation of the CLCPA, consistent with this overall structure of the statue, the Department is not seeking through this rulemaking to make significant policy decisions regarding the level of emission reductions required for each type of GHG emission source. If the Department were to establish limits on individual types of greenhouse gases, it would conflict with this statutory objective and structure, because it may prematurely suggest or establish the relative amount of emission reductions necessary from each sector or type of source."

In other words, the DEC declared that it could not set statewide limits on individual GHGs or GHG sources prior to finishing the rulemakings for attainment regulations. This analysis reflects the DEC's appropriate legal conclusion that that it may not impose emission limits or other requirements on sources in the absence of rules governing how the decisions concerning those limits and other requirements should be made. The same concerns outlined in the language quoted above should guide the DEC's interpretation of the Section 7(2) review requirement. The DEC should not be mandating Section 7(2) reviews as part of its permit review process until it has

validly adopted regulations establishing criteria and procedures for deciding how those limits should be set. (K-4)

**Response:** See Responses 11-14,16, 22 and 27. In addition, the Commissioner's Policy on Climate Change and DEC Action, finalized December 14, 2022, outlines a sequence for the phasing of DEC's implementation of CLCPA (see V.2 "Scoping Plan"). Also, UPA is a procedural regulation and does not establish individual GHG emission limits.

30. **Comment:** Absent the implementation regulations [for CLCPA], the DEC runs the risk that any consistency review would have a high degree of uncertainty given the myriad GHG sources throughout the state's economy. (K-5)

**Response:** See Responses 11-14,16 and 22.

31. **Comment**: The DEC should acknowledge that it lacks the authority under the Uniform Procedures Act to use the proposed permitting procedures and informational requirements to condition or deny permits.

If the DEC maintains that it has the authority to request Section 7(2) consistency information in connection with applications for permits, permit renewals and modifications, the DEC must acknowledge that it may not use the informational requirements of Part 621 to impose conditions on projects or reject permits.

The Department's Regulatory Impact Statement ("RIS") for the proposed regulations supports the Coalition's position in this regard. The RIS states that amendments in the Proposed Rule are "procedural in nature" and "do not include changes to the standards for permitting issuance." The RIS also says that, for federally delegated or authorized permitting programs, such as Title V permits and State Pollution Discharge Elimination System (SPDES) permits, "substantive changes have not been proposed."

Further, Part 621 is a procedural regulation, establishing a uniform process for issuing state environmental permits. The relevant provision of the proposal requires applicants to "provide information" regarding consistency. Because no substantive standards have been set for assessing the consistency of particular types of projects with the emission limits of the CLCPA, imposing consistency review requirements under Part 621 is premature.

Additionally, the DEC should explain the Proposed Rule's interaction with the proposed DAR-21 and CP-49 guidance, in which the DEC incorrectly asserted that it has the authority to substantially condition or even reject permits on the basis of CLCPA consistency reviews. The DEC has never finalized the guidance or stated publicly that it is not moving forward with the guidance. The Coalition filed extensive

comments on the legal and technical issues with the guidance, which we have attached to these comments and incorporate by reference. We urge the DEC to explicitly revoke those prior proposals. (K-6)

**Response:** See responses 11-14, 16 and 22. In addition, the Uniform Procedures Act provides the overall framework for decision-making on applications for permits to which it applies, including procedures related to the conditional issuance of permits and denial of applications. This authority to deny a permit application includes, by reference at section 621.10(f), "…any of the standards or criteria applicable under any statute or regulation pursuant to which the permit is sought, including applicable findings required by article 8 of the ECL and its implementing regulations at Part 617 of this Title…" This includes the requirements of CLCPA Section 7. Specifically regarding CLCPA Section 7, DEC has authority under CLCPA Section 7 to deny a permit application, where such denial is warranted based on its application of this statutory provision to specific facts of a particular application. *See Danskammer Energy, LLC v. DEC*, 76 Misc.3d 196 (Sup. Ct. Orange Co. 2022).

**32. Comment:** "The DEC should acknowledge that Section 7(2) is a review provision and does not provide authority to condition or deny permits. Section 7(2) does not grant authority to agencies such as the DEC to reject projects that otherwise conform to state and federal laws. The statewide emission limits adopted by the DEC are not binding on individual projects such that "interfering with" those limits provide a basis for invalidating a project.

Rather, by its terms, Section 7(2) is a mandate on state agencies to conduct a review. Had the legislature intended to authorize state agencies to deny permits for individual projects based on a CLCPA consistency review it would have used different and more direct language.

By proposing to reject permit applications pursuant to Section 7(2), the DEC effectively has claimed to find, in a vague and ancillary provision of the CLCPA, transformative regulatory authorities that would have broad economic consequences.33 Yet, the legislature "could not have intended to delegate such a sweeping and consequential authority in so cryptic a fashion." The DEC should acknowledge that it may not use the procedures outlined in the Proposed Rule for such actions." (K-7)

**Response:** See Response 31.

**33. Comment:** The proposed requirements are vague as to what demonstration is required to satisfy the New York Community Risk and Resiliency Act ("CRRA"). The Proposed Rule includes CRRA requirements to demonstrate that future physical climate risk has been considered, and states that an application is incomplete until

the required demonstration is provided to the DEC. The Coalition understands the CRRA requires permit applicants to demonstrate that future physical climate risks due to sea level rise, storm surge, and flooding have been considered. Consistent with comment below, the Coalition does not believe a one-size-fits-all approach for CRRA analyses is appropriate for all permit applications governed by this proposed rulemaking. To the extent DEC will not remove this proposed requirement from its final regulatory revisions, the Coalition is unsure what this demonstration would entail and encourages the DEC to provide further details. The Coalition requests that the DEC provide parameters that appropriately scale the CRRA analyses to be submitted based on project size and whether it is a new project or a permit renewal for existing facilities. (K-9)

**Response:** As outlined in the DEC Commissioner's Policy on Climate Change and DEC Action (CP-49), finalized December 14, 2022 (see section V.4), DEC's Office of Climate Change will be working with other programs within DEC to develop guidance, policies, and procedures to ensure that climate risks are adequately considered under CRRA. Some guidance on the implementation of CRRA has already been developed by the Office of Climate Change and is available on DEC's website at https://www.dec.ny.gov/lands/102559.html.

**34. Comment:** "The EJ provisions within draft Part 621 should take effect after finalization and adoption of the Climate Justice Working Group's criteria, list, and map for what constitutes a disadvantaged community, as discussed above; otherwise, even though Subdivision 3 of CLCPA Section 7 became effective on January 1, 2020, the EJ provisions of Part 621 cannot be implemented without the applicant knowing what the State has decided a disadvantaged community is, and it is unreasonable and unfair for the DEC to require applicants to propose application provisions on this point with only a draft proposal for what those communities may be. Also, the EJ provisions of Part 621 should not be implemented until the DEC updates its CP-29, at a minimum, to provide detailed guidance on implementation of Section 7(3) and, more necessarily, until it promulgates regulations to establish those requirements.

Below are the specific language changes recommended by IPPNY, as shown in upper case bold text, in order to incorporate the reasoning discussed above.

"(13) The Environmental Justice Act of 2019 and CLCPA require the department to consider environmental justice concerns in permitting decisions subject to this Part and provide enhanced public participation opportunities. Therefore, where applicable, an application is incomplete until the following information is provided to the department: (i) an enhanced public participation plan, PURSUANT TO REGULATIONS TO BE PROMULGATED BY THE DEPARTMENT TO AMEND THIS PART 621.3 (a) (13) TO ESTABLISH MANDATORY PUBLIC PARTICIPATION REQUIREMENTS and (ii) additional information deemed

necessary by the department to evaluate and, where necessary, THE IDENTIFICATION OF SPECIFIC MEASURES THE APPLIANT WILL TAKE TO AVOID, LOWER, MINIMIZE, OFFSET, OR mitigate, TO THE MAXIMUM EXTENT PRACTICABLE USING VERIFIABLE MEASURES, ANY SIGNIFICANT AND ADVERSE DISPROPORTIONATE environmental impacts on the identified environmental justice area(s) or disadvantaged communities UPON THE ADOPTION OF THE CRITERIA, MAP, AND LIST FOR IDENTIFYING DISADVANTAGED COMMUNITIES PURSUANT TO SECTION 75-0111 OF THE ECL AND UPON THE PROMULGATION OF REGULATIONS TO PROVIDE DETAILED GUIDANCE ON IMPLEMENTATION OF SUBDIVISION 3 OF SECTION 7 OF THE CLCPA (CHAPTER 106 OF THE LAWS OF 2019)." (H-3)

**Response:** See Responses 11-14, 16 and 27. In addition, although the Commissioner's Policy on Environmental Justice and Permitting (CP-29) may be revised in the future to incorporate important updates related to CLCPA, the policy already exists, and its provisions related to permits covered by the Uniform Procedures Act are implemented through Part 621.

35. **Comment:** Section 621.3(e) states that "The department may suspend review of an application when an enforcement proceeding or action is formally commenced against an applicant" for any alleged violations, including those at other sites. This approach could disproportionately and unfairly affect governmental agencies that own or manage several sites performing similar operations requiring similar operating permits. The fact that another site under same ownership has a violation should not be a factor in DEC's decision to suspend processing a permit application. This approach would negatively impact the public lands and environmental justice communities that rely on open space. (A-1)

**Response:** The impetus for the rule change is to address the situation where an applicant that has one or more unresolved violations on other sites could continue to conduct additional regulated activities at another location. The proposed rule also aligns section 621.3(e) with the DEC Commissioner Policy on "Record of Compliance Enforcement Policy" (DEE-16, last revised March 5, 1993). The policy is available on DEC's website at: https://www.dec.ny.gov/regulations/25244.html. As noted in DEE-16, "…the courts have recognized that the environmental compliance history of a permit applicant is a relevant consideration regarding qualification for permitting [Matter of Bio-Tech Mills Inc. v. Williams, 105 A.D. 2d 301 (3d Dept., 1985), Aff'd, 65 N.Y. 2d 855 (1985), Olsen v. Town Board of Saugerties, __AD 2d _ (3rd Dept., 1990)]". DEE-16 also provides references to DEC's authority to suspend, modify, or revoke permits. Therefore, DEC is not obligated to process a permit application at an additional site while one or more ECL violations persist on other sites, even if the additional site is geographically removed from the site(s) of the violation(s).

Also as noted in DEE-16, it "…does not establish a strict code of procedures or standards. Rather, the procedures and guidelines for review must be applied on a case-by-case basis to determine the appropriate Department position in response to the submission of permit applications." The same considerations described in making case-by-case determinations under DEE-16, would be expected to be considered in applying the additional provision proposed at section 621.3(e). DEC has clarified that the enforcement proceeding must be formally commenced, consistent with decisional law and current practice. In addition, to further clarify this provision, DEC has revised the rule to limit its scope to enforcement and compliance matters for sites within New York State.

**36. Comment:** It appears that DEC may suspend the review and processing of a permit application for alleged violations related to the activity that may have occurred at the facility or site that is the subject of the application or at a site owned or controlled by the applicant. It is unclear why other businesses (sites) of the applicant should be subject to suspension of activities? If we misread this statute, we would appreciate you rephrasing it to avoid misconception. (E-3)

**Response:** See Response 35.

**37. Comment:** With the proposed addition to Section 621.3(e) of "or at a site owned or controlled by the applicant," DEC would greatly expand its ability to suspend review of permit applications. Currently, DEC can suspend review of a permit application on a site if that same site is subject to a DEC enforcement action. Under the proposed revision, DEC could suspend its permit review if any site controlled by the applicant is currently subject to a formal enforcement proceeding.

This approach disproportionately and unfairly affects the City of New York, which includes entities such as NYC DEP, NYC Parks, and DSNY that own or control many sites requiring operating permits. Because the rule would continue to broadly provide that the alleged violation be related to "provisions of law administered by the Department," the substitution of "must" for "may" is not limiting. The fact that another site under same ownership has a violation should not be a factor in DEC's decision to suspend processing a permit application. As written, an alleged DEC violation for not properly color coding a petroleum bulk storage tank at one facility owned or controlled by a city agency could suspend DEC's permit review for that City agency to operate a compost facility. Such facilities will be managed by different personnel, and could be separated by great distances, and perform entirely different functions. As such, this provision unfairly threatens the operation of New York City municipal facilities, as New York City is uniquely large both in terms of population and geographic area. The proposed freezing of municipal agencies' permit applications for unrelated incidents at distant facilities would be unworkable in a city of eight

million residents and countless commercial entities that rely on the day-to-day municipal services that are subject to environmental permits.

This approach would also delay and restrict the City's ability, through agencies like NYC Parks, to conduct capital improvement projects, maintain public parkland and infrastructure, and manage and restore natural resources. This would hinder the City's ability to respond to community needs and concerns and would negatively impact the public and environmental justice communities that rely on the City's public open space, facilities, and infrastructure. (I-2)

**Response:** See Response 35.

**38. Comment:** 621.3(e): enforcement: the changes to clarify when enforcement warrants suspension of review is helpful, however, the changes appear to allow the Department to suspend processing for formal enforcement against any of an applicant's facilities, for any program, including those unrelated to the permit under review. This is likely broader than many of the substantive Environmental Conservation Law (ECL) statutes allow, and the UPA does not contemplate this as a basis for suspending processing. (J-4)

**Response:** See Response 35.

**39. Comment:** The DEC should not suspend processing of a company's permit applications based on an alleged violation at an unrelated facility or project site or for an unrelated area of environmental law. Expanding the focus of permitting analysis beyond a project for which an application is sought is potentially a significant overreach of the agency's regulatory power. The suspension provision should only apply for an alleged violation directly related to the activity for which the permit is sought (i.e. the same project or facility site and same type of permit), and the regulation should clarify that suspension is only required for significant violations. A suspension for a minor violation at a separate and unrelated site is not consistent with due process. In addition, the DEC should provide more details on how the DEC will analyze enforcement decisions in comparison to the permit application in question. If a permit is suspended under this provision, the Department should provide a timeframe for resolution of the issue. Scenarios involving emergency permits should also be considered. (K-14)

**Response:** See Response 35. With respect to requests for emergency authorizations, DEC is required under section 621.12(e) to make a finding that an emergency exists, as defined at section 621.2(l). If a bona fide emergency exists, DEC prioritizes authorization of actions that are necessary to protect life, health, general welfare, property and natural resources and would not unnecessarily withhold or delay such an authorization. As provided at section 621.2(e)(2) and

621.2(j), DEC may also condition emergency authorizations and may impose other requirements to ensure compliance with the authorization and other applicable regulatory standards.

## 621.4 – Requirements for Specific Applications

**40. Comment:** In general, CVEC supports the proposed amendments that will streamline the review of permit applications and expand the list of projects that may be considered "minor". (B-1)

**Response:** Comment noted.

**41. Comment:** Given proposed additions of specific small-scale projects, such as bridge repairs and small quantities of wetland fill being de-classified as "major" under UPA, due to generation of little public interest, further consideration should be given to classifying natural area management as "minor" under UPA to reduce permitting costs and timelines. Experience shows that legal notices for natural areas management projects in wetlands and adjacent areas classified as "major" under UPA have generated little public interest. These projects benefit the environment and public and typically involve projects to remove environmental contaminants, improve ecosystem services of wetlands and forests, and provide safe public access in environmental justice communities. Natural area management projects also improve climate change resiliency for human and ecological communities, including but not limited to buffering storm surge, increasing biodiversity, removal of defunct and hazardous structures, and mitigating sea level rise. Restoration practitioners and open space land managers in NYC have shown that natural area management projects do not result in significant adverse impacts, do not typically generate community concern, and support the objectives of the Climate Leadership and Community Protection Act (CLCPA) and Community Risk and Resiliency Act (CRRA). (A-3)

**Response:** The minor classifications apply to UPA permits, there is no such permit type for "natural area management". While DEC understands that well-designed projects developed to restore or manage natural areas are ultimately beneficial to the environment, the scale of such projects can often involve large areas of disturbance and potential short-term impacts, including impacts or changes to ecosystem hydrology, biodiversity, vegetation, and others. As a result, broadly classifying natural area restoration or management activities as minor would not be appropriate. If organizations have frequent and routine management activities that would each require an individual, major permits, DEC may consider a single permit application that would incorporate such a management program and into a single, broad permit.

**42. Comment:** The proposed amendments would further limit public participation by adding or expanding dozens of actions that would now be considered "minor projects." The Department justifies this on the basis that "large-scale, environmentally consequential, or contentious developments" elicit higher levels of public interest than smaller-scale, more localized ones. While a bigger project will obviously impact more people, this should not be the basis for ignoring the concerns of those impacted by smaller projects. The proposal would exacerbate the current non-compliance with ECL section 70-0109(2)(a) and convert many more activities into private conversations between an applicant and agency staff. In reviewing permits, the Department's regional staff should have the benefit of any input and insights that local elected officials, organizations and members of the public feel are relevant. They can share information that is indispensable in assessing a proposed project's environmental impact, and their inclusion in the Uniform Procedures Act process was an essential element in the legislative design. (F-4)

**Response:** Since 1977, when UPA was first enacted into law by the Legislature, ECL Article 70 [sections 70-0105(3), 70-0107(1)] has given DEC the authority to classify minor projects and adopt rules concerning public notice. In Governor Carey's 1977 Annual Message to the Legislature, in which he recommended the UPA legislation, the Governor stated the purpose of UPA was "[t]o assure that the regulatory processes fulfill their intended objectives without costly delays or attention to frivolous concerns." See the Governor's approval message, McKinney's 1977 Session Laws, p. 2523.

Thus, in addition, along with its purpose to encourage public participation in government review and decision-making [ECL section 70-0103(4)], UPA is also purposed to provide for the "expeditious" review of regulatory permits [ECL section 70-0103(1)]. Therefore, such classifications have always been done based on degree of potential impact on the environment and public interest in particular projects. The expansion of the minors list is based on over 15 of years of public review of applications where such projects attracted little interest. The proposed rule also retains DEC's authority to require public notice and to treat minor projects as "major projects" [section 621.3(b)(3)]. In addition, the proposed rule, and its changes to the major and minor classifications, do not change the underlying permit issuance standards contained in the permit program regulations.

**43. Comment:** Proposed changes to 6 NYCRR 621.4 will increase the number of projects considered "minor" (defined as "... by its nature and with respect to its location will not have a significant impact on the environment...) by expanding the types of allowable disturbances in wetlands and adjacent areas and increasing some disturbance thresholds. DEC states that it is making these changes to better reflect the level of interest generated by the public.

However, if implemented, these changes would reduce the number of projects DEC would forward to NYC Department of Environmental Protection (DEP) for review under Addendum A of the DEC/DEP MOU when those activities are located within 1000 feet of a Reservoir or Controlled Lake. The projects that must be forwarded pursuant to Addendum A include major projects and only two types of minor projects – underground utilities and residential water supply wells. Comments on specific changes to minor project classifications follow.

DEP's continued ability to review all projects that it currently reviews pursuant to Addendum A is critical to the protection of the drinking water supply to eight million City residents and one million upstate customers. The City therefore requests that if DEC adopt the proposed changes, it carve out an exception to the proposed changes for projects that are located in the New York City Watershed. Alternatively, the City requests that if DEC adopts the regulations as proposed that it renegotiate the MOU with DEP prior to the revisions taking effect to ensure that there is no interruption to DEP's ongoing review of these activities when they take place in the Watershed. (I-3)

**Response:** See Response 42. In addition, the proposed rule is independent of more specific review procedures that DEC and the NYC Department of Environmental Protection (DEP) may agree to under its memorandum of understanding (MOU). The terms of the DEC/DEP MOU allow for periodic review and the MOU may be amended to reflect the needs and interests of each agency for projects located within the New York City watershed.

**44. Comment:** the City suggests that the list of minor projects should be expanded to include an additional category of projects not contemplated by the revisions. The City's experience shows that legal notices for ecological restoration projects, such as wetland and adjacent area restoration classified as "major" under UPA have generated little public interest. These projects benefit the environment and typically involve excavation of anthropogenic fill, clean fill placement, and vegetation establishment and management, among other beneficial improvements. The City's ecological restoration projects improve climate change resiliency for human and ecological communities, including but not limited to buffering storm surge, increasing biodiversity, removal of defunct and hazardous structures, and mitigating sea level rise. The City has shown that ecological restoration projects do not result in significant adverse impacts, do not typically generate community concern, and support the objectives of the CLCPA and Community Risk and Resiliency Act (CRRA). Therefore, further consideration should be given to classifying some ecological restoration as "minor" under UPA so that permitting timelines and costs are reduced. (I-4)

**Response:** See Response 41.

**45. Comment:** Proposed 621.4, header: this adds an express authorization to require "supplemental information" before and after the application has been determined to be complete. This addition could be useful to allow for more expedited processing, however, it should not be used as a basis to delay completeness, or to hold up completeness on the basis of the supplemental information requests. (J-5)

**Response:** The propose rule rephrases, but does not fundamentally change, a statement that already existed in the section 621.4 header that read as follows: "Supplemental information that the department determines is necessary to review the application may be requested at any time." This concept is also reinforced by the special provision at section 621.14(b), which is not changing in the proposed rule, that allows the department at any time during the review of an application to request any "…additional information which is reasonably necessary to make any findings or determinations required by law". DEC also remains mindful of the provision in section 621.6(d) indicating the need in notices of incomplete applications to list all identified areas of incompleteness, which is done to the extent they can be known based on the information submitted.

**46. Comment:** Some of the recommended changes to section 621.4 appear to be in direct conflict with the intent of the CRRA, in that they classify projects known to or anticipated to increase threats of erosion or flooding as "minor" projects. For instance, the proposed amendments would now categorize the construction of residential structures and accessory structures, as well as the clearcutting of vegetation, adjacent to freshwater wetlands as minor projects. Such projects have the potential not only to directly impact these wetlands, but also to encourage further encroachment on the wetland as well as place the structures at risk of flooding. Given the importance that wetlands play in protecting communities from impacts of climate change, and the State's mandate to protect residential property from flooding, it seems that such relaxations in review standards could have a potentially significant impact on the environment. (L-1)

**Response:** While CRRA does not apply to minor projects, Article 24 and the wetland regulations recognize the importance of wetland protection in providing flood protection benefits and take account of climate change. [ECL sections 24-0105(3), 24-0105(7)(a), 24-0705(1), 6 NYCRR 663.5]. Therefore, the reclassification does not affect DEC's substantive consideration of resiliency and climate change in the review of freshwater wetland permit applications. The same permit issuance standards contained in 6 NYCRR 663.5 apply to minor and major projects. By reference, these standards also include the compatibility designations contained in 6 NYCRR 663.4(d), which are also not changing. As a result, applicants still have to meet the same burden of compatibility and weighing contained in the permit

issuance standards whether the application is classified as minor or major pursuant to UPA.

In addition to freshwater wetlands permits, many of the Uniform Procedures Act permitting programs are implemented under statutes (ECL) and regulations (6 NYCRR) that already incorporate and require consideration of flooding impacts, flood protection benefits, erosion, and other factors that are related to climate change risks – along with the overarching consideration of public health and welfare. In this regard, the same permit issuance standards and considerations related to climate change will continue to apply to both minor and major projects.

**47. Comment:** This approach significantly increases the allowable stream bed or bank disturbance considered "minor" under UPA from 100 lineal feet to 500 lineal feet. A project that results in 500 feet of lineal disturbance along any 1,000 feet of a watercourse is significant and should continue to require a higher level of review.

In 2021, the United States Army Corps of Engineers (USACE) and United States Environmental Protection Agency reissued the federal Nationwide Permits (NWPs) for projects subject to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. This included the removal of the 300 linear foot limit for losses of stream bed from 10 NWPs (NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52). As a result, USACE now relies on a ½-acre impact limitation. Removal of the 300-foot limit for losses of stream bed disproportionately impacted lower order streams that have smaller widths, in some cases doubling the amount of impact permitted under a NWP. This weakening of federal authority greatly reduced stream protections across the United States. The combined effect of reduced federal oversight and an increase in the allowable stream bed bank disturbance considered "minor" under UPA would negatively impact New York's waterways and decrease overall regulatory authority. (I-5)

**Response:** The importance of minimizing stream disturbances and preventing adverse impacts, including the danger of flooding is recognized in ECL Article 15, Title 5 and in the regulations that implement those provisions of law. [ECL sections 15-0501(3)(b), 6 NYCRR 608.7, 6 NYCRR 608.8]. Therefore, the reclassification does not affect DEC's substantive consideration of resiliency and climate change in the review of protection of waters permit applications. The same permit issuance standards apply to minor and major projects.

The USACE Nationwide Permits are subject to the DEC blanket Section 401 Water Quality Certification decision dated October 15, 2021. A copy of the blanket water quality certification and additional information is available on the DEC website at: https://www.dec.ny.gov/permits/6546.html .

**48. Comment:** Similar concerns arise from proposed provisions that would treat any construction, removal, or breach of a Class A ("low hazard") dam as a minor project. Such activities may well involve climate and resiliency impacts as well as riparian rights and should require local notices. These are far from all of the concerns raised by the Department's proposed expansion of the definitions of minor projects. All of the proposed changes to section 621.4 should be addressed further with the participation of all affected parties. (F-7)

**Response:** See Response 46 and Response 47. In addition, note that ECL Article 15 [section 15-0507(1)] mandates that dam owners maintain and operate structures in a safe condition, which may, in their judgement or by DEC's order [section 15-0507(3)(b)], require the removal or breach of a dam. DEC has removed "construction" from section 621.4(a)(2)(iii)*(b),* so that construction of a new class A dam would be a major project.

**49. Comment:** As another example, the proposed amendments would now categorize shoreline stabilization structures of less than 500 linear feet (section 621.4(a)(4)(ii)) as minor. However, the State's own guidance document, prepared pursuant to the CRRA, states in its findings, "Structural erosion-management, flood-mitigation and stormwater-management strategies that do not rely on or mimic natural systems are often only partially effective over time, may be harmful to adjacent or nearby properties and can compromise the function of natural features and processes that reduce risk." In addition to the CRRA guidance, the State' s Coastal Management Program and Long Island Sound Coastal Management Program contain policies that discourage the use of structural erosion control measures. The Town of Smithtown has experienced significant loss of the public foreshore as well as damage to adjoining properties because of erosion control structures, even those that are significantly smaller than the State's proposed threshold...(L-2)

**Response:** See Responses 46 and 47. Under protection of waters permitting and coastal erosion hazard area (CEHA) permitting [ECL Article 34, 6 NYCRR Part 505] permitting, DEC has long-considered shoreline hardening issues and encouraged the use of natural resiliency measures to the extent appropriate. Within CEHAs, the minor category threshold for erosion protection structures in the proposed rule is 200 feet and not 500 feet [section 621.4(o)(3)]. These programs inherently address climate change and resiliency, and the proposed rule does not change underlying permitting standards (section 505.6). In addition to other requirements, the permit issuance standards at section 505.6(b) require DEC's evaluation of whether a project is "…likely to cause a measurable increase in erosion at the proposed site or at other locations." The CEHA regulations also include provisions for the local delegation of the permitting program for communities that wish to regulate activities within CEHAs (sections 505.16-505.20).

**50. Comment:** In Section 621.4(b)(2)(v) a new minor project was proposed for "temporary dewatering systems withdrawing less than two million gallons per day". Temporary dewatering less than two million gallons per day is significant depending on site conditions and duration of dewatering. Temporary dewatering up to two million gallons per day could adversely impact adjacent property owners and natural resources and should therefore require higher level or review as a "major" project. (A-5)

**Response:** In DEC's experience, the majority of temporary dewatering projects occur within and near New York City and involve construction projects located near shorelines of major tidal rivers and water bodies where shallow water tables exist. For such projects, discharges also typically occur directly into the major rivers or water bodies and do not significantly affect the water table beyond the project boundaries or the water levels in the receiving waters. Where there may be significant impacts to either the surrounding water table or areas receiving a discharge, DEC retains the authority to treat a minor project as major [section 621.3(b)(3)]. In addition, the permitting issuance standards are unchanged for minor and major projects.

**51. Comment:** The proposed amendments to section 621.4 [section 621.4(c)(2)] also reclassify residential subdivisions as large as ten lots as minor projects for the Wild, Scenic and Recreational Rivers program. This is a five-fold increase above the current threshold of "not more than two lots." Furthermore, the proximity of such projects to a wild, scenic, or recreational river often means that there could be potential impacts to significant fish and wildlife habitat, historic structures, or archeologically significant areas. (L-3)

**Response:** Whether classified as major or minor, the permit issuance standards contained in 6 NYCRR section 663.8 will still apply to DEC's application review and decision-making and the potential impacts noted above would be addressed. In addition, the Wild, Scenic and Recreational River (WSRR) regulations include provisions for the local delegation of the permitting program for communities that wish to regulate activities within WSRR areas (see ECL 34-0105 and implementing regulations at 6 NYCRR section 666.5), including WSRR permits that are required for residential subdivisions. Through that delegation, communities that wish to avail themselves of the regulatory jurisdiction, can have increased public notice standards.

**52. Comment:** As written, the proposed amendments to section 621.4(h)(2)(ii) and (iii) would appear to allow multiple sequential lateral and vertical expansions of an existing mine to be considered as minor projects. It is our recommendation that the proposed language be clarified to allow only one such expansion of each type as a minor project, with subsequent expansions subjected to full review procedures. (L-4)

**Response:** DEC retains its discretion under section 621.3(b)(3) to determine that a minor project will be processed as a major project. In this regard, DEC staff are also mindful of the need avoid and prevent improper segmentation of reviews under SEQR. In addition, most permittees will likely have an incentive to avoid the overhead costs associated with multiple applications and favor fewer applications that reflect their actual operational needs and objectives. DEC will also continue to comply with the requirement in the MLR law [ECL section 23-2711(3)] to notify towns by certified mail of applications for a property not previously permitted pursuant to the MLR law regardless of whether a project is classified as major or minor.

**53. Comment:** This change includes an increase in disturbance thresholds from 540 sq. ft. to 10,890sq. ft. for restoring or reconstructing existing structures. Approximately one quarter acre of wetland disturbance is significant and should continue to require a higher level of review and notice to DEP. (I-7)

**Response:** See Responses 43 and 46. Existing structures are typically located in areas that are already developed. In addition, the minor category at 621.4(i)(2)(ii) is limited to temporary disturbances, so the restoration of the disturbed area will continue to be a necessary project element of this category.

**54. Comment:** We have identified several concerns regarding the proposed amendments to section 621.4(i)(2), "Minor freshwater wetlands projects", as follows: As written, paragraph (ii) would allow a twenty-fold increase in disturbance of ground surface. While some increase may be justifiable, the extent of this proposed increase appears excessive; (L-5)

**Response:** See Response 46. As noted in that response, permit issuance standards under Part 663 remain unchanged.

**55. Comment:** Proposed changes to 621.4 (i)(2)(iv) would significantly increase allowable disturbance in the adjacent area (AA) to be classified as a minor project. Currently, only constructing a driveway in the AA to an existing residence is considered minor. The proposed changes will allow the construction of a driveway, residential structure, or residential accessory structure in the AA. These disturbances could adversely impact the wetland and should continue to require a higher level of review. Should these activities ultimately be classified as minor, a renegotiation of Addendum A may be necessary so that DEP may secure the opportunity to review these minor activities in the NYC watershed. (I-8)

**Response:** See Response 46. As noted in that response, permitting issuance standards under Part 663 remain unchanged.

**56. Comment:** Section 621.4(i)(2)(iv), (xv), (xxi) Minor Projects in Adjacent Areas. The proposed changes categorizing certain projects as minor do not consider the state of the science on wetland buffers and would negatively affect core habitat for state-listed species, increase disturbance to wetlands, and reduce the resiliency of wetlands to climate change. DEC should instead consider development restrictions in the freshwater wetland adjacent area, similar to development restrictions for tidal wetlands. The disturbances classified as "minor" under the proposed revisions would be significant and should continue to have a higher level of review as a "major" project. The importance of wetlands buffers is summarized. (I-14)

**Response:** See Response 46. As noted in that response, permitting issuance standards under Part 663 remain unchanged.

**57. Comment:** Section 621.4(i)(2)(vii) cutting but not elimination or destruction of vegetation [, such that the functions and benefits of the wetland are not significant adversely affected]; These disturbances could adversely impact the wetland and should continue to require a higher level of review. (I-9)

**Response:** See Response 46. As noted in that response, permit issuance standards under Part 663 remain unchanged.

**58. Comment:** We have identified several concerns regarding the proposed amendments to section 621.4(i)(2), "Minor freshwater wetlands projects", as follows: As written, paragraph (viii) would consider dredging "at least once every ten years" to be a minor project. Should this language be "not more than once every ten years"? (L-6)

**Response:** See Response 46. In addition, this change aligns the minor category under Freshwater Wetlands with the long-standing minor threshold contained for Protection of Waters, Excavation & Fill permits under section 621.4(a)(4)(ii). The underlying rationale for this minor category is that maintenance dredging that occurs on a frequent basis (at least every ten years) does not result in significant adverse impacts because the area dredged does not have time to revert to a natural condition with the full range of wetland functions and benefits. In contrast, if dredged areas are not dredged on a consistent basis they potentially revert to a more natural condition and less frequent dredging would potentially have more impacts.

**59. Comment:** In Section 621.4(i)(2)(xi) the minor project for "installing a dock, pier, wharf or other structure built on floats or open-work" is proposed as double the currently allowable footprint and number of boats allowed without public notice under

existing regulations, supporting 40 boats (as opposed to 20) and up to 400 square feet (as opposed to 200 square feet). This could adversely impact local property owners on the shoreline and reduces public participation and awareness opportunities. (A-6)

**Response:** See Response 42 and Response 46. In addition, the change to the minor category at section 621.4(i)(2)(xi) pertains to freshwater wetland permits and does not identify the number of boats associated with a proposed dock. The change to 621.4(i)(2)(xi) is separate from the minor categories identified for Protection of Waters permits under section 621.4(a)(3)(ii), which do identify the numbers of boats. Regardless, changes in the major/minor thresholds do not change the underlying permit issuance standards in Part 663, which remain unchanged.

**60. Comment:** We have identified several concerns regarding the proposed amendments to section 621.4(i)(2), "Minor freshwater wetlands projects", as follows: As written, paragraph (xi) would allow a doubling in the size of a dock, pier, wharf, or similar structure. Due to the multiple known impacts associated with such structures, we would recommend against any increase in size. (L-7)

**Response:** See Response 59.

**61. Comment:** 621.4 (i)(2)(xii) allows for the installation of utilities from an existing utility distribution facility to a structure. The proposed change deletes the caveat “where no major modifications or construction activities in the wetland are necessary.” That stipulation should remain. Minor projects, by definition, should not cause major modifications or construction activities in the wetland. (I-10)

**Response:** See Responses 42 and 46. The rule removes language that is subjective and creates ambiguity. Where such installations would require clearing and removal of woody vegetation, grading, or filling, the activities could be classified as major under other appropriate thresholds or treated as major under the provision of section 621.3(b)(3).

**62. Comment:** By striking the reference to the adjacent area, the proposed changes to 621.4(i)(2)(xiv) would classify as minor activities intensive, organized, and repetitive use of ATVs, air and motorboats, and snowmobiles in freshwater wetlands. These uses, particularly ATVs, pose significant adverse impacts to wetlands and thus should remain as major projects subject to more intensive review. (I-11)

**Response:** See Responses 42 and 46. In addition, the major/minor thresholds do not change the underlying permit issuance standards in Part 663.

**63. Comment:** We have identified several concerns regarding the proposed amendments to section 621.4(i)(2), "Minor freshwater wetlands projects", as follows: As written, paragraph (xix) would allow disturbance of up to 0.1 acres of wetland for farm ponds. Due to the multiple ecological benefits of wetlands we would recommend against the proposed change. (L-9)

**Response:** See Responses 42 and 46. In addition, the major/minor thresholds do not change the underlying permit issuance standards in Part 663.

**64. Comment:** Clear cutting vegetation beyond timber in the adjacent area could adversely impact the wetland and should continue to require a higher level of review. (I-12)

**Response:** See Responses 42 and 46. Also, the major/minor thresholds do not change the underlying permit issuance standards in Part 663.

**65. Comment:** We have identified several concerns regarding the proposed amendments to section 621.4(i)(2), "Minor freshwater wetlands projects", as follows: As written, paragraph (xv) would allow clear cutting of "other vegetation" in adjacent areas to a wetland. Due to the erosion control, shoreline stabilization, wildlife habitat, and pollutant filtering benefits of such vegetation we would recommend against the proposed change. (L-8)

**Response:** See Responses 42 and 46. In addition, the expansion of the minor category will allow more expeditious review of management activities needed to address the spread of invasive, non-native vegetation. Also, the major/minor thresholds do not change the underlying permit issuance standards in Part 663.

**66. Comment:** Section 621.4(i)(2) (xxi) constructing a non-residential structure in the adjacent area of a wetland [placing a non-commercial structure, no larger than 576 square feet (53.51 square meters) gross floor area and no closer than 25 feet (7.62 meters) from the wetland boundary, approximate to an existing single-family residence in the adjacent area of a wetland]. These disturbances could adversely impact the wetland and should continue to require a higher level of review. Should these activities ultimately be classified as minor, a renegotiation of Addendum A may be necessary so that DEP may secure the opportunity to review these minor activities in the NYC watershed. (I-13)

**Response:** See Responses 42, 43, and 46. In addition, permitting issuance standards under Part 663 remain unchanged.

**67. Comment:** We have identified several concerns regarding the proposed amendments to section 621.4(i)(2), "Minor freshwater wetlands projects", as follows: As written, paragraph (xxi) would allow the construction of "a non-residential structure in the adjacent area of a wetland", absent any required setbacks or size limitations. The lack of such setback and size requirements is of great concern, as is the term "non- residential." If this term is either a typographical error (the existing paragraph prohibits non-commercial structures) or is intended to mean a non-habitable residential structure, then the proposed use would appear to be acceptable with appropriate setback and size requirements. However, the term "non-residential structure" is customarily interpreted as either a commercial or industrial structure, neither of which would be appropriate in the adjacent area of a wetland. We recommend that this paragraph be revised accordingly. (L-10)

**Response:** See Responses 42 and 46. In addition, the classifications of projects as major or minor for procedural purposes under UPA do not constitute “prohibitions” or allowances. The proposed construction of commercial facilities, industrial facilities, public buildings, or related structures or facilities in wetland adjacent areas will continue to be subject to the same permit issuance standards contained in 6 NYCRR Part 663.

**68. Comment:** Proposed changes to 6 NYCRR 621.4 (see Pg. 22) will increase the number of projects considered “minor”, defined as “... by its nature and with respect to its location will not have a significant impact on the environment...,” by expanding the types of allowable disturbances in wetlands and adjacent areas and increasing some disturbance thresholds. These proposed changes do not consider the state of the science on wetland buffers and would negatively affect wetlands, their functions, and the wildlife that rely on them. These changes would impact critical habitat for state-listed species, increase disturbance to wetlands, and reduce wetland flood capacity and resilience to climate change. Wetland buffer importance is summarized...(A-7)

**Response:** See Responses 42 and 46. Also, the major/minor thresholds do not change the underlying permit issuance standards in Part 663.

**69. Comment:** The proposed changes to the following “minor” freshwater wetland projects thresholds may result in significant adverse impacts. DEC should reconsider these changes, or, at a minimum, routinely forward these types of projects for DEP review when the activities occur in the New York City Watershed. The proposed changes also fail to consider the regional location of the wetlands. For example, these changes could result in more impacts where there are fewer wetlands, such in urban areas, where more protection is needed. Similarly, they could result in more impacts where wetlands are necessary to protect the City’s drinking water supply. (I-6)

**Response:** See Responses 42, 43 and 46. Also, the major/minor thresholds do not change the underlying permit issuance standards in Part 663.

**70. Comment:** The expanded list of minor projects also does not appear to have taken the CLCPA and CRRA into account. For example, under the proposal the activities in a freshwater wetland and its adjacent area could be the subject of multiple, simultaneous applications for "minor project" permits. All of the following could be proposed for the same wetland simultaneously: construction of residential and non-residential structures, unpermitted pesticide applications, intensive, organized and repetitive use of motorboats and airboats, increased permanent wetland fill and cutting vegetation" such that the functions and benefits of the wetland are…significantly adversely affected." The potential for the cumulative destructive impact on these important "carbon sinks" is not considered. (F-6)

**Response:** See Response 42 and Response 46. In addition, the provisions in section 621.3(b)(3) and 621.3(b)(5) allow DEC to treat a project with multiple minor activities as a major project where the DEC determines there may be a significant impact or determines that public notice is necessary.

**71. Comment:** As written, the proposed amendments to section 621.4(o)(3) would allow substantial increases in the allowable areas of excavation, grading, mining, filling, and dredging and in the linear extent of erosion protection structures. Of greatest concern is the proposed new provision which would allow "vertical modification of a structure" with no limitations upon the new height of the structure. The absence of such regulations can be expected to result in adverse visual impacts and degradation of community character and aesthetics. (L-11)

**Response:** See Response 49. In addition, the "vertical modification of a structure with no change in ground coverage" is included in the rule to facilitate projects that are necessary to improve the resiliency of erosion protection structures. To the extent that the minor classification may be applied to increases in the height of other structures with no changes in ground coverage (*e.g.,* buildings), the potential visual impacts, community character, and aesthetics are not permit issuance standards under DEC's consideration pursuant to section 505.6. However, DEC has revised the rule at 621.4(o)(3) to apply only to vertical changes in erosion protection structures. Where such projects are subject to local jurisdiction and approval, those factors may be considered by the local municipality in accordance with the State Environmental Quality Review Act and applicable local laws or ordinances and planning documents (*e.g.*, Local Waterfront Revitalization Program, site plan review, etc.).

**72. Comment:** ...the Department proposes to establish that all Incidental Take Permits are "major" permits, with no "minor" permits, regardless of the scope of a project. This requirement is entirely inconsistent with the regulatory scheme of the UPA, which seeks to establish expedited procedures for certain, comparatively less impactful, projects. The Department should establish a clear rule that permits proposing to permanently impact 20 acres or less of" occupied habitat" (as that phrase is used in Part 182), or projects proposing only temporary impacts to occupied habitat, are "minor" in nature and governed by the UPA's procedures for minor permit applications. (C-3, D-3)

**Response:** Species designated as threatened or endangered are inherently sensitive and vulnerable, which is reflected in the requirements in 6 NYCRR Part 182 that applicants must first demonstrate that impacts are unavoidable and then, for unavoidable impacts, develop a mitigation plan to offset those impacts. Therefore, the suggested designation of a 20-acre threshold for a minor Incidental Taking projects would not meet the definition of minor project contained in the rule at 6 NYCRR section 621.2(u) [previously 621.2(s)]. By that definition, “minor projects are projects which by their nature and with respect to their location are not likely to have a significant impact on the environment.”

**73. Comment:** The changes to section 621.4 would allow an application for modification of a permit that would otherwise be treated as new to be converted to a minor project provided it “involves an expansion or increase of any regulated area, volume, rate, or capacity that does not exceed 10% of the existing regulated area, volume, rate, or capacity.” To illustrate the magnitude of this change, the current proposal to expand the height of the Seneca Meadows SWMF from 774 feet to 843.5 feet would fall within this exemption. Even worse, nothing in the proposed rule would prevent a permittee who is granted a 10% increase from applying for another 10% increase, or another ten of them, and have each modification processed without any public notification. This is the antithesis of the transparency we expect from state government. (F-5)

**Response:** The rule at section 621.4(r) for the minor modification of permits contains several requirements, all of which have to be met to be processed as a minor project. In addition to the first criterion related to a 10% increase in regulated area, volume, rate or capacity, projects would also have to meet the second criterion, which affirms the applicable minor/major project thresholds contained elsewhere in section 621.4. The third criterion also does not allow sequential minor modifications where the combined changes of proposed and preceding minor modifications exceed other applicable minor/major project thresholds elsewhere in section 621.4. In addition, the rule retains DEC’s discretion to treat minor projects as major pursuant to section 621.3(b)(3).

With respect to the Seneca Meadows Landfill expansion proposal, the comment incorrectly applies the rule and incorrectly concludes the project could be processed

as a minor application. The project is a major project on several grounds[2]. The project proposes to expand the acreage of the landfill by over 10 percent [621.4(r)(1)]. The expansion is not minor under any of the thresholds contained at 621.4(l)(2) for solid waste management applications [621.4(r)(2)]. Finally, apart from not meeting the criteria at 621.4(r), the project is also major because DEC has determined under the State Environmental Quality Review Act that it may have a significant impact on the environment and an Environmental Impact Statement must be prepared [621.3(b)(3)].

**74. Comment:** Similar to our comment regarding section 621.4(h)(2)(ii) and (iii), section 621.4(r)(l) should state that it is limited to a one-time expansion of 10% or less, with subsequent expansions not being considered as minor projects. (L-12)

**Response:** The third criterion at section 624.4(r)(3) does not allow sequential minor modifications where the combined changes of proposed and preceding minor modifications exceed other applicable minor/major project thresholds elsewhere in section 621.4. In addition, 621.4(h)(2)(ii) and (iii) are revised to limit such expansions to no more than once every five years.

## 621.5 – Optional Preapplication Conferences

**75. Comment:** No comments were received related to section 621.5

## 621.6 – Department Action on Applications

**76. Comment:** The DEC should add a provision making clear that it will not rescind a "completeness" determination for a permit application. To promote the integrity and predictability of permitting, the Coalition urges the DEC to include new provisions respecting the completeness of applications.

Regarding the notice of a complete application (NOCA), we recommend adding the following provision: "Once a notice of complete application (NOCA) has been issued for the application in writing or the applicable deadline for issuing the notice of complete application has passed without action by the Department, the notice of complete application is considered final and cannot be withdrawn."

[2] Information on the proposed Seneca Meadows Landfill expansion is taken from the application materials filed with DEC and available SEQR documents, including DEC's Positive Declaration announced March 23, 2022 ( https://www.dec.ny.gov/enb/20220323_not8.html ) and Draft Scoping Document announced December 14, 2022 ( https://www.dec.ny.gov/enb/20221214_not8.html ).

Regarding the notice of an incomplete application (NOIA), we recommend adding the following provision: "Upon receipt of the response to the notice of an incomplete application, department staff may require additional information to clarify or supplement the applicant's response to its original request. However, department staff may not issue a new NOIA on topics not addressed in the original notice. Once the issues raised in the NOIA have been resolved, the DEC must issue a completeness determination. Information regarding subjects not addressed in the notice may be requested pursuant to 6 NYCRR 621.14(b)". (K-12)

**Response:** Neither the existing rule nor the proposed changes address rescission of notices of complete application. It does not change existing law. To the extent that new information, new requirements, or project modifications arise after a determination that an application is complete, but before DEC's final decision, DEC would explore ways to comply with UPA and evaluate the proposed project. This could include a request for supplemental information [ECL 70-0117(2) and 6 NYCRR 617.14(b)] or seeking a mutual agreement with an applicant to suspend UPA time frames pursuant to section 621.14(a) to reopen or extend a public comment period to provide required public notice. New information affecting the completeness of an application could include, for instance, the recission of a negative declaration under SEQR by the lead agency. Rescission of a negative declaration and the issuance of a positive declaration means that the underlying application is incomplete until the lead agency has accepted a draft EIS.

With respect to notices of incomplete application, the rule at 621.6(d) already requires DEC to list "all identified areas of incompleteness". Further, the suggested revision provided in the comment fails to recognize that some aspects of completeness review are iterative. For example, if additional DEC permit jurisdictions are identified in the initial notice of incomplete application, the subsequent submission of the applications for the identified jurisdictions may also contain deficiencies that must be identified in subsequent notices of incomplete application.

77. **Comment:** Given that there is an initial notice of incomplete application and that the allowable period for an incomplete application to remain viable is lengthy, it is reasonable that DEC limit the process for notification of withdrawal to one step. However, DEC should provide that joint follow-up notice/withdrawal notification by certified mail to ensure its receipt by applicant. (I-15)

**Response:** ECL Article 70 does not require certified mailing for the type of correspondence covered in section 621.6(f). The use of last known contact information to mail an applicant a follow-up notice of incomplete application, either by regular mail or email, is sufficient. Also, deeming an application withdrawn is done without prejudice and does not preclude any individual from submitting a new permit application.

## 621.7 – Public Notice and Comment

**78. Comment:** It states that "SPDES permit applications or renewals within an area designated pursuant to any Federal or state statute as a sole source aquifer, the project description must include the names and addresses of all public water purveyors with a service area or portion thereof located within a three-mile radius of the applicant's facility". In NYC, Brooklyn & Queens are located over the sole aquifer. However, this aquifer is not used as potable water supply in the City of New York. All drinking water is provided from upstate NY. If there are any known private wells in the City, the water may be used for technical purposes only. We assume that there would be no necessity in providing the information for a 3-mile radius. Please clarify in the language. (E-4)

**Response:** The proposed change to Part 621 incorporates the statutory requirement in ECL Article 17 (section 17-0828) for SPDES permit notices for facilities located within areas designated by federal or state statute as a sole source aquifer. For the purposes of section 17-0828 "public water purveyor" means "any person, partnership, public or private corporation, municipality, or public authority which sells water derived from a sole source aquifer to at least five service connections or at least twenty-five individuals." Therefore, the scenario described in the comment, which involves private wells used for "technical purposes", would not be subject to the notice requirement.

**79. Comment:** We also note the repeal of section 621.7(g) which currently provides that the Department may subject a minor project to some of the notification procedures of that section. The Department already appears to out of compliance with the express provisions of ECL section 70-0109(2)(a), under which a notice of application for any project, major or minor, must be published in a local newspaper and the Environmental Notice Bulletin and provided to the chief executive officer of each municipality in which the proposed project is located. Given this contravention of the statute, we urge the Department to strengthen or at a minimum to at least retain the provisions of section 621.7(g). (F-3)

**Response:** Section 621.7(g) was superfluous since 621.3(b)(3) requires DEC to process any minor project that requires public notice as a major project. Also, 621.3(b)(4) specifies that when a project involves simultaneous permit application for both major and minor activities, all applications are processed as major for purposes of this Part. Therefore, all the requirements for notices in 621.7 apply to minor projects that are determined to be processed as major projects, which include the requirements to circulate the notice to the Chief Executive Officer of the municipality

[621.7(a)(1)] and to publish the notice in the Environmental Notice Bulletin [621.7(a)(2)] and a newspaper [621.7(c)].

## 621.8 – Determination to Conduct a Public Comment Hearing or Adjudicatory Proceeding

**80. Comment:** The DEC should consider natural gas pipeline permitting requirements in determining whether an application is complete and in issuing its final decisions on applications. The Proposed Rule includes a threshold for whether a significant degree of public interest exists to hold a public hearing, as determined by the DEC. The Coalition requests a definition of the public interest threshold to hold a public hearing or adjudicatory proceeding. It is unclear how Coalition members would prepare for such proceedings and hearings without a predictable definition from the Department's regulations. (K-15)

**Response:** The criterion identified in section 621.8(c)(1) applies to determinations whether to hold public comment hearings and does not apply to determinations on whether staff should refer a matter for an adjudicatory proceeding under 6 NYCRR Part 624. As defined at section 621.2(ac) a public comment hearing "provides an opportunity for the public to make unsworn statements, based on facts or belief, for consideration by the department in its review of applications for permits." Thus, while applicants are responsible for making certain logistical arrangements (*e.g.*, venues for in-person hearings, stenographic services) and publishing notices for public comment hearings as directed by DEC, there is no burden on applicants to "prepare" substantive statements or arguments for public comment hearings.

In determining whether "a significant degree of public interest exists", DEC may consider various factors, including the number of relevant comments compared to the general population of the area potentially affected by the project.

**81. Comment:** "The proposal also would make a key change to section 621.8 that seems intended to reduce the public's opportunities to raise concerns about a proposed permit in a public hearing. Both current and proposed section 621.8 refer to two types of hearings – "adjudicatory public hearings" (which the proposal would rename "adjudicatory proceedings" and "legislative public hearings" (which would be renamed "public comment hearings"). Under the current regulations, the determination to hold an adjudicatory public hearing is based on whether the project as proposed may not meet statutory or regulatory criteria or whether comments on the application have raised "substantive and significant issues" relating to the application. In contrast, the current regulations provide that a determination to hold a legislative public hearing shall be based on any of three factors, including "if a significant degree of public interest exists."

The current section then provides: "Mere expressions of general opposition to a project are insufficient grounds for holding an adjudicatory public hearing proceeding on a permit application. In order to raise substantive and significant issues, written comments expressing objection or opposition to an application must explain the basis of that opposition and identify the specific grounds which could lead the department to deny or impose significant conditions on the permit." Until now, the Department has not imposed this "specific grounds" test to a determination to hold a legislative public hearing where a significant degree of public interest has been demonstrated.

Without providing any reasons or even noting a change, the new proposal would amend the regulations to read: "Mere expressions of general opposition to a project are insufficient grounds for holding a public comment hearing or for referring a project to OHMS for an adjudicatory [public hearing] proceeding on a permit application." (OHMS refers to the Department's Office of Hearings & Medication Services.) This change is not required by statute, and in fact appears to be contrary to section 70-0103(4), which provides: "It is the intent of the legislature to encourage public participation in government review and decision-making processes and to promote public understanding of all government activities." It is also contrary to Governor Hochul's directives to state agencies to increase the transparency of their operations. It should not be adopted. " (F-2)

**Response:** In response to the comment, DEC has clarified the express terms by removing "public comment hearing" from section 621.8(d).

## 621.9 – Settlement Conferences

**82. Comment:** No comments were received related to section 621.9

## 621.10 – Final Decisions on Applications

**83. Comment:** Regarding final decisions on applications, the DEC proposes that the agency will issue final decisions on all applications concurrently unless there is good cause not to do so. Often certain pieces of a project or construction move forward with a subset of permits while awaiting approval on others. Some permit applications are timed differently than others based on assumptions of normal review time. The Coalition requests that permits continue to be processed efficiently and not held up if one permit is ready to be issued, while another requires more time. (K-16)

**Response:** The rule at section 621.10(g) reflects long-standing DEC practice and complements the requirement at section 621.3(a)(4) to submit all necessary DEC permit applications for a single project, a requirement that is not new (See Response 15). This approach is also supported by the legislative intent contained in ECL Article 70 for "comprehensive project review" (section 70-0103). At the same time, the provision provides DEC discretion to issue permits for a single project at different times where there is "good cause".

**84. Comment:** The Department is proposing to amend section 621.10(i) to read: "Maximum permit terms. In issuing permits pursuant to this Part, the department may specify a permit up to the maximum provided in this subdivision. **At its discretion, the department may specify a term shorter than the maximum**." (Emphasis added)

The Department should identify in revised express terms the factors that it will use to support a shortened permit term. Alliance members seek to understand this change, particularly with respect to renewals, which historically have retained consistent permit terms. Uncertainty in the outcome of permit term decisions by the Department during a renewal will unduly complicate operator planning, maintenance and capital expenditures related to a permitted facility.

Further, if a shorter term is imposed in a renewed permit that differs from the existing permit, Alliance members request clarification in the proposed express terms that a new, shorter permit term imposed by the Department be added to the list in Section 621.13(a) and processed as a Department-initiated permit modification under Section 621.13. (G-3)

**Response:** The previous rule at section 621.4 specified the maximum permit terms for various permits. As such, DEC's discretion to issue shorter permit terms has been long understood. The provision at section 621.10(i) has been written to consolidate the permit terms within the rule for clarity and to place them in the section related to final decision-making where they more logically apply. However, it does not change DEC's discretion to issue permits for terms shorter than the maximum, as has always been the case.

In most cases, DEC issues permits for the maximum terms. However, specific circumstances may warrant shorter terms, including but not limited to the following situations: aligning the term with short, temporary disturbances; to impose deadlines necessary for compliance; to impose deadlines necessary to limit environmental impacts; and to align permit terms of multiple permits for a single project. The facts involved in such decisions are too variable to prescribe in the rule.

**621.11 – Applications for Permit Renewals, Reissuances, and Modifications, Including Transferring or Relinquishing Permits**

**85. Comment:** With respect to section 621.11(a), given City agencies have large numbers of permitted facilities, the transition period to 180 days lead time from 30 days lead time could be problematic. The revision of the deadline for renewals should be phased in slowly for City facilities (e.g., in 90-day increments). (I-16)

**Response:** The revisions of the renewal application deadlines from 30 days to 180 days only applies to Water Withdrawal permits, Long Island well permits, and Mined Land Reclamation Permits. The other permits listed in section 621.11(a)(1) and SPDES permits have always had 180-day renewal application deadlines. Many of the affected permits issued prior to the effective date of the rule will contain an existing condition that the renewal application is due 30 days prior to permit expiration.

To address the need for transition after the rule takes effect, DEC will allow renewal applications to be submitted in accordance with the terms of an existing permit (*i.e.,* 30 days prior to expiration) and modify the condition to include a 180-day renewal application deadline when the permit is renewed or modified. This is consistent with the provision in 621.11(a)(3) that recognizes a deadline may be contained in a permit condition, and the approach will allow gradual transition to the new deadlines.

**86. Comment:** Proposed section 621.11(h)(1), treating renewals/mods as new applications: this language allows DEC to treat an application as a new application for "material changes" in existing permit conditions or the scope of permitted actions. However, it adds language reciting "non-material changes," including administrative changes like transfer of ownership. This needs to be revised. The new language on "non-material changes" should state that those types of changes are administrative and would not require, generally, a permit renewal or modification at all. Actual examples of "non-material" and non-administrative changes should be added instead in the parentheses. (J-6)

**Response:** Transfers of permits have long been defined in Part 621 as a type of permit modification and the rule does not change the terms of Part 621 and DEC's long-standing practice in this regard. In addition, the list of non-material changes included in the parenthetical material at section 621.11(h)(1) reflects lists of actions that involve permit modifications in other applicable permitting regulations [*e.g.*, SPDES permits at 40 CFR 122.63, referenced at section 621.11(i)(3), and RCRA permits at sections 373-1.7(a) and 373-1.7(c)]. The parenthetical list in section 621.11(h)(1) is also intended to be illustrative and provide clarity, without being prescriptive as to the actions as to the list of actions that may be deemed non-material. Material changes, on the other hand, involve those that change facility

operations or proposed activities in a way that may alter environmental impacts, such that the impacts require further review and possible changes to the terms and conditions of a permit. With the revisions in the rule, such material changes may either be reviewed as minor or major projects, depending on the scope of the changes involved.

**87. Comment:** The DEC should consider adding a new section regarding permit renewals, reissuances, and modifications, including transferring or relinquishing permits. Generally, the Proposed Rule discusses circumstances under which an application for renewal or modification will be treated as a new application. In the past, Coalition members have been required to respond to information requests wholly unrelated to the permit being renewed or modified. For example, with respect to routine air permit renewals, the DEC has requested information about traffic, visual, noise, and other impacts unrelated to the projected facility's air emissions. The Coalition recommends that DEC revise the Proposed Rule to clarify that it cannot ask for information that is not directly related to the permit under review when it elects to treat a permit renewal or modification application as a new application.

For the reasons discussed above, the Coalition recommends the following modification to 621.11(h)(i): "In such circumstances, on or before 15 days after receipt of an application, the department must mail the applicant notice of its determination, and a determination of whether the application is complete. In addition, **the department may only request information related to the environmental conditions directly regulated by the relevant permit**." (K-17)

**Response:** DEC agrees that its requests for information related to permit applications should be relevant and necessary. However, as reflected in section 621.11(h)(1)-(6), the grounds for considering whether an application should be treated as new are broad and may require DEC to gather information beyond the permit that is the subject of a renewal application. To the extent such information is needed to assess whether there are changes in environmental conditions, is new information, or are newly applicable laws or regulations, DEC may ask for the necessary information, either directly under the provision at section 621.11(h), or under the provision contained at section 621.14(b).

**88. Comment:** Second, the Alliance interprets the Department's proposed express terms to mean that a public participation plan, where required, will be considered by the Department in determining the completeness of a renewal application, and will not be considered in determining whether a renewal application is sufficient under 6 NYCRR 621.2(ad), 621.11(l) or Section 401(2) of the State Administrative Procedure Act (SAPA). If this is not the Department's interpretation, the Department would need to clarify this in the express terms, treat the change in express terms as a

significant modification to the proposed rule and reevaluate the change under both SAPA and the State Environmental Quality Review Act (SEQRA). (G-2)

**Response:** DEC agrees that where a renewal application is treated as a new application, and it further requires preparation of a public participation plan under the provisions of sections 621.3(a)(3) or 621.3(a)(13) as part of a complete application, that sufficiency of the initial renewal application for purposes of the State Administrative Procedure Act (SAPA) could be determined separately on the basis of the definition provided at section 621.2(ai). Nevertheless, where a timely and sufficient renewal application has been submitted, DEC may also identify and request additional information prior to its final decision that is reasonably necessary to make any findings or determinations required by law (*e.g.,* CLCPA) under section 621.14(b). Such information could include a public participation plan and its related documents (e.g., meeting summaries, etc.).

**89. Comment:** Finally, we are concerned about a proposed change in the regulations on permit renewals in section 621.11 that does not appear to be factually based and that could present an obstacle to achieving the targets of the CLCPA. State Administrative Procedure Act section 401(2) provides that when a timely and sufficient application has been made for a new or renewed permit "with reference to any activity of a continuing nature," the existing permit does not expire until a final determination is issued or until the last day to seek judicial review or fixed by court order. The term "activity of a continuing nature" is not defined but has been reserved for judicial construction. Cases on this provision have had different outcomes based on the facts surrounding a specific activity.

The proposed rule would displace this fact-based standard with a new provision listing operations of hazardous waste management facilities, solid waste management facilities, air pollution and water withdrawal permits and several other permit categories as predetermined "activities of a continuing nature" regardless of the specific facts involved. The need to comply with the CLCPA may motivate some polluting facilities to seek to continue their operations through extended litigation. The regulations should not provide them with a safe harbor to do so in cases where they might otherwise have been found to not meet the "continuing nature" test. If the Department intends to merely identify those categories of permits that could potentially be determined to involve activities of a continuing nature, clarifying language to that effect should be added to the regulations. Otherwise, this provision should be dropped from consideration. (F-8)

**Response:** The rule provides clarity that reflects DEC's long-standing practice regarding the permit types involving activities of a continuing nature and that are subject to the provisions of the State Administrative Procedures Act for timely and sufficient renewal applications. Renewal applications for all the permit types listed in the comment have been considered by staff to involve activities of a continuing

nature and the rule does not change this historic practice. In the particular case of delegated permits [see section 621.2(i)], DEC's approach is consistent with the equivalent provisions in federal regulation that also allow for administrative continuance of such permits during the pendency of a timely renewal application [see 40 CFR section 122.6, 40 CFR section 70.7(b), 40 CFR section 71.7(c)(3), and 40 CFR sections 270.51(a) and (d)].

It would be wrong and impracticable for DEC staff to apply a "judicial review" standard to each renewal application, of which DEC has received over 1,300 per year in the last five years. The suggestion in the comment would replace longstanding administrative practice that provides certainty to the public and regulated community with uncertain litigated outcomes. Nevertheless, to ensure a thorough review of renewal applications, DEC retains its authority in the rule to determine that renewal applications may be treated as new based on the facts presented in the application and the grounds contained in section 621.11(h)(1).

## 621.12 – Emergency Authorizations

**90. Comment:** The DEC should not suspend processing of a company's permit applications based on an alleged violation at an unrelated facility or project site or for an unrelated area of environmental law. Expanding the focus of permitting analysis beyond a project for which an application is sought is potentially a significant overreach of the agency's regulatory power. The suspension provision should only apply for an alleged violation directly related to the activity for which the permit is sought (i.e., the same project or facility site and same type of permit), and the regulation should clarify that suspension is only required for significant violations. A suspension for a minor violation at a separate and unrelated site is not consistent with due process. In addition, the DEC should provide more details on how the DEC will analyze enforcement decisions in comparison to the permit application in question. If a permit is suspended under this provision, the Department should provide a timeframe for resolution of the issue. Scenarios involving emergency permits should also be considered. (K-14)

**Response:** See Responses 35 and 39.

## 621.13 through 621.19

**91. Comment:** No comments were received related to sections 621.13 through 621.19

## Other Comments

**92. Comment:** No comments were received related to conforming changes proposed to 6 NYCRR Part 421 and 6 NYCRR Part 601.

# Appendix of Comments Submitted

Part 621 Comment Letter A

October 28, 2022

*Via electronic mail*

James J. Eldred
New York State Department of Environmental Conservation
Division of Environmental Permits
625 Broadway
Albany, NY 12233-1750
comment.uparulemaking2022@dec.ny.gov

Re: Comments on Proposed Amendments to Uniform Procedures Act Regulations (Parts 621, 421, 601)

Dear James Eldred:

On behalf of the Natural Areas Conservancy (NAC), please accept the enclosed comments on the proposed amendments to the Uniform Procedures Act (UPA) Regulations Parts 621, 421, and 601. NAC is a non-profit organization that exists to restore and conserve New York City's forests, grasslands, and wetlands to enhance the lives of all New Yorkers. We have worked as a formal partner to the New York City Department of Parks and Recreation (NYC Parks) for the past decade, to care for our city's natural areas. We also work closely with State and Federal agencies to increase protection and investment of urban natural areas nationwide. The NAC's mission is to champion urban natural areas in New York City and across the nation through innovative research, partnerships, and advocacy, and increase the health and resilience of urban forests and wetlands, catalyze connections between people and nature, and strengthen the environmental workforce. Please do not hesitate to contact us for more information.

Sincerely,

Sarah Charlop-Powers
Executive Director
Natural Areas Conservancy
sarah.charlop-powers@naturalareasnyc.gov

**Section 621.3 General requirements for applications**

1. Section 621.3(e) states that "The department may suspend review of an application when an enforcement proceeding or action is formally commenced against an applicant" for any alleged violations, including those at other sites. This approach could disproportionately and unfairly affect governmental agencies that own or manage several sites performing similar operations requiring similar operating permits. The fact that another site under same ownership has a violation should not be a factor in DEC's decision to suspend processing a permit application. This approach would negatively impact the public lands and environmental justice communities that rely on open space 1
2. NAC generally supports enhanced public participation and awareness opportunities, including the development of public participation plans and any other relevant information that can be provided by the applicant during permitting in order to address environmental justice concerns. 2

**Section 621.4 Requirements for specific permit applications**

1. Given proposed additions of specific small-scale projects, such as bridge repairs and small quantities of wetland fill being de-classified as "major" under UPA, due to generation of little public interest, further consideration should be given to classifying natural area management as "minor" under UPA to reduce permitting costs and timelines. Experience shows that legal notices for natural areas management projects in wetlands and adjacent areas classified as "major" under UPA have generated little public interest. These projects benefit the environment and public and typically involve projects to remove environmental contaminants, improve ecosystem services of wetlands and forests, and provide safe public access in environmental justice communities. Natural area management projects also improve climate change resiliency for human and ecological communities, including but not limited to buffering storm surge, increasing biodiversity, removal of defunct and hazardous structures, and mitigating sea level rise. Restoration practitioners and open space land managers in NYC have shown that natural area management projects do not result in significant adverse impacts, do not typically generate community concern, and support the objectives of the Climate Leadership and Community Protection Act (CLCPA) and Community Risk and Resiliency Act (CRRA). 3
2. In Section 621.4(ii) Minor stream bed or bank disturbance actions were expanded to significantly increases the allowable stream bed or bank disturbance considered "minor" under UPA from 100 lineal feet to 500 lineal feet. A project that results in 500 feet of lineal disturbance along any 1,000 feet of a watercourse is significant and should continue to require a higher level of review. In 2021, the United States Army Corps of Engineers (USACE) and United States Environmental Protection Agency reissued the federal Nationwide Permits (NWPs) for projects subject to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. This included the removal of the 300 linear foot limit for losses of stream bed from 10 NWPs (NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52). As a result, USACE now relies on a ½-acre impact limitation. Removal of the 300 foot limit for losses of stream bed disproportionately impacted lower order streams that have smaller widths, in some cases doubling the amount of impact permitted under a NWP. This weakening of federal authority greatly reduced stream protections across the United States. The combined effect of reduced federal oversight and an increase in the allowable stream bed bank disturbance considered "minor" under UPA would negatively impact New York's waterways and decrease overall regulatory authority. 4

**Section 621.4(b)(2) Minor projects for water withdrawals**

1. In Section 621.4(b)(2)(v) a new minor project was proposed for “temporary dewatering systems withdrawing less than two million gallons per day”. Temporary dewatering less than two millions gallons per day is significant depending on site conditions and duration of dewatering. Temporary dewatering up to two million gallons per day could adversely impact adjacent property owners and natural resources and should therefore require higher level or review as a “major” project. 5

**Section 621.4(i)(2) Minor projects in freshwater wetlands**

1. In Section 621.4(i)(2)(xi) the minor project for “installing a dock, pier, wharf or other structure built on floats or open-work" is proposed as double the currently allowable footprint and number of boats allowed without public notice under existing regulations, supporting 40 boats (as opposed to 20) and up to 400 square feet (as opposed to 200 square feet). This could adversely impact local property owners on the shoreline and reduces public participation and awareness opportunities. 6
2. Proposed changes to 6 NYCRR 621.4 (see Pg. 22) will increase the number of projects considered “minor”, defined as “... by its nature and with respect to its location will not have a significant impact on the environment...,” by expanding the types of allowable disturbances in wetlands and adjacent areas and increasing some disturbance thresholds. These proposed changes do not consider the state of the science on wetland buffers and would negatively affect wetlands, their functions, and the wildlife that rely on them. These changes would impact critical habitat for state-listed species, increase disturbance to wetlands, and reduce wetland flood capacity and resilience to climate change. Wetland buffer importance is summarized as follows: 7
    A. Buffers protect critical ecosystem functions and values of wetlands by regulating temperature, providing wildlife habitat, maintaining hydroperiods and water budgets, and protecting water quality by reducing nutrient (e.g., phosphorous and nitrogen) and sediment pollution, removing toxic chemicals bound to sediments, stabilizing soils, (ELI 2008; Hruby 2013; MACC 2019). Wetlands and waterways with high sediment loads and steep slopes require wide, undeveloped buffers, as the efficiency and duration of sediment capture functions decreases as slope increases and sediments become saturated (Wenger 1999, Sheldon et al. 2005).
    B. Buffers provide space for wetlands to shift position over time in response to changing environmental conditions such as climate change, increased precipitation, and rainfall, and provide critical flood protection for dense urban communities.
    C. Buffers reduce impacts to wetlands from adjacent land uses and provide critical terrestrial habitat for wetland dependent species that require access to aquatic and terrestrial habitats to complete their life cycle (Granger et al 2005; Sheldon et al 2005; Hruby 2013).
        a. Many of these wetland dependent species are considered endangered, threatened, or special concern in New York State.
        b. Buffers provide habitat for foraging, rearing, cover, and hibernation, and support biodiversity (Boyd 2001). Semi-aquatic frogs, salamanders, snakes, and turtles utilize up to 950 feet from the high water edge (Semlitsch & Bodie 2003), while birds and mammals, like the Tri-colored bat (*Perimyotis subflavus*), Gadwall (*Anas strepera*), and Blue-winged Teal (*Anas discors*) use habitat 200 feet beyond the water’s edge (Boyd 2001).
    D. Wetland buffers provide a barrier to illicit impacts, of which small, urban wetlands are most vulnerable. Several literature reviews recommend restricting development

in buffers in highly urbanized areas where other environmental stressors are present (Hruby 2013; MACC 2019).

E. Buffers reduce fragmentation (MACC 2019) and increase landscape connectivity by acting as corridors for seed dispersal and wildlife movement. Many wildlife species rely on multiple wetland ecosystems in the landscape to survive and forage for food (Gibbons 2003; Roe and Georges 2007; Harper et al 2008).

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Cricket Valley Energy

October 26, 2022

James J. Eldred
New York State Department of Environmental Conservation (NYSDEC)
Division of Environmental Permits
625 Broadway
Albany, NY 12233-1750

**Re: Comments on Proposed Part 621**

Dear Mr. Eldred,

Cricket Valley Energy Center, LLC (CVEC) appreciates the opportunity to comment on NYSDEC's proposed amendments to Part 621 of Title 6 of the New York Codes, Rules, and Regulations (NYCRR). In general, CVEC supports the proposed amendments that will streamline the review of permit applications and expand the list of projects that may be considered "minor". 1

CVEC does not agree, however, with the inclusion at this time of the proposed amendments that would require applicants to provide information pursuant to New York's Climate Leadership and Community Protection Act (CLCPA) in order for a permit application to be considered complete. As detailed in this letter, CVEC believes that the inclusion of these provisions is premature and, therefore, recommends removing them from the proposed rule or modifying them to take effect after the effective date of NYSDEC policies and required regulations that will clarify what information is required and how it will be used. 2

Background

Section 7(2) of the CLCPA requires that NYSDEC and other state agencies "consider whether permitting decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits" codified in 6 NYCRR 496. Section 7(3) requires that permitting decisions "shall not disproportionately burden" and shall "prioritize reductions of greenhouse gas emissions and co-pollutants" in disadvantaged communities. The proposed amendments to 6 NYCRR 621 address these legislative requirements by requiring (in paragraphs 621.3(a)(11) and (13)) that a complete permit application include, "where applicable", information on whether the project is "inconsistent with, or will interfere with the attainment of the the state-wide emission limits" and information needed to evaluate and, where necessary, mitigate environmental impacts on disadvantaged communities.

The CLCPA also requires[1] that NYSDEC promulgate, by January 1, 2024, regulations containing legally enforceable emissions limits, performance standards, or measures for greenhouse (GHG) emission sources to ensure the state-wide emission limits are met while ensuring that disadvantaged communities are not disproportionately burdened. These regulations must be developed after consultation with the Environmental Justice Advisory and Climate Justice Working groups established by the CLCPA and other

[1] ECL §75-0109

stakeholders, and after public workshops and hearings, and must reflect the findings of the Climate Action Council's (CAC) scoping plan.

As of the date of this letter, NYSDEC has not yet proposed the required implementing regulations and the CAC Scoping Plan exists only as a draft. NYSDEC has issued a draft policy document (CP-49) concerning *Climate Change and DEC Action* for public comment, but this document has not yet been finalized and expressly states that it is intended for use by Department personnel and is not enforceable by any party in administrative or judicial litigation.

Applicability Not Defined

Paragraphs 621.3(a)(11) and (13) of the proposed amendments contain the phrase "where applicable" which indicates that the specified information may not be required for all applications. Unlike the Community Risk and Resiliency Act (CRRA)[2] cited in Paragraph 621.3(a)(12), however, the CLCPA and the proposed Part 621 amendments do not define which applications require this information, or what information is required, in order for an application to be deemed complete. 2

The draft NYSDEC Policy CP-49 lists the types of permit applications to which it would apply, but this policy has not yet been implemented and it does not specify the information that an applicant must submit for DEC's determination of consistency in accordance with Section 7(2) of the CLCPA. The Division of Air Resources (DAR) has issued a draft policy document (DAR-21) with guidance for applicants concerning submission of a CLCPA analysis, but this policy also has not been implemented and applies only to air permits. For guidance on the implementation of Section 7(3) of the CLCPA, the draft CP-49 defers to "a forthcoming revision to CP-29, DEC Policy on *Environmental Justice and Permitting*" that is yet to be promulgated.

Consistency Dependent on Future Regulations

The CLCPA recognizes that achieving the real and permanent GHG emission reductions necessary to meet the state-wide emission limits is a complex problem. It requires NYSDEC to utilize input from a wide variety of stakeholders to develop implementing regulations that achieve the emissions goals in an equitable manner while minimizing costs and maximizing the benefits to the State, avoiding disproportionate impacts on disadvantaged communities, and (for emission reductions in the electric power generation sector) ensuring safe and reliable electric service[3] in the state. A specific project could result in unchanged or even increased GHG emissions and still be consistent with the CLCPA emission limits[4] if it results in an overall decrease in state-wide emissions (e.g., by displacing a higher emitting source) or is otherwise justified because it contributes to another objective of the regulations such as reducing adverse impacts on disadvantaged communities or ensuring electric system reliability.

Consistency with the CLCPA emission limits depends not only on a project's future GHG emissions but also on the future emissions from other GHG sources and how they may be affected by the project (information that may not be available to the applicant). This is best evaluated in the context of compliance with NYSDECs future regulations for implementing the CLCPA emission limits. That NYSDEC

[2] The CRRA indicates, by modifying the applicable sections of the NYS Environmental Conservation law, which projects require a demonstration that future physical climate risk has been considered and the proposed paragraph 6 NYCRRR 621.3(a)(12) further qualifies this demonstration as applicable to "major" projects.

[3] ECL §75-0109 and PSL §66-p.

[4] For example, the draft NYSDEC policies CP-49 and DAR-21 state that, pending the finalization of the Scoping Plan and future regulations, a routine permit renewal that does not lead to an increase in GHG emissions would normally be considered consistent with the CLCPA emissions limits.

considers compliance with these future regulations to be integral to a project's consistency with the CLCPA emission limits is evidenced by the fact that Title V Air Permit renewals recently issued by the Department contain the following condition:

> *Pursuant to The New York State Climate Leadership and Community Protection Act (CLCPA) and Article 75 of the Environmental Conservation Law, emission sources shall comply with regulations to be promulgated by the Department to ensure that by 2030 statewide greenhouse gas emissions are reduced by 40% of 1990 levels, and by 2050 statewide greenhouse gas emissions are reduced by 85% of 1990 levels.*

Likewise, NYSDEC's draft policy CP-49 states that "*an action that complies with regulations implementing the CLCPA and Scoping Plan may be considered consistent with the Emission Limits, and therefore in compliance with CLCPA Section 7(2)*".

Suggested Change to the Proposed Amendment

Current NYSDEC regulations and policies do not specify what projects will require an applicant to submit the information listed in paragraphs 621.3(a)(1) and 621(a)(13) of the proposed amendments or what specific information will be required. Since consistency with the CLCPA emission limits depends on compliance with the future regulations required by ECL §75-109, information submitted by an applicant concerning a project's consistency with the limits before these regulations are promulgated will be speculative and subject to change. CVEC therefore suggests that paragraphs 621.3(a)(1) and 621.3(a)(13) in the proposed amendments to 6 NYCRR 621 be modified to state that the information is required for a complete application *after* the effective date of the CLCPA implementing regulations and DEC policies concerning its submission. 3

Thank you for your consideration of these comments. Please contact me at (617)320-5219 or mduquette@advancedpowerna.com if you require any additional information.

Sincerely,

Marc J. Duquette
Director Environmental Health and Safety
Cricket Valley Energy Center

Genesee County Economic Development Center

Power People Incentives

New York State Department of
Environmental Conservation
Attn: James J. Eldred
625 Broadway
Albany, NY 12233-1750

October 27, 2022

Dear Mr. Eldred:

The Genesee County Industrial Development Agency d/b/a the Genesee County Economic Development Corporation ("**GCEDC**"), in conjunction with the Genesee Gateway Local Development Corporation ("**GGLDC**"), the non-profit real estate affiliate of GCEDC, has been working for more than a decade to develop the Western New York Science & Technology Advanced Manufacturing Park ("**STAMP**" or "**Project**"). STAMP is a shovel-ready advanced manufacturing technology campus on approximately 1,262 acres located on the west side of New York State Route 63/77, approximately five miles north of the I-90/New York State Thruway ("**Site**") in the Town of Alabama, New York ("**Town**").

We understand that the New York State Department of Environmental Conservation ("**NYSDEC**" or "**Department**") is evaluating certain proposed modifications to its uniform procedures for processing permit applications ("**Amendments**") codified at 6 N.Y.C.R.R. Part 621 ("**UPA**"). In connection with the Department's review of the Amendments, we hereby provide the following comments for the Department's consideration based on GCEDC's extensive permitting experience, particularly relating to the development of STAMP.

## Comments Regarding Amendments to the Uniform Procedure Act

*General Comment*: As an initial matter, GCEDC agrees with the Department that the role of the UPA is to "establish uniform procedures and specific timeframes for processing of a wide range of environmental permit applications" as set forth in the Department's summary of the Amendments. The UPA currently sets forth specific, clear permit application obligations and timelines, both for applicants and the Departments. These timelines in particular allow for applicants (including new businesses) to have a

reasonable degree of certainty as to when a permitting decision by the Department will be issued.

The Amendments, however, propose many new procedural hurdles for applicants to clear prior to obtaining a notice of complete application from the Department. As these hurdles (such as public participation plans, discussed below) do not themselves have strict timelines binding applicants, Departments, and third parties, they introduce inherent uncertainty into the permitting process. Such uncertainty is detrimental not only to the stated goals of the UPA, but also to the ability of New York State to remain competitive for business opportunities going forward. 1

*Part 621.1 - Inclusion of Part 182 Permits*: The Department proposes to include Incidental Take Permits issued pursuant to 6 N.Y.C.R.R. Part 182 under the list of permits explicitly governed by the UPA. As the Department is aware, 6 N.Y.C.R.R. 182.9 sets forth the procedure for an applicant to request a determination from NYSDEC as to whether an Incidental Take Permit is required. The Amendments do not provide applicants with any right to request a reconsideration or appeal of that determination, notwithstanding the fact that the UPA generally subjects decisions made by the Department to review in an adjudicatory proceeding. Accordingly, GCEDC recommends that the Department establish that a determination made by the Department that an action is subject to Part 182's permitting requirements is subject to an adjudicatory hearing at the request of an applicant. 2

In addition, the Department proposes to establish that all Incidental Take Permits are "major" permits, with no "minor" permits, regardless of the scope of a project. This requirement is entirely inconsistent with the regulatory scheme of the UPA, which seeks to establish expedited procedures for certain, comparatively less impactful, projects. The Department should establish a clear rule that permits proposing to permanently impact 20 acres or less of "occupied habitat" (as that phrase is used in Part 182), or projects proposing only temporary impacts to occupied habitat, are "minor" in nature and governed by the UPA's procedures for minor permit applications. 3

*Part 621.3 - Public Participation Plans*: The Department proposes to require that applicants prepare, submit, and carry out the public participation plan **prior** to a determination that an application is complete. As the Department is aware, Commissioner Policy 29 provides for enhanced public participation requirements for proposed projects in environmental justice areas identified by the Department. Initially, we note that requiring the completion of a public participation plan prior to a determination of application completeness appears to be contradicted later in the proposed new subsection 6 NYCRR 621.3(13), which provides that the submission of the plan itself is sufficient to render an application complete. 4

In addition, this new requirement is both inconsistent with the existing UPA structure for public participation and detrimental to the efficient processing of permit applications. The UPA timeline for public participation is structured such that public notice and comment periods follow a determination by the Department that an application is complete and the issuance of a notice of complete application. A public comment period then follows pursuant to the UPA. Requiring an enhanced public participation plan to be completed prior to the issuance of a notice of complete application would force applicants and members of the public to meet and consult on permit application details without the benefit of a draft permit for review and discussion. In other words, until the Department has issued a notice of complete application complete with a draft permit, any public participation in the permitting process is premature. Accordingly, the Department should revise the Amendments to remove the requirement that an enhanced public participation plan be completed prior to a determination of completeness for an application. 4

*Part 621.3 - Simultaneous Submittal*: The Department proposes to require that applicants submit applications for all permits associated with a project simultaneously. This new requirement ignores the real-world business considerations that drive permit application timing. While GCEDC appreciates that a project applying for all permits and approvals simultaneously (with subsequent, simultaneous decisions on such permits) would be administratively cleaner from a permit-processing perspective, the reality of project development is such that rarely do project design details line up so perfectly as to allow for fulsome applications for complex projects to be made across various permitting areas at the same time. 5

By way of example, the development of STAMP has required numerous permits from the Department to date. Future development of STAMP will undoubtedly require additional permits as the Project continues to develop. Even on the level of specific tenants at STAMP, information may not be readily available on (for example) air permitting details at the same time as details regarding an incidental take permit. Requiring applicants to delay submission of permit applications until such time as all permit requirements are known and prepared to be applied for threatens to ward off new projects from entering the state due to this regulatory barrier to effective permitting.

*Part 621.3 - CLCPA*: The Department proposed to add a requirement to 6 NYCRR 621.3 that applicants must provide information to explain whether the project will be inconsistent with, or will interfere with, the attainment of statewide GHG emission limits. The Department further proposes to require that applications for major permits must demonstrate that future physical climate risk has been considered. GCEDC respectfully submits that the Department should clarify that these requirements apply to applications for air permits regulated by the UPA rather than **every** permit regulated by the UPA. 6

## Conclusion

STAMP is an exciting endeavor that will have significant socioeconomic impact on the Town, as well as the larger Buffalo/Niagara and Rochester regions. Development of the Project has been ongoing for more than ten years, including numerous permit applications submitted to and approved by NYSDEC. The Project's history and future provide an important context for the Amendments now considered by the Department. Accordingly, GCEDC respectfully requests that the Department incorporate the above suggestions prior to finalizing the Amendments.

Sincerely,

Genesee County Economic Development Center

By: 

Mark A. Masse, CPA
Senior Vice President of Operations

cc: Adam Walters, Esq.

October 27, 2022

New York State
Department of Environmental Conservation
Attn: James J. Eldred
625 Broadway
Albany, NY 12233-1750

Dear Mr. Eldred:

I am writing on behalf of Greater Rochester Enterprise to support public policy that aligns with New York State's new shovel ready sites program ***FAST-NY***.

Greater Rochester Enterprise (GRE) is an economic development organization working to attract new capital investments, wealth and jobs throughout the Greater Rochester/Finger Lakes region of New York. This shovel ready site development is critical to our work to bring large business attraction and expansion opportunities and jobs to a successful conclusion to communities throughout the entire region.

To stay competitive in today's fast-moving corporate site selection process, New York State must possess site and building inventories that meet requirements for business attraction and expansion opportunities. Without an inventory of shovel ready developable sites, New York could lose the chance to compete for new private investment, new jobs, and the associated economic growth that each of these opportunities presents.

We understand that the New York State Department of Environmental Conservation ("NYSDEC" or "Department") is evaluating certain proposed modifications to its uniform procedures for processing permit applications ("Amendments") codified at 6 N.Y.C.R.R. Part 621 ("UPA"). In connection with the Department's review of the Amendments, we provide the following comments for the Department's consideration based on permitting experience, particularly relating to the development of STAMP in Genesee County. STAMP is an outstanding candidate for the ***FAST-NY*** program.

**Comments Regarding Amendments to the Uniform Procedure Act**

*General Comment*: As an initial matter, GRE agrees with the Department that the role of the UPA is to "establish[] uniform procedures and specific timeframes for processing of a wide range of environmental permit applications" as set forth in the Department's summary of the Amendments. The UPA currently sets forth specific, clear permit application obligations and timelines, both for applicants and the Departments. These timelines in particular allow for applicants (including new businesses) to have a reasonable degree of certainty as to when a permitting decision by the Department will be issued.

The Amendments, however, propose many new procedural hurdles for applicants to clear prior to obtaining a notice of complete application from the Department. As these hurdles (such as public participation plans, discussed below) do not themselves have strict timelines binding applicants, Departments, and third parties, they introduce inherent uncertainty into the permitting process. Such uncertainty is detrimental not only to the stated goals of the UPA, but also to the ability of New York State to remain competitive for business opportunities going forward. 1

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In addition, the Department proposes to establish that all Incidental Take Permits are "major" permits, with no "minor" permits, regardless of the scope of a project. This requirement is entirely inconsistent with the regulatory scheme of the UPA, which seeks to establish expedited procedures for certain, comparatively less impactful, projects. The Department should establish a clear rule that permits proposing to permanently impact 20 acres or less of "occupied habitat" (as that phrase is used in Part 182), or projects proposing only temporary impacts to occupied habitat, are "minor" in nature and governed by the UPA's procedures for minor permit applications. 3

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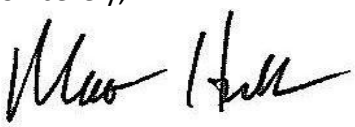
**Conclusion**

STAMP is an exciting endeavor that will have significant socioeconomic impact on the Town, as well as the larger Buffalo/Niagara and Rochester regions. Development of the Project has been ongoing for more than ten years, including numerous permit applications submitted to and approved by NYSDEC. The Project's history and future provide an important context for the Amendments now considered by the Department. Accordingly, GRE respectfully requests that the Department incorporate the above suggestions prior to finalizing the Amendments.

Sincerely,



Matt Hurlbutt
President & CEO

Part 621 Comment Letter E

DEEDX, PLLC
31 BUTTERCUP DR.
BOHEMIA, NY 11716
PHONE: (646) 436-6322
E-MAIL: MILANA@DEEDXNY.COM

November 13, 2022

New York State Department of Environmental Conservation
Division of Environmental Permits
625 Broadway
Albany, NY 12233-726
comment.uparulemaking2022@dec.ny.gov

RE: Comments on Proposed Part 621

To Whom It May Concern:

DEEDX provides consulting services to industrial entities, including, at a minimum, concrete plants, asphalt plants and facilities processing municipal solid waste (MSW) and excavated materials from construction, demolition, and development projects, reducing the volume of waste to be disposed of at landfills, promoting recycling, and generating vital construction materials to support recycling goals of the City of New York (R-2), Long Island (Nassau and Suffolk Counties – R-1), Westchester, and close Upstate New York (R-3). DEEDX has reviewed the proposed amendments to 6 NYCRR 621 and provides the following comments.

DEEDX believes that the amended version of the proposed 2022 Part 621.3 regulations provides certain improvements, in particular, related to the protection of the environment. However, we urge the Department of Environmental Conservation (DEC) to consider our comments listed below and incorporate them into the final rule. Our comments include:

***621.3(b):*** We believe that elimination of Type II actions' list from the "Minor Project" definition may create a confusion with filing of applications in New York City. The NYC December 2021 *CEQR Technical Manual* references Type II actions outlined in 6 NYCRR Part 617.5(c). We trust that consistency in use of Type II action list would be beneficial for the applicants in understand the type of the permit application required for their project. 1

***621.3(a)(1)(vi) & 621.6(b):*** Very often, Landowner is not a Permit Applicant/Owner or a Facility Operator. A requirement for the Landowner to give the DEC staff permission to enter the facility site does not seem to be accurate or appropriate. We believe it should be addressed by the Permittee, who would have an agreement with the Landowner for use of the property. 2

***621.3(e):*** It appears that DEC may suspend the review and processing of a permit application for alleged violations related to the activity that may have occurred at the facility or site that is the subject of the application or at a site owned or controlled by the applicant. It is unclear why other businesses (sites) of the applicant should be subject to suspension of activities? If we misread this statute, we would appreciate you rephrasing it to avoid misconception. 3

***621.7(b)(8)(iv):*** It states that *"SPDES permit applications or renewals within an area designated pursuant to any Federal or state statute as a sole source aquifer, the project description must include the names and addresses of all public water purveyors with a service area or portion thereof located within a three-mile radius of the applicant's facility"*. In NYC, Brooklyn & Queens are located over the sole aquifer. However, this aquifer is not used as potable water supply in the City of New York. All drinking water is provided from upstate NY. If there are any known private wells in the City, the water may be used for technical purposes only. We assume that there would be no necessity in providing the information for a 3-mile radius. Please clarify in the language. 4

We appreciate the opportunity to provide these comments on the Proposed Amended 6 NYCRR Part 621 Uniform Procedure Act. If I can be of additional assistance, please contact me at milana@deedxny.com or 646-436-6322.

Respectfully,

Milana Kononenko, P.E.
DEEDX

# THE ASSEMBLY
# STATE OF NEW YORK
# ALBANY

November 14, 2022

James J. Eldred
Department of Environmental Conservation
625 Broadway – 4th Floor
Albany, NY 12233-1750

Dear Mr. Eldred:

The Department of Environmental Conservation has proposed amendments to its regulations implementing Article 70 of the Environmental Conservation Law (ECL), the "Uniform Procedures Act" (*State Register* I.D. #ENV-33-22-00004-P). While several of the updates to these regulations have merit, we find three aspects of the proposal to be concerning. These include incomplete and inartful attempts to incorporate recent major environmental statutes, problematic changes that would reduce public participation in permit review and decision-making and an unwarranted expansion of statutory language on activities of a continuing nature.

The proposal would add new paragraphs (11) and (12) to §621.3 to specify the information needed to comply with the requirements of the Climate Leadership & Community Protection Act (CLCPA) and the Community Risk & Resiliency Act (CRRA), respectively. Each provision is incomplete and out of sync with guidance recently proposed by the Department. Proposed paragraph (11) would require that "where applicable, the applicant must provide information to explain whether the project will be inconsistent with, or will interfere with, the attainment of statewide GHG emission limits." This is far less than the Department requires in draft air guidance (DAR-21), which calls for an objective analysis of project emissions and, where emissions would increase, requires a description of proposed alternatives or mitigation measures. 1

It would be preferable to include the specific minimum information needed to demonstrate CLCPA compliance in §621.4 ("Requirements for specific permit applications."), which "identifies the minimum information" needed to determine completeness of permit applications covered by the Uniform Procedures Act. In fact, this is the approach contemplated under the Act: ECL §70-0107(2) provides that the regulations adopted pursuant to the Act "shall govern the review by the department of applications for permits…"

Inclusion of information needed for permit reviews in part 621 also appears to be the approach the Department is taking for CRRA compliance. Draft Commissioner's Policy CP-49 ("Climate Change & DEC Policy") states, with regard to compliance with the CRRA: The Division of Environmental Permits shall, in consultation with the Office of Climate Change, Office of General Counsel and Program divisions, establish permit application review procedures to ensure compliance with the CRRA." Proposed §621.3(12) does not meet this standard. We also note that, in the event general CLCPA information requirements remain in §621.3, that CP-49 would also require climate impact analyses for energy-related projects and for permits applicable to sources and activities that result in GHG emissions, directly or indirectly.

The requirements of the CLCPA and CRRA for permit reviews are already law, but fragmented and incomplete procedural requirements could serve to delay or frustrate their effective implementation. Given the urgency of the climate situation, any delays in adopting the enhanced permit review procedures that are required to ensure the attainment of statutory targets and to initiate protections against extreme weather events would be inexcusable. We urge the Department to ensure that its regulations and guidance are properly executed to avoid creating loopholes or confusion. 1

The proposal also would make a key change to §621.8 that seems intended to reduce the public's opportunities to raise concerns about a proposed permit in a public hearing. Both current and proposed §621.8 refer to two types of hearings – "adjudicatory public hearings" (which the proposal would rename "adjudicatory proceedings" and "legislative public hearings" (which would be renamed "public comment hearings"). Under the current regulations, the determination to hold an adjudicatory public hearing is based on whether the project as proposed may not meet statutory or regulatory criteria or whether comments on the application have raised "substantive and significant issues" relating to the application. In contrast, the current regulations provide that a determination to hold a legislative public hearing shall be based on any of three factors, including "if a significant degree of public interest exists." 2

The current section then provides: ''Mere expressions of general opposition to a project are insufficient grounds for holding an adjudicatory public hearing proceeding on a permit application. In order to raise substantive and significant issues, written comments expressing objection or opposition to an application must explain the basis of that opposition and identify the specific grounds which could lead the department to deny or impose significant conditions on the permit." Until now, the Department has not imposed this "specific grounds" test to a determination to hold a legislative public hearing where a significant degree of public interest has been demonstrated.

Without providing any reasons or even noting a change, the new proposal would amend the regulations to read: ''Mere expressions of general opposition to a project are insufficient grounds for holding <u>a public comment hearing or for referring a project to OHMS for</u> an adjudicatory [public hearing] proceeding on a permit application." (OHMS refers to the Department's Office of Hearings & Medication Services.) This change is not required by statute, and in fact appears to be contrary to §70-0103(4), which provides: "It is the intent of the legislature to encourage public participation in government review and decision-making processes and to promote public understanding of all government activities." It is also contrary to Governor Hochul's directives to state agencies to increase the transparency of their operations. It should not be adopted.

We also note the repeal of §621.7(g) which currently provides that the Department may subject a minor project to some of the notification procedures of that section. The Department already appears to out of compliance with the express provisions of ECL §70-0109(2)(a), under which a notice of application for any project, major or minor, must be published in a local newspaper and the *Environmental Notice Bulletin* and provided to the chief executive officer of each municipality in which the proposed project is located. Given this contravention of the statute, we urge the Department to strengthen or at a minimum to at least retain the provisions of §621.7(g). 3

The proposed amendments would further limit public participation by adding or expanding dozens of actions that would now be considered "minor projects." The Department justifies this on the basis that "large-scale, environmentally consequential, or contentious developments" elicit higher levels of public interest than smaller-scale, more localized ones. While a bigger project will obviously impact more people, this should not be the basis for ignoring the concerns of those impacted by smaller projects. The proposal would exacerbate the current non-compliance with ECL §70-0109(2)(a) and convert many more activities into private conversations between an applicant and agency staff. In reviewing permits, the Department's regional staff should have the benefit of any input and insights that local elected officials, organizations and members of the public feel are relevant. They can share information that is indispensable in assessing a proposed project's environmental impact, and their inclusion in the Uniform Procedures Act process was an essential element in the legislative design. 4

The changes to §621.4 would allow an application for modification of a permit that would otherwise be treated as new to be converted to a minor project provided it "involves an expansion or increase of any regulated area, volume, rate, or capacity that does not exceed 10% of the existing regulated area, volume, rate, or capacity." To illustrate the magnitude of this change, the current proposal to expand the height of the Seneca Meadows SWMF from 774 feet to 843.5 feet would fall within this exemption. Even worse, nothing in the proposed rule would prevent a permittee who is granted a 10% increase from applying for another 10% increase, or another ten of them, and have each modification processed without any public notification. This is the antithesis of the transparency we expect from state government. 5

The expanded list of minor projects **also** does not appear to have taken the CLCPA and CRRA into account. For example, under the proposal the activities in a freshwater wetland and its adjacent area could be the subject of multiple, simultaneous applications for "minor project" permits. All of the following could be proposed for the same wetland simultaneously: construction of residential and non-residential structures, unpermitted pesticide applications, intensive, organized and repetitive use of motorboats and airboats, increased permanent wetland fill and cutting vegetation "such that the functions and benefits of the wetland are…significantly adversely affected." The potential for the cumulative destructive impact on these important "carbon sinks" is not considered. 6

Similar concerns arise from proposed provisions that would treat any construction, removal or breach of a Class A ("low hazard") dam as a minor project. Such activities may well involve climate and resiliency impacts as well as riparian rights and should require local notices. These are far from all of the concerns raised by the Department's proposed expansion of the definitions of minor projects. All of the proposed changes to §621.4 should be addressed further with the participation of all affected parties. 7

Finally, we are concerned about a proposed change in the regulations on permit renewals in §621.11 that does not appear to be factually based and that could present an obstacle to achieving the targets of the CLCPA. State Administrative Procedure Act §401(2) provides that when a timely and sufficient application has been made for a new or renewed permit "with reference to any activity of a continuing nature," the existing permit does not expire until a final determination is issued or until the last day to seek judicial review or fixed by court order. The term "activity of a continuing nature" is not defined but has been reserved for judicial construction. Cases on this provision have had different outcomes based on the facts surrounding a specific activity. 8

The proposed rule would displace this fact-based standard with a new provision listing operations of hazardous waste management facilities**,** solid waste management facilities, air pollution and water withdrawal permits and several other permit categories as predetermined "activities of a continuing nature" regardless of the specific facts involved. The need to comply with the CLCPA may motivate some polluting facilities to seek to continue their operations through extended litigation. The regulations should not provide them with a safe harbor to do so in cases where they might otherwise have been found to not meet the "continuing nature" test. If the Department intends to merely identify those categories of permits that could potentially be determined to involve activities of a continuing nature, clarifying language to that effect should be added to the regulations. Otherwise, this provision should be dropped from consideration.

Please feel free to contact us if more information is required on these matters.

Very truly yours,

Steve Englebright

Steve Englebright
Chair, Assembly Committee
on Environmental Conservation

Dan Quart
Assembly Chair
Administrative Regulations
Review Commission

cc: DEC Office of General Counsel
DEC Office of Climate Change

Part 621 Comment Letter G

ENVIRONMENTAL ENERGY ALLIANCE OF NEW YORK
677 Broadway, Suite 1205
Albany, New York 12207-2996

November 14, 2022

James J. Eldred
New York State Department of Environmental Conservation
Division of Environmental Permits
625 Broadway, 4th Floor
Albany NY 12233-1750

By electronic submission to: comment.uparulemaking2022@dec.ny.gov;

Dear Mr. Eldred:

I am writing on behalf of members of the Environmental Energy Alliance of New York (the "Alliance") to provide comments on the proposed revisions to the Uniform Procedures Act (UPA) regulations that are found at 6 NYCRR Part 621. The Alliance is an ad hoc, voluntary group of electric generating companies, transmission / distribution companies and other providers of energy services in New York State. The Alliance supports our members in understanding state and national environmental regulatory initiatives to formulate and achieve their business goals and proactively advocate for cost-effective regulations and policies. The operations of Alliance members contribute to the reliability of the State's electric grid and to the economic well-being of the State.

Alliance members have an interest in this rulemaking as it will among other things, affect permitting and the continued operation of both generation and transmission/distribution assets. These continued operations also affect many stakeholders who depend on a reliable supply of electricity to power homes and businesses across New York State.

Our comments address the proposed requirements for a public participation plan, shortening permit terms, and the uncertainties associated with the Department's effort to align Part 621 with the Climate Leadership and Community Protection Act (CLCPA) and the Environmental Justice Act of 2019 in the absence of finalizing regulations and guidance documents needed to implement these laws.

**Requirements for a Public Participation Plan**

The Department is proposing to amend Section 621.3(a)(3) to read:

> The department may require the applicant to ***submit and carry out*** a public participation plan that would include the applicant conducting public participation meetings ***before an application is determined or deemed complete***. The public participation plan is intended to enhance community awareness of the project. It may include various means of communication with the affected public through different media, and local outreach actions, including distributing project information in the community, and conducting public project information meetings in appropriate languages. (emphasis added)

1

Alliance members have two comments on this proposed amendment. First, we suggest that the proposed rule be revised to indicate that the Department will not impose new, duplicative public participation requirements on applications for activities of a continuing nature, specifically permit renewals with no modifications or renewals with minor modifications. The Department's current regulations already provide an opportunity for public comment on air and water permit renewals (*see* 6 NYCRR 621.7), and the Department itself determined long ago that these types of permit actions have no significant environmental impacts (*see* 6 NYCRR 617.5[c][32]). The proposed rule, if left unchanged, would impose an unnecessary new requirement that would delay securing a decision required to maintain energy and utility operations, without providing any benefit to the public, who already have an opportunity to comment on applications for permit renewals. Accordingly, we request that the proposed express terms be revised as follows: 1

> The department may require the applicant to submit and carry out a public participation plan that would include the applicant conducting public participation meetings before an application is determined or deemed complete. The public participation plan is intended to enhance community awareness of the project. It may include various means of communication with the affected public through different media, and local outreach actions, including distributing project information in the community, and conducting public project information meetings in appropriate languages. ***This paragraph shall not apply to applications for permit renewal that (i) are subject to public notice and comment pursuant to section 621.7 and (ii) propose no material change in permit conditions or the scope of permitted activities.*** (emphasis added)

This revision proposed by the Alliance would also align with the construct already existing in Commissioner Policy 29 - Environmental Justice and Permitting (CP-29), Section V.A.2, wherein public participation plans are expressly not required in the context of permit renewals.

Second, the Alliance interprets the Department's proposed express terms to mean that a public participation plan, where required, will be considered by the Department in determining the completeness of a renewal application, and will not be considered in determining whether a renewal application is sufficient under 6 NYCRR 621.2(ad), 621.11(l) or Section 401(2) of the State Administrative Procedure Act (SAPA). If this is not the Department's interpretation, the Department would need to clarify this in the express terms, treat the change in express terms as a significant modification to the proposed rule and reevaluate the change under both SAPA and the State Environmental Quality Review Act (SEQRA). 2

**Changes to Permit Terms**

The Department is proposing to amend Section 621.10(i) to read: 3

> Maximum permit terms. In issuing permits pursuant to this Part, the department may specify a permit up to the maximum provided in this subdivision. ***At its discretion, the department may specify a term shorter than the maximum.*** (emphasis added)

The Department should identify in revised express terms the factors that it will use to support a shortened permit term. Alliance members seek to understand this change, particularly with respect to renewals, which historically have retained consistent permit terms. Uncertainty in the outcome of permit term decisions by the Department during a renewal will unduly complicate operator planning, maintenance and capital expenditures related to a permitted facility.

Further, if a shorter term is imposed in a renewed permit that differs from the existing permit, Alliance members request clarification in the proposed express terms that a new, shorter permit term imposed by the Department be added to the list in Section 621.13(a) and processed as a Department-initiated permit modification under Section 621.13. 3

**Addition of Terms to Align Part 621 with the CLCPA and EJ Act Without Sufficient Detail for Applicants**

Alliance members submitted comments on both draft DAR-21 *The Climate Leadership and Community Protection Act and Air Permit Applications* and draft CP-49 *Climate Change and DEC Action*, requesting clarification on issues critical to our ability to accurately respond to the requirements of permit applications and renewals addressed in the Part 621 proposed revisions. Given neither a guidance document nor implementing regulations have been finalized, the Department could impose unspecified and arbitrary information requirements on an ad hoc basis before it makes a determination that an application is complete. Accordingly, the draft guidance documents are directly relevant to the public's ability to provide meaningful comments on proposed changes to Part 621 relating to permit renewal and the requirements of the CLCPA (e.g., proposed Section 621.3(a)(11) and (13)). 4

Proposed Section 621.3(a)(11) reads:

> The Climate Leadership and Community Protection Act (CLCPA) requires the department to consider whether its permitting decisions subject to this Part are inconsistent with, or will interfere with, the attainment of the statewide greenhouse gas (GHG) emission limits established in Article 75 of the ECL and reflected in Part 496 of this Title. Therefore, where applicable, the ***applicant must provide information to explain whether the project will be inconsistent with, or will interfere with***, the attainment of statewide GHG emission limits. An application is incomplete until such information is provided to the department. (emphasis added)

Proposed Section 621.3(a)(13) reads:

> The Environmental Justice Act of 2019 and CLCPA require the department to consider environmental justice concerns in permitting decisions subject to this Part and provide enhanced public participation opportunities. Therefore, where applicable, an application is incomplete until the following information is provided to the department: (i) an ***enhanced public participation plan***; and (ii) ***additional information deemed necessary*** by the department to evaluate and, where necessary, mitigate environmental impacts on the identified environmental justice area(s) or disadvantaged communities. (emphasis added)

We express the same concerns about uncertainty in response to draft Part 621 as we identified in our comments on DAR-21 and CP-49. It is unfortunate we are unable to react to any changes or updates to these directly relevant guidance documents in our comments on this rulemaking; we resubmit and incorporate those comments into these comments and await the opportunity to comment on the Department's proposed regulations implementing these laws.

Finally, consistent with our comments above on the requirements for a public participation plan, we request that both subdivisions (11) and (13) be further revised to state that "***additional information and an enhanced public participation plan will not be required for applications for permit renewal with no material change in permit conditions or the scope of the permitted activities***." 5

Alliance members thank the Department for its consideration of our comments.

Sincerely,

Sandra Meier, PhD
Director
Sandra.Meier@eeanyweb.org

Attached:
Alliance Comments Draft CP-49 2.7.22
Alliance Comments Draft DAR-21 2.7.22

Part 621 Comment Letter G

ENVIRONMENTAL ENERGY ALLIANCE OF NEW YORK
677 Broadway, Suite 1205
Albany, New York 12207-2996

February 7, 2022

email to: climate.regs@dec.ny.gov

Maureen Leddy
New York State Department of Environmental Conservation
Office of Climate Change
625 Broadway
Albany, NY 12233-1050

RE: Proposed Policy CP-49: *Climate Change and DEC Action*

Dear Ms. Leddy:

I write on behalf of the Environmental Energy Alliance of New York ("the Alliance") to provide comments on the proposed policy referenced above. The Alliance is an ad hoc, voluntary group of electric generating companies, transmission/ distribution companies and other providers of energy services in New York State (NYS). The Alliance supports our members in understanding state and national environmental regulatory initiatives to formulate and achieve their business goals and proactively advocate for cost-effective regulations and policies. The operations of Alliance members contribute to the reliability of the State's electric grid and to the economic well-being of NYS.

Alliance members support the goals of the Climate Leadership and Community Protection Act (CLCPA). Alliance members also recognize that there will be significant changes in the energy generation and delivery systems in NYS in the time frames delineated by the CLCPA. At the same time, it is imperative to supply reliable and resilient energy to the people of NYS at reasonable rates. To balance these two, Alliance members will need to continue to operate their facilities in compliance with their existing air permits and will need a clear path for renewing those existing air permits and for applying for new air permits as the need arises. Alliance members strive to make the permitting process as efficient as possible and recognize a sound policy can help to simplify the permitting process for both the New York State Department of Environmental Conservation ("DEC") and applicants.

The Alliance recognizes that the DEC has indicated that the "…Policy is intended solely for the use of Department personnel" [page 3] and not by applicants for permits or grants, but nevertheless offers these comments in hopes that the DEC can provide additional clarity when the policy is finalized. It is often true that applicants will seek guidance from DEC staff in the preliminary stages of preparing permit and grant applications. The Alliance believes that it is important that DEC policies provide sufficient clarity to DEC staff so that they, in turn, can provide clear guidance to entities seeking to make the permit application process as efficient as possible.

Our comments consider those areas of the draft policy that would benefit from additional clarity for the regulated community:

1. **It is premature to finalize the policy permit decisions in advance of a final CLCPA Scoping Plan.**

The CLCPA envisions the development of a Scoping Plan during 2022, and the initiation of rulemaking activities by the DEC in 2023 with a target completion date of 2024. The language of proposed CP-49 recognizes that the DEC has not completed its rulemaking obligations associated with the CLCPA: "Some, but not all, of these statutory requirements have been added to the Environmental Conservation Law ("ECL")" [page 1]. As such, it is difficult to envision that staff within the DEC will have sufficient regulatory direction to consistently apply the provisions of the proposed policy to their routine activities.

The DEC seems to recognize this conundrum [pages 5 and 6] in that it sets forth an interim, phased-in approach to applying CLCPA Section 7(2). Even with a phased-in approach, there seems to be very little direction to DEC staff in the regions on how to determine whether a specific action is "consistent" with the CLCPA.

2. **The proposed policy appears to have conflicting thresholds for when a full CLCPA analysis is required.**

The proposed policy under the section entitled "Scoping Plan" [page 5] states the following:

*"Thus, an action that complies with regulations implementing the CLCPA and Scoping Plan may be considered consistent with the Emission Limits, and therefore in compliance with CLCPA Section 7(2). If the decision, however, is not covered by regulation, a full analysis of consistency with the Emission Limits is necessary"* (emphasis added).

Inasmuch as the DEC has not promulgated regulations implementing the Scoping Plan (because it is not finished), this requirement would seem to imply that all decisions in 2022 and 2023 would require a "full analysis". However, at page six the proposed policy states:

*"Routine permit renewals that would not lead to an increase in actual or potential GHG emissions would ordinarily be considered consistent with the CLCPA pending finalization of the Scoping Plan and future regulations unless project specific facts support a finding of inconsistency."*

Thus, DEC staff considering a permit renewal in a program area not (yet) covered by a regulation stemming from the Scoping Plan would face a conundrum – does the applicant have to provide a complete analysis or not?

The Alliance again points out that the phrase "unless project specific facts support a finding of inconsistency" is vague and offers no guidance to DEC staff on when an analysis is required.

3. **Questions around "Identification of Alternatives and GHG Mitigation"**

The Alliance appreciates that this section of the proposed policy [page 7] identifies that it is the **applicant** that is to propose potential alternatives. This is in contrast with language in proposed DAR-21 The Climate Leadership and Community Protection Act and Air Permit Applications suggests that the **DEC** would be responsible to propose alternatives. The Alliance believes that it is much more efficient if the applicant identifies alternatives in consultation with DEC staff.

There also appears to be a contradiction within the proposed policy as to the location of any proposed mitigation. At page 7, the proposed policy indicates that the applicant may propose "…*GHG mitigation measures at the project location*" (emphasis added). A subsequent statement [page 8] indicates that mitigation can include a wide variety of approaches including:

- *"Financial, funds to invest in GHG emissions reductions projects;*
- *Technological, such as carbon capture and utilization;*
- *Legally enforceable limitations on GHG emissions, fuel use, or hours of operation; or*
- *Sequestration."*

Mitigation approaches such as investing in GHG emission reduction projects, carbon capture, sequestration would not likely be at the project location in many scenarios. The Alliance believes that the DEC will be best able to meet the goals of the CLCPA if it takes an expansive view of mitigation and does not limit mitigation approaches strictly at a project location.

**4. Consideration of Future Climate Risks**

In the section entitled "Consideration of Future Climate Risks" the proposed policy introduces terms that provide little or no guidance to DEC staff.

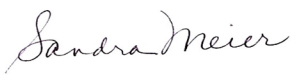
"*Programs shall, to the extent permitted by available resources and actionable information, consider future risks, both physical and non-physical, in all decisions and actions in which climate or weather is a relevant factor."* [page 8]

The first complexity arises from the fact that this is the first reference in the proposed policy to "weather." Does the DEC mean storm surge, flooding, increased temperature, and other parameters in which climate change impacts what is considered a typical "weather" pattern? Additionally, there is no guidance in this statement as to how DEC staff will determine whether "climate" or "weather" is a relevant factor and what determines the degree of relevance of these factors. The Alliance believes that DEC staff will be best served if criteria for considering "relevance" are added to the proposed policy when it is finalized.

In summary, Alliance members are supportive of the goals of the CLCPA and are anxious to meet the DEC expectations in applying for the permits and authorizations required to continue to provide safe and reliable energy to our customers as the NYS energy system undergoes a groundbreaking transformation.

The Alliance welcomes discussion with the DEC staff on any of the points raised above.

Sincerely,



Sandra Meier, Ph.D.
Director
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518-573-0191

Part 621 Comment Letter G

ENVIRONMENTAL ENERGY ALLIANCE OF NEW YORK
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February 7, 2022

email to: air.regs@dec.ny.gov

Mark Lanzafame, P.E
New York State Department of Environmental Conservation
Division of Air Resources
625 Broadway
Albany, NY 12233-3254

RE: Proposed Policy DAR-21: *The Climate Leadership and Community Protection Act and Air Permit Applications*

Dear Mr. Lanzafame:

I write on behalf of the Environmental Energy Alliance of New York ("the Alliance;" see list of generating company members supporting these comments highlighted below) to provide comments on the proposed policy referenced above. The Alliance is an ad hoc, voluntary group of electric generating companies, transmission/ distribution companies and other providers of energy services in New York State (NYS). The Alliance supports our members in understanding state and national environmental regulatory initiatives to formulate and achieve their business goals and proactively advocate for cost-effective regulations and policies. The operations of Alliance members contribute to the reliability of the State's electric grid and to the economic well-being of NYS.

At the outset, I note that the Alliance members support the goals of the Climate Leadership and Community Protection Act (CLCPA). Alliance members recognize that there will be significant changes in the energy generation and delivery systems in NYS in the time frames delineated by the CLCPA. At the same time, Alliance members recognize the imperative to supply reliable and resilient energy to the people of NYS at reasonable rates. Indeed, our view is that a reliable energy system is the necessary foundation upon which a clean energy system should be built. To best achieve the goals of the CLCPA during the transition, Alliance members will need to continue to operate their facilities in compliance with their existing air permits and will need an orderly process that acknowledges the importance of reliability for renewing those existing air permits and for applying for new air permits as the need arises. Alliance members believe a permitting process that is as efficient as possible is critical and recognize a sound policy can help to simplify the permitting process for both the New York State Department of Environmental Conservation (DEC) and applicants.

Our comments consider those areas of the draft policy that would benefit from additional clarity for the regulated community:

1. **The policy should be modified to identify specific types of permit actions that are consistent with CLCPA policies to avoid disruption in the utility sector and maintain reliable electric service.**

The Alliance supports the overarching principle of the proposed policy to provide guidance for applicants and DEC staff in support of air permit applications under CLCPA Section 7(2). However, the policy must recognize the impacts of permit actions on grid reliability and provide for an orderly transition from existing sources of electricity generation until large scale renewable generation and storage become available.

Page 2 of the draft policy under the heading "Applicability" states: "DEC staff may require [any] applicant to submit a CLCPA analysis regardless of the applicability stated in this section to ensure the requirements of Section 7(2) are met or if the facts surrounding the project indicate that an analysis is warranted." Then, on page 3, under the heading "Determining Project Scope," the draft policy states that DEC staff can decide to require a CLCPA analysis for permit renewals (*i.e.,* continued operation of existing equipment under existing permit terms without any modifications) again to "ensure the requirements of Section 7(2) are met."

The possibility that the renewal of an air permit for fossil fuel electric generation may, in undefined circumstances, be stalled pending a broad ranging CLCPA analysis that might require an operator to provide new financial mitigations or take other actions, threatens to accelerate the retirement of fossil fuel generation before renewable generating capacity is ready to take its place. This aspect of draft DAR-21 would also mark a radical departure from longstanding DEC permitting policy, which has for decades recognized that permit renewals with no change in the scope of permitted activities never have a significant adverse on the environment. *See e.g.,* 6 NYCRR 617.5(b)(32).

Continued availability of existing fossil fuel electric generating units, both large and small, are still needed to maintain electric system reliability on the hottest days of summer, when adverse weather requires a diverse fuel mix to maintain a reliable, affordable utility service, or at any other time when generating capacity is needed to address an unforeseen supply outage. Emergency demand response programs sponsored by EEANY members and approved by the Public Service Commission depend on the electric generating capacity of small fossil fuel generators with Air State Facility permits or registrations to maintain electric service during periods of peak demand. In fact, maintaining the availability of existing generators is critical. Renewable generation is growing quickly but still accounts for approximately 30 percent of the state's energy supply. Meanwhile recent DEC permitting decisions suggest that new in-state conventional generation is unlikely to be constructed.

Accordingly, we request that DEC revise the applicability section of DAR-21 to state explicitly that two categories of air permits be deemed consistent with the attainment of statewide greenhouse gas emissions under Section 7(2) until regulations that provide for the long-term phase out existing fossil fuel fired generation are adopted:

(1) renewals of Title V permits, Air State Facility permits and Air Facility registrations for sources in the electric generation sector where there will be no material change in permit conditions or the scope of permitted activities; and

(2) modifications to existing sources in the electric generation sector to the extent necessary to accommodate combustion of fuels with greenhouse gas emitting potential equal to or below the current fuel mix.

Continued operation of existing electric generation sources until DEC adopts implementing regulations would not interfere with the attainment or the zero-emission electric generation sector by 2040. (Surely if the Legislature had thought continued generator operation interfered with this requirement, it would not have embedded in the statute a 2024 date to promulgate regulations for their phase out by 2040.) Continued operation of an existing fossil fuel generation or the source's switching to less greenhouse gas intensive fuels by definition do not create or enable a significant new source of greenhouse gas emissions or necessitate the development of new fossil-fuel infrastructure. Permit renewals and fuel changes do not materially affect the market demand for, or access to, GHG emissions reduction technologies or strategies. To the contrary, policies that prematurely result in retirement of fossil-fuel electric generation will make it more difficult and expensive for the State to reduce GHG emissions that meet the statewide emissions limits, while compromising the ability of utilities to reliably supply their customers. In sum, prematurely disrupting or conditioning permit renewals that provide generation relied on by Alliance members threatens the very environmental, economic, and social harm the policy seeks to avoid.

Finally, if DEC interprets CLCPA 7(2) to authorize it to deny or materially limit permit renewals before CLCPA implementing regulations are promulgated, it should state this explicitly and transparently in the policy. It should also evaluate the potential cumulative impacts of accelerated fossil fuel generation shutdowns on the statewide electric demand system in an environmental impact statement before this policy is finalized, rather than in the segmented, project-by-project fashion currently contemplated in the current draft.

2. **It is premature to make permit decisions in advance of a final CLCPA Scoping Plan and implementing regulations; a more informed outcome is possible using the process followed by the Peaker Rule.**

The proposed "Purpose and Background" section of DAR- 21 lays out the schedule mandated by the CLCPA, indicating that the scoping plan is scheduled to be completed by January 1, 2023, and the implementing regulations associated with the scoping plan are scheduled to be completed by January 1, 2024. As an overarching principle, the Alliance suggests that it is premature for the DEC to be making decisions on existing permits relative to the CLCPA before the scoping plan and implementing regulations are finalized. By setting policy now, the DEC may make decisions that are contrary to the ultimate goals set forth in the scoping plan. Likewise, a permit review policy completed prematurely may "chill" investments that would otherwise support emission reductions, or as indicated above, accelerate the retirement of fossil fuel fired generation before adequate renewable generation exists.

Further, the draft CLCPA Scoping Plan [bullet 2, page 157] notes the need for "*coordination of closures and the necessary reliability assessments*" which should be accomplished by collectively evaluating <u>all</u> Title V permit renewals to determine the impact on system reliability. Rather than making a one-off decision on any individual permit, we suggest the DEC follow the same approach designed for the Peaker Rule (6NYCRR Part 227-3) as informed by the New York Independent System Operator (NYISO).

3. **Alternatives or GHG mitigation measures should be proposed by applicants, not the state agency.**

The draft policy proposes if a decision is deemed inconsistent with the CLCPA, the state agency must provide a detailed justification and identify alternatives or GHG mitigation measures to be imposed on the applicant [page 1 of 7]. Whenever a permit is deemed inconsistent with the CLCPA, DEC must consult with the NYISO [and, where appropriate the local distribution utility] in advance of further review under to evaluate reliability impacts. Alliance members suggest alternatives are best proposed by the applicant rather than agency staff; the applicant more fully understands what is possible for the facility to achieve.

4. **The derivation of emissions factors is confusing and questionable; the process for proposing alternative factors is lacking direction.**

The Alliance points out that an Alvarez paper from 2012[1], sponsored by the Environmental Defense Fund, noted that that there are immediate climate benefits for switching power plants from coal to natural gas if methane emissions from the natural gas supply chain are 3.2 % or less of annual production. The Alvarez paper that the Preliminary Draft Interim document references indicated that the loss rate is approximately 2.3%, significantly less than Dr. Alvarez's published and peer-reviewed conclusion that the benefits of natural gas use accrue at 3.2%.

Furthermore, Table 12 on page 24 of the ERG study indicates that 50% of the natural gas provided to New York comes from production facilities in the Appalachian shale with a leakage rate of only 0.7%. Figure 4 on page 23 of the ERG report indicates that the percentage of low-emitting Appalachian natural gas is continuing to increase.

The Alliance asserts that, on its face, the table on emission factors in the *Preliminary Interim Draft* presents an implausible result. It the table is accurate, natural gas emits 120% more greenhouse gas than coal and 175% more greenhouse gas than diesel. This conclusion is completely opposed to the fact that the utility industry has reduced greenhouse gas emissions by a remarkable amount over the past decade by converting both coal and petroleum-fired generators to natural gas. The DEC itself, over the recent years, has invested significant regulatory resources in eliminating coal-fired generation in the State and reducing the viability of oil-fired generation.[2]

Stated simply, the Alliance believes that the DEC should not make permit decisions based on the emission factors listed in the Preliminary Draft Interim document because the modeling described in the NYSERDA documents does not correctly reflect the current rate of emissions in the upstream facilities serving New York State. The Alliance requests that the Department convene a technical conference to allow air permit practitioners and other interested parties to better understand the NYSERDA consultant's modeling rationale and to offer additional data that would refine the table in the Preliminary Draft Interim report.

5. **DEC should provide clear guidance on determining upstream emissions as part of the CLCPA analyses.**

Continuing to highlight concerns with the "CLCPA Analysis Requirements," the Alliance notes the following requirement:

"*Upstream emissions also include GHG emissions associated with the generation of electricity imported into the State. In general, DAR does not typically review interconnection projects. However, <u>if a project is known to use power imported into the State</u>, the CLCPA analysis should include the upstream emissions associated with that use*." [page 4 of 7]

[1] Alvarez, et al. Greater focus needed on methane leakage from natural gas infrastructure. Proceedings of the National Academy of Sciences 109, 6435 – 6440 (Published April 24, 2012)

[2] New York State Energy Research and Development Authority (NYSERDA). 2019. "New York State Oil and Gas Sector Methane Emissions Inventory." NYSERDA Report Number 19-36. Prepared by Abt Associates, Rockville, MD and Energy and Environmental Research Associates, LLC, Pittsford, NY. nyserda.ny.gov/publications.

Here, the use of the phrase "*known to use power imported into the State…*" first requires an understanding of how it will be "known" that a project utilizes power imported into the State when a project will connect to the existing transmission/distribution grid. The Alliance is aware that there are proposed projects that would import (emission-free) hydroelectric power from Canada and presumes that an applicant could take advantage of the availability of that imported power. If the DEC envisions a methodology for determining the emissions characteristics of upstream electrical generation, it should be described in the policy. If the DEC intends to leave that showing to the applicant, the policy should describe the criteria by which the DEC will evaluate the applicants' submittal.

6. **DEC is requiring applicants to speculate on operational activities beyond the permit cycle.**

The CLCPA analyses requirements as noted below necessitate considerable speculation on facility operations that extends well beyond the five-year Title V operating permit cycle. Given the many unknowns associated with this requirement (such as regulations that will follow the final Climate Action Council Scoping Plan or the outcome of innovation that will lead to new technology options) we suggest the requirements will not yield useful or realistic information as to the future operations of any facility.

*"(5) Projected future GHG and CO2e emissions for the years 2030, 2040 (for facilities in the electric generation sector), and 2050, including any proposed future emissions reduction strategies."* [page 4 of 7]

*"(7) For facilities in the electric generation sector, the analysis should discuss how the facility intends to comply with the requirement that the electric generation sector be zero emissions by 2040. This discussion should cover the feasibility and impacts from any alternative fuels or technologies that will be used by the facility to comply, and any alternatives or mitigation measures that will be implemented."* [page 5 of 7]

7. **DEC should provide the criteria used to evaluate the viability of alternative fuels, alternative technologies, and mitigation measures.**

Further, in the "CLCPA Analysis Requirements" the Alliance notes the following:

*"7. For facilities in the electric generation sector, the analysis should discuss how the facility intends to comply with the requirement that the electric generation sector be zero emissions by 2040. This discussion should cover the feasibility and impacts from any alternative fuels or technologies that will be used by the facility to comply, and any alternatives or mitigation measures that will be implemented."* [page 5 of 7]

The Alliance notes that in its "Notice of Denial of Title V Air Permit" for the Danskammer Energy Center (DEC ID: 3-3346-00011/00017) and in its "Notice of Denial of Title V Air Permit" for the Astoria Gas Turbine Power Project (DEC ID: 2-6301-00191/00014) the DEC rejected the use of both hydrogen and renewable natural gas (RNG) as a 2040 compliance mechanism because the DEC considers them "speculative" and "aspirational". These conclusions contrast starkly with the hundreds of millions of dollars being invested by the federal and state government and industrial groups into the development of these fuels and their growing adoption in Europe and the United States, including NYS.[3] At the very least, the proposed policy should acknowledge these substantial efforts and include the criteria by which the DEC will evaluate the viability of alternative fuels, alternative technologies, and mitigation measures in considering air permit

[3] See Governor Hochul Announces Construction Start at Largest Green Hydrogen Plant in North America. It seems NYS is also investing considerable money into green hydrogen projects.

applications. Otherwise, an applicant is faced with an unknown set of rules and could invest significant analytical resources in evaluating alternatives only to have the DEC dismiss them as "too speculative."

8. **DEC should provide more succinct criteria for when a project is "inconsistent" and when it is "justified" under the CLCPA.**

The Alliance also seeks clarification in the text associated with Section V.D entitled "Considering Inconsistency with CLCPA." This section notes that DAR must evaluate the applicant's submittal to determine if the project is consistent with the CLCPA. The proposed policy states:

*"While each determination will be based on the facts surrounding the project itself, some potential causes of interference and inconsistency are…[T]he project facilitates the expanded or continued use of fossil fuels through infrastructure development*." [page 5 of 7]

The policy goes on to suggest that there may be acceptable justifications as to why a project would be justified even if it is inconsistent with the requirements of the CLCPA. The proposed policy describes one of the possible justifications in this manner:

*"While each determination will be based on the facts surrounding the project itself, potential examples of acceptable justifications may include…[T]he project is needed to improve or maintain the safety and reliability of existing systems."* [page 5 of 7]

There are many conceivable projects in which these two statements may lead to contradictory results. For example, if an applicant is upgrading an existing natural gas compressor to comply with the DEC's proposed Part 203, such a project would "allow for the continued use of fossil fuels through infrastructure development" and would therefore be inconsistent with the CLCPA. However, since the entire basis of proposed Part 203 is that the new requirements are needed "to improve the safety and reliability" and emission characteristics of existing (gas) systems, these upgrades would be justified as an approvable project. The Alliance suggests that the proposed policy, once finalized, should provide more succinct criteria for when a project is "inconsistent" and when it is "justified" under the CLCPA.

9. **DEC should explain how the "reasonable alternative" will be evaluated.**

Finally, as it relates to Section V.E., "Identification of Alternatives and Mitigation," the DEC notes, under examples of potential alternatives, the possibility that "*no reasonable alternative exists*" [page 6 of 7]. While the Alliance appreciates that the DEC is trying to offer applicants some flexibility, the DEC should provide some further detail on how it would evaluate the term "reasonable" in an applicants' submittal.

Again, recognizing that the DEC is attempting to allow some flexibility in the implementation of the policy, the Alliance notes the section entitled "*Examples of potential mitigation measures*." Included in the list are the following [page 7 of 7]:

- *"Financial mitigation, such as providing funds for GHG reduction projects in the local community;*
- *Technological mitigation, such as the installation of emission controls that capture or reduce GHG emissions;*
- *Operational mitigation, such as limitations on the amount of fossil fuel combusted at the project or the allowable hours of operation for the project; and*

- *Physical mitigation, such as the planting and upkeep of trees or other means of carbon sequestration."*

These types of permissible mitigations seem to offer significant opportunities for both applicants and the DEC. The Alliance notes, however, in DEC draft policy CP-49 (the companion policy governing CLCPA compliance across all DEC programs and published on the same date as proposed DAR-21), the mitigation section indicates that mitigation must occur "*at the project*" (see proposed CP-49 at page 7). The DEC should reconcile this difference in approach in the final policies; the Alliance encourages the more open perspective listed in proposed DAR-21.

In closing, Alliance members reiterate their commitment to achieving the goals of the CLCPA. Our members in many ways are leading the way through the energy system transition envisioned by the Climate Action Council process and the development of the scoping plan. Alliance members are also dedicated to continuing to provide reliable and resilient energy to all the people of NYS. The Alliance encourages the DEC to revisit the proposed DAR-21 policy to ensure that these two important requirements – decarbonization and reliability – will be met on a going-forward basis.

The Alliance welcomes discussion with the DEC staff on any of the points raised above.

Sincerely,

Sandra Meier, Ph.D.
Director
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Part 621 Comment Letter H

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INDEPENDENT POWER PRODUCERS OF NEW YORK

November 14, 2022

Via email to comment.uparulemaking2022@dec.ny.gov

James J. Eldred
New York State Department of Environmental Conservation ("DEC")
Division of Environmental Permits
625 Broadway, 4th Floor
Albany, New York 12233-1750

**Re: Comments on Proposed Part 621**

Dear Mr. Eldred:

The Independent Power Producers of New York ("IPPNY")[1] submits the following comments on the DEC's proposed changes to its Uniform Procedures Act regulation ("Part 621"). As discussed in detail below, our comments propose changes to improve the coordination of the proposed rule with: the New York Independent System Operator's ("NYISO") reliability requirements, similar to how the DEC's "Peaker Rule" (Subpart 227-3 - Ozone Season Oxides of Nitrogen (NOx) Emission Limits for Simple Cycle and Regenerative Combustion Turbines) was implemented; and the use of existing emission reduction regulations until the DEC promulgates additional ones to implement Section 7 of the Climate Leadership and Community Protection Act ("CLCPA").

This approach will ensure that emissions from existing fossil facilities are compliant with current requirements and new ones, as they are established by the CLCPA process, and that reliability is maintained, while intermittent renewable resources enter commercial operations and displace fossil facility output over time. As renewable resources are interconnected, existing resources will emit less, because they will be dispatched less frequently. Due to economics, lower emission resources will be dispatched ahead of higher emitting or less efficient ones, which are dispatched when needed to maintain reliability.

Without a coordinated Part 621, the installed capacity reserve margin will shrink prematurely, as existing fossil generation exits prior to necessary resources entering the system. Without that flexibility, load shedding will be required.

## 1. Who IPPNY Is

IPPNY is a trade association representing companies in the competitive power industry in New York. We were established in 1986 and currently have 85 Members. Our companies produce more than 75% of the State's power from all sources, such as: wind, solar, hydro, energy

[1] All of the views expressed in IPPNY's comments do not necessarily represent the positions of each of our Members.

storage, natural gas, oil, waste-to-energy, biomass, and nuclear. In combination, these resources maintain electric system reliability. IPPNY Members employ over 10,000 people across the State and pay about $1.7 billion in property taxes annually. Additionally, New York's power sector has reduced the emission rates of nitrogen oxides by 92% and sulfur dioxide by 99%. The electric generation sector has decreased greenhouse gas emissions ("GHG") by 46%, the most of any other sector of the economy.

## 2. CLCPA Overview Pertaining to Draft Part 621

### *a. Climate Action Council*

The CLCPA mandates reduction of New York's statewide GHG emissions by 40% from 1990 levels by 2030 and by 85% from 1990 levels by 2050. The CLCPA created a Climate Action Council (the "Council"), a 22-member body tasked with establishing advisory panels and creating and approving a Scoping Plan within three years, by January 1, 2023, to set out recommendations to the New York legislative and executive branches on how to achieve these mandates.

### *b. Adopted Part 496 on Statewide Limits*

The CLCPA also requires DEC to promulgate regulations to establish the overall statewide GHG emission limits for 2030 and 2050. In December 2020, DEC promulgated such regulations at 6 NYCRR Part 496 ("Part 496"), but the DEC has stated on its website that the rule "adopts limits on the emission of greenhouse gases in 2030 and 2050, as a percentage of 1990 emissions, per the requirements of the [CLCPA]. It applies to all emission sources in the State, but the rule ***does not itself impose compliance obligations***."

### *c. 2024 Implementing Regulations*

The CLCPA further requires DEC to implement the Council's recommendations within four years, by January 1, 2024, by promulgating regulations to ensure that the Part 496 statewide limits are met ("2024 Implementing Regulations"). The CLCPA also requires that the regulations DEC promulgates must "[e]nsure that the aggregate emissions of greenhouse gases from greenhouse gas emission sources will not exceed the statewide greenhouse gas emissions limits, . . . [i]nclude legally enforceable emissions limits, performance standards, or measures or other requirements to control emissions from greenhouse gas emission sources," and "reflect, in substantial part, the findings of the scoping plan." Presumably, the 2024 Implementing Regulations would include specific emissions limits, or specific criteria for calculating those limits, for various regulated entities, such as electric generating facilities. The CLCPA states that these 2024 Implementing Regulations are the avenue by which compliance with Part 496 would be required and would reflect the findings of the Council's Scoping Plan, which is to be finalized by the end of this year.

The CLCPA requires DEC to complete a public comment and consultation process before it can promulgate the 2024 Implementing Regulations to impose measures to ensure compliance with Part 496. Before DEC can promulgate these enforceable regulations, the CLCPA requires public workshops and consultation with the Council, the Environmental Justice Advisory Group, the Climate Justice Working Group, representatives of regulated entities, community organizations, environmental groups, health professionals, labor unions, municipal corporations, trade associations and other stakeholders. At least two public hearings and a 120-day public comment period must be provided. Only after this extensive stakeholder process concludes is DEC authorized to promulgate the 2024 Implementing Regulations.

### 3. What DEC's Proposed Changes to Part 621 Do

DEC has issued for public comment a proposed rulemaking to revise Part 621. The Regulatory Impact Statement ("RIS") for the proposed rule indicates that the regulation would ***implement provisions of the CLCPA.*** 1

The regulation would require permit applications to include certain information required by the CLCPA to be deemed complete by DEC. Specifically, the proposed rule would require applications to include an explanation of whether the project will be inconsistent with, or will interfere with, the attainment of statewide GHG emission limits and an evaluation of the need for mitigation of environmental impacts on environmental justice ("EJ") areas and disadvantaged communities. The proposed rule does not include specific provisions for how the DEC will implement these requirements.

The RIS does not discuss why DEC is proposing these changes in advance of the completion, by the end of this year, of the Council's Scoping Plan recommending measures to implement the CLCPA and the requirement that ***DEC implement the Council's recommendations via the 2024 Implementing Regulations*** as discussed above. It also does not acknowledge the pending Division of Air Resources Guidance DAR-21, entitled "The Climate Leadership and Community Protection Act and Air Permit Applications," which would apply to all types of DEC air permitting, including new, modified, and renewed Title V permits, and the proposed revisions to the DEC Commissioner's Policy ("CP-49") - Climate Change and DEC Action, both of which would implement Section 7 of the CLCPA. Also, it does not refer to the draft criteria and map for what constitutes a disadvantaged community, as discussed below, in terms of the draft rule's EJ-related language.

### 4. Relevant CLCPA Requirements Specific to Draft Part 621

Subdivision 2 of CLCPA Section 7, which took effect on January 1, 2020, requires consideration of whether State entity decisions are consistent with the attainment of statewide GHG emissions limits, even though DEC has yet to promulgate its 2024 Implementing Regulations to implement and enforce the Part 496 GHG emissions limits.

Subdivision 3 of Section 7, which also became effective on January 1, 2020, requires that decisions by State entities on permits, licenses, and other administrative approvals must not disproportionately burden disadvantaged communities and are required to prioritize reductions of GHG emissions and co-pollutants in disadvantaged communities. The CLCPA defines "co-pollutants" to mean hazardous air pollutants produced by GHG emissions sources. Notably, the DEC's Air Toxics Program already includes requirements for hazardous air pollutants. Emissions of nitrogen oxides and sulfur dioxide already are being reduced, as discussed above.

The CLCPA requires the Climate Justice Working Group to establish criteria to identify disadvantaged communities "for the purposes of co-pollutant reductions, greenhouse gas emissions reductions, regulatory impact statements, and the allocation of investments" under the CLCPA. In March of this year, the Climate Justice Working Group released for public comment, until July 7, its draft criteria, list, and map for what constitutes a disadvantaged community; however, the draft criteria, list, and map have not been finalized and adopted, and the CLCPA does not specify a deadline.

### 5. Rationale for the Use of Existing Requirements to Implement CLCPA Provisions Via the Proposed Part 621 Rule

Having the DEC make permit decisions based upon its existing requirements is consistent with the phased-in approach for CLCPA consistency, as envisioned by the updated draft CP-49 that

the DEC provided for public comment. Draft CP-49 states: "For the interim period, between the date of adoption of this Policy and the adoption of regulations implementing the CLCPA and Scoping Plan, the Department shall employ a ***phased-in approach when applying CLCPA Section 7(2)*** and review agency decisions ***in the context of the current phase of CLCPA implementation***." Draft CP-49 also indicates that: "In advance of the completion of the proposed criteria identifying disadvantaged communities by the Climate Justice Working Group, as required by the CLCPA, the Department will ***identify disadvantaged communities using an interim approach***" and that "***Detailed guidance on implementation of Section 7(3) will be provided through a forthcoming revision to CP-29***, DEC Policy on Environmental Justice and Permitting or other Department actions."

To IPPNY's knowledge, the DEC Commissioner's Policy ("CP-29") on Environmental Justice and Permitting remains unchanged, and its provisions are current. In terms of the "interim approach" for Section 7(3) referenced by draft CP-49 above, that approach should be using the current CP-29 for identified environmental justice areas until it is updated and until regulations are promulgated to provide detailed guidance on implementation of Section 7(3), after the finalization and adoption of the Climate Justice Working Group's criteria, list, and map for what constitutes a disadvantaged community, as discussed in further detail below.

## 6. IPPNY's Recommended Changes to the Proposed Part 621 Rule

### *a. GHG Emission Reductions*

#### *1) Provisions of Draft DAR-21 and CP-49 on CLCPA Consistency of Permit Renewals*

The proposed DAR-21 states that DEC "would in most circumstances" deem an applicant's permit renewal application consistent with the CLCPA if it "does not include a significant modification and would not lead to an increase in actual or potential GHG emissions." The proposed revised CP-49 states that "[r]outine permit renewals that would not lead to an increase in actual or potential GHG emissions would ordinarily be considered consistent with the CLCPA pending finalization of the Scoping Plan and future regulations unless project specific facts support a finding of inconsistency." It also states that "an action that complies with regulations implementing the CLCPA and Scoping Plan may be considered consistent with the Emission Limits, and therefore in compliance with CLCPA Section 7(2)."

IPPNY argued in its February 7, 2022 comments on draft DAR-21 that the guidance's provisions must be implemented through the promulgation of regulations by the DEC. The approach of establishing regulations for how to implement Section 7(2) is in harmony with the need to establish the 2024 Implementing Regulations, as well as with the content of approved renewal applications (as discussed below), and is consistent with regulations to be promulgated by the DEC for how to implement Section 7(3).

#### *2) Provisions of DEC's Renewed Permits*

DEC recently approved some Title V permit renewal applications and included provisions referencing compliance with the CLCPA, the Regional Greenhouse Gas Initiative ("Part 242"), and Greenhouse Gas Emission Performance Standards ("Part 251") in such renewed permits. With respect to the CLCPA, DEC has imposed a requirement in renewed Title V permits that, pursuant to the CLCPA and Article 75 of the Environmental Conservation Law ("ECL"), "emission sources shall comply with regulations ***to be promulgated by the Department*** to ensure that by 2030 statewide greenhouse gas emissions are reduced by 40% of 1990 levels, and by 2050 statewide greenhouse gas emissions are reduced by 85% of 1990 levels."

Even though Subdivision 2 of CLCPA Section 7 took effect on January 1, 2020, the only regulation that DEC has promulgated to implement the CLCPA is Part 496, which, as discussed above, is not enforceable and has no relation to individual Title V permits. DEC has not taken any of the steps required by the CLCPA, as discussed above, to promulgate and enforce the 2024 Implementing Regulations. Until DEC promulgates this rule, which arguably would impose enforceable GHG emissions limits on, and determine the methods and mechanisms on how such limits should be applied to, GHG emission sources (such as electric generators as a class), DEC cannot reasonably determine whether a particular electric generator, among all other generators in the State, is inconsistent with the statewide GHG emissions limits under Part 496.

As DEC cannot apply Subdivision 2 of CLCPA Section 7 until it, at a minimum, promulgates the 2024 Implementing Regulations to impose enforceable GHG emissions limits on specific industries, such as electric generators, the proposed changes to Part 621 should be revised to state that the CLCPA consistency demonstration would take effect upon the effective date of the 2024 regulation to be promulgated by the DEC to implement Part 496, given that this provision is consistent with the language DEC has included within issued renewal permits as discussed above, and that the DEC would use existing rules (Parts 242 and 251) to implement Subdivision 2 of CLCPA Section 7 in the interim.

*3) IPPNY's Recommended Changes to Part 621 on GHG Emission Reductions*

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Below are our specific recommended language changes shown in upper case bold text.

(11) The Climate Leadership and Community Protection Act (CLCPA) requires the department to consider whether its permitting decisions subject to this Part are inconsistent with, or will interfere with, the attainment of the statewide greenhouse gas (GHG) emission limits established in Article 75 of the ECL and reflected in Part 496 of this Title. Therefore, where applicable **AND ON AND AFTER THE EFFECTIVE DATE OF REGULATIONS TO BE PROMULGATED BY THE DEPARTMENT PURSUANT TO SECTION 75-0109 OF THE ECL TO IMPLEMENT PART 496**, the applicant must provide information to explain whether the project will be inconsistent with, or will interfere with, the attainment of statewide GHG emission limits**. ON AND AFTER THE EFFECTIVE DATE OF THE ADOPTION OF REGULATIONS TO IMPLEMENT PART 496**, an application is incomplete until such information is provided to the department. **PRIOR TO THE ADOPTION OF REGULATIONS TO IMPLEMENT PART 496, AN APPLICATION BY AN APPLICANT SUBJECT TO PARTS 242 AND 251 OF THIS TITLE WOULD BE COMPLETE UPON THE PROVISION OF INFORMATION TO THE DEPARTMENT THAT DEMOSTRATES COMPLIANCE WITH THOSE REGULATIONS.**

***b. Environmental Justice***

*1) Mitigation to Reflect Provisions of Part 487 and the Governor's Executive Order*

The text of the draft rule on the EJ provisions should be revised to include the substance of the DEC's EJ power plant rule ("Part 487"- Analyzing Environmental Justice Issues in Siting of Major Electric Generating Facilities Pursuant to Public Service Law Article 10). If a project is in an EJ area, Part 487 requires applicants to identify specific measures to avoid, minimize, offset, or mitigate any significant and adverse disproportionate environmental impacts on EJ areas to the maximum extent practicable using verifiable measures.

The EJ provisions within draft Part 621 should take effect after finalization and adoption of the Climate Justice Working Group's criteria, list, and map for what constitutes a disadvantaged community, as discussed above; otherwise, even though Subdivision 3 of CLCPA Section 7

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became effective on January 1, 2020, the EJ provisions of Part 621 cannot be implemented without the applicant knowing what the State has decided a disadvantaged community is, and it is unreasonable and unfair for the DEC to require applicants to propose application provisions on this point with only a draft proposal for what those communities ***may*** be. Also, the EJ provisions of Part 621 should not be implemented until the DEC updates its CP-29, at a minimum, to provide detailed guidance on implementation of Section 7(3) and, more necessarily, until it promulgates regulations to establish those requirements. 3

Also, Governor Kathy Hochul has issued Executive Order #22 of 2022 to establish a pathway for State agencies and authorities to comport their onsite activities with the requirements of the CLCPA, such as subdivision 3 of CLCPA Section 7. The Executive Order would require State entity compliance "to the maximum extent practicable" "to ***lower*** the impact of its operations on Disadvantaged Communities."

2) *Enhanced Public Participation Plan to Include Provisions of Regulations to Be Promulgated by DEC*

CP-29 includes public participation provisions, under the DEC's review process pursuant to the State Environmental Quality Review Act, and it applies to "applications for major projects and major modifications for permits;" however, it states that: "This policy shall not apply to permit applications for minor modifications, except as provided above, nor to renewals, registrations or general permits."

CP-29 also requires the DEC to make available guidance to assist permit applicants in complying with the public participation plan requirements of this policy. The policy also requires the DEC to draft regulations to establish mandatory public participation requirements. To IPPNY's knowledge, the DEC has not established this guidance or such regulations and only has promulgated its Part 487 regulation, as discussed above.

3) *IPPNY's Recommended Changes to Part 621 on Environmental Justice and Public Participation Plans* 3

Below are the specific language changes recommended by IPPNY, as shown in upper case bold text, in order to incorporate the reasoning discussed above.

(13) The Environmental Justice Act of 2019 and CLCPA require the department to consider environmental justice concerns in permitting decisions subject to this Part and provide enhanced public participation opportunities. Therefore, where applicable, an application is incomplete until the following information is provided to the department: (i) an enhanced public participation plan**, PURSUANT TO REGULATIONS TO BE PROMULGATED BY THE DEPARTMENT TO AMEND THIS PART 621.3 (a) (13) TO ESTABLISH MANDATORY PUBLIC PARTICIPATION REQUIREMENTS** and (ii) additional information deemed necessary by the department to evaluate ~~**and**~~, where necessary, **THE IDENTIFICATION OF SPECIFIC MEASURES THE APPLIANT WILL TAKE TO AVOID, LOWER, MINIMIZE, OFFSET, OR** mitigate, **TO THE MAXIMUM EXTENT PRACTICABLE USING VERIFIABLE MEASURES, ANY SIGNIFICANT AND ADVERSE DISPROPORTIONATE** environmental impacts on the identified environmental justice area(s) or disadvantaged communities **UPON THE ADOPTION OF THE CRITERIA, MAP, AND LIST FOR IDENTIFYING DISADVANTAGED COMMUNITIES PURSUANT TO SECTION 75-0111 OF THE ECL AND UPON THE PROMULGATION OF REGULATIONS TO PROVIDE DETAILED GUIDANCE ON IMPLEMENTATION OF SUBDIVISION 3 OF SECTION 7 OF THE CLCPA (CHAPTER 106 OF THE LAWS OF 2019)**.

**6. Urgency of Having a Coordinated Part 621**

IPPNY is recommending these revisions to the proposed Part 621 rule to ensure DEC's permit application procedures implementing the CLCPA's Section 7(2) and 7(3) have clarity and do not unreasonably and unduly burden applicants seeking permits, especially permit renewals. It is imperative that DEC's permit procedures do not burden new and existing electric generation that is needed to provide safe and reliable service, given the ongoing and recent findings of the NYISO about the shrinking capacity reserve margin and the looming threat to electric system reliability. 4

Several recent, independent studies have found that the State's current plan to develop thousands of megawatts of intermittent solar and wind generation will not allow the electric system to do away with fossil-fueled generation without careful coordination. The development of yet-to-be-determined, fully dispatchable emission free resources ("DEFRs") is crucial to maintaining reliability as the economy electrifies, to meeting the CLCPA's 2040 zero emissions target, and to supplementing increased reliance on intermittent renewable and duration limited resources. The 2021-2040 System and Resource Outlook, released by the NYISO, affirms that 95 GW of zero emission energy has to be on the system by 2040 to meet the CLCPA target. This study ran scenarios for how to meet the CLCPA targets, while maintaining reliability. Of the 95 GW needed to meet the 2040 target, at least 27 GW would be new DEFRs that are required to be on the system by 2040 in order to maintain reliability. Until new DEFRs are developed and commercialized, which could take many years, the efficient operation and maintenance of fossil-fueled generation, particularly that which can be converted to run on zero emissions fuels in the future, will remain critically necessary to ensure system reliability. Efficient operations will reduce emissions, while maintaining reliability during the transition.

The DEC's Peaker Rule requires emission reductions in 2023 and 2025, while accounting for the NYISO's reliability requirements, and the NYISO warns that this rule may have to be tolled if any of the planned transmission projects that are needed to ensure reliable service in the absence of these generation facilities are delayed.

The DEC needs to be able to process and approve permits in a coordinated manner to continue to provide the proper investment signal for necessary investment in generation and ultimately in DEFRs, which are critically needed to maintain the reliability of the State's electric system as the State moves to achieve the requirements of the CLCPA and reliably transitions to a zero-emissions generation fleet. In addition, some zones are expected to become winter peaking by 2032. If sufficient fossil-fueled generators are unable to be operated because they cannot receive Title V air permits: electric system reliability will be harmed; customers' service will be interrupted, and their costs will be increased; and the confidence in achieving the goals of the CLCPA in a reliable manner will be thwarted. 4

Thank you for the opportunity to provide these comments. Please contact me, should you have any questions.

Sincerely,

*Radmila P. Miletich*

Radmila P. Miletich
IPPNY's Legislative & Environmental Policy Director

Part 621 Comment Letter I

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November 14, 2022

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**Re: Proposed Amendments to Uniform Procedures Act Regulations**
**Proposed Parts 621, 421, 601**

Dear Mr. Eldred:

The New York City Law Department submits these comments on behalf of the City of New York ("City") in response to the New York State Department of Environmental Conservation's ("DEC") solicitation for comments on its proposal to revise the Uniform Procedures Act regulations. The City provides the following specific comments on the updated provisions.

**Comments on § 621.3. General requirements for applications**

*Section 621.3(a) General requirements for complete application. [In order] T[t]o be determined complete for the purpose of commencing department review, the application [for a permit listed in section 621.1 of this Part] must meet the requirements [specifically listed] in section 621.4 of this Part [as well as] and the following [criteria] requirements:*

***

*(11) The Climate Leadership and Community Protection Act (CLCPA) requires the department to consider whether its permitting decisions subject to this Part are inconsistent with, or will interfere with, the attainment of the statewide greenhouse gas*

*(GHG) emission limits established in Article 75 of the ECL and reflected in Part 496 of this Title. Therefore, where applicable, the applicant must provide information to explain whether the project will be inconsistent with, or will interfere with, the attainment of statewide GHG emission limits. An application is incomplete until such information is provided to the department.*

*(13) The Environmental Justice Act of 2019 and CLCPA require the department to consider environmental justice concerns in permitting decisions subject to this Part and provide enhanced public participation opportunities. Therefore, where applicable, an application is incomplete until the following information is provided to the department:*

*(i) an enhanced public participation plan; and*

*(ii) additional information deemed necessary by the department to evaluate and, where necessary, mitigate environmental impacts on the identified environmental justice area(s) or disadvantaged communities.*

Comment:

The City recognizes and supports compliance with and the goals of the CLCPA and the Environmental Justice Act. But the proposed revision offers insufficient guidance to applicants on addressing these issues. The Climate Action Council is developing a framework for the implementation of the CLCPA, but this work is still in the beginning stages. The City, along with many other municipalities and stakeholders, submitted detailed comments on the Climate Action Council's Draft Scoping Plan in July 2022. As there are not yet established regulations implementing the CLCPA, a permit applicant does not have the necessary prior notice of how to "demonstrate whether the project will be inconsistent with or will interfere with the attainment of statewide GHG emission limits" as required by proposed revision to Section 621.3(a)(11). Similarly, the applicant has no prior notice of the potential "additional information deemed necessary" to evaluate a project's impact on identified environmental justice areas or disadvantaged communities as required by the revision to Section 621.3(a)(13)(ii). The City understands the need for a project applicant to address the CLCPA and the Environmental Justice Act, but without regulations setting standards for a project's compliance, the addition to the UPA is premature. 1

On page 2 of the Regulatory Impact Statement, DEC explains that the changes proposed are intended to be procedural in nature. However, the changes in Section 621.3(a) (11) and (13) cannot be characterized as merely procedural. The vagueness of the proposed application requirements would create significant confusion for permit applicants. Without regulations providing standards for the preparation of analyses, applicants will be required to engage in guesswork, potentially resulting in inefficient feedback loops, delays, and unanticipated costs.

*Section 621.3(e) [Enforcement actions. Processing and] The department may suspend review of an application [of an application may be suspended by written notice to the applicant if] when*

*an enforcement proceeding or action [has been or] is formally commenced against [the] an applicant for alleged violations of a provision of the ECL, regulation or permit, or [other] any environmental law[s] administered by the department [at the facility or site that is the subject of the application]. The alleged violations [may] must be related to the activity for which the permit is sought or to other provisions of law administered by the department and have occurred at the facility or site that is the subject of the application or at a site owned or controlled by the applicant.*

> *Regulatory Impact Statement p. 5*
>
> *The regulatory text that permits DEC to suspend processing of a UPA permit if DEC staff have commenced an enforcement proceeding is currently limited to enforcement proceedings concerning alleged violations at the same facility or site that is the subject of the permit application. DEC proposes to amend 621.3 by allowing DEC to suspend processing of a permit application for any site owned or controlled by an applicant and not merely where the site that is the subject of the application is the same as the site where the violation is alleged to have occurred or is occurring.*

Comment:

With the proposed addition to Section 621.3(e) of "or at a site owned or controlled by the applicant," DEC would greatly expand its ability to suspend review of permit applications. Currently, DEC can suspend review of a permit application on a site if that same site is subject to a DEC enforcement action. Under the proposed revision, DEC could suspend its permit review if any site controlled by the applicant is currently subject to a formal enforcement proceeding. 2

This approach disproportionately and unfairly affects the City of New York, which includes entities such as NYC DEP, NYC Parks, and DSNY that own or control many sites requiring operating permits. Because the rule would continue to broadly provide that the alleged violation be related to "provisions of law administered by the Department," the substitution of "must" for "may" is not limiting. The fact that another site under same ownership has a violation should not be a factor in DEC's decision to suspend processing a permit application. As written, an alleged DEC violation for not properly color coding a petroleum bulk storage tank at one facility owned or controlled by a City agency could suspend DEC's permit review for that City agency to operate a compost facility. Such facilities will be managed by different personnel, and could be separated by great distances, and perform entirely different functions. As such, this provision unfairly threatens the operation of New York City municipal facilities, as New York City is uniquely large both in terms of population and geographic area. The proposed freezing of municipal agencies' permit applications for unrelated incidents at distant facilities would be unworkable in a city of eight million residents and countless commercial entities that rely on the day-to-day municipal services that are subject to environmental permits.

This approach would also delay and restrict the City's ability, through agencies like NYC Parks, to conduct capital improvement projects, maintain public parkland and infrastructure, and manage and restore natural resources. This would hinder the City's ability to respond to community needs and concerns and would negatively impact the public and environmental justice communities that rely on the City's public open space, facilities, and infrastructure.

**Comments on § 621.4 Requirements for specific permit applications**

Proposed changes to 6 NYCRR 621.4 will increase the number of projects considered "minor" (defined as "... by its nature and with respect to its location will not have a significant impact on the environment...) by expanding the types of allowable disturbances in wetlands and adjacent areas and increasing some disturbance thresholds. DEC states that it is making these changes to better reflect the level of interest generated by the public. 3

However, if implemented, these changes would reduce the number of projects DEC would forward to NYC Department of Environmental Protection (DEP) for review under Addendum A of the DEC/DEP MOU when those activities are located within 1000 feet of a Reservoir or Controlled Lake. The projects that must be forwarded pursuant to Addendum A include major projects and only two types of minor projects – underground utilities and residential water supply wells. Comments on specific changes to minor project classifications follow.

DEP's continued ability to review all projects that it currently reviews pursuant to Addendum A is critical to the protection of the drinking water supply to eight million City residents and one million upstate customers. The City therefore requests that if DEC adopt the proposed changes, it carve out an exception to the proposed changes for projects that are located in the New York City Watershed. Alternatively, the City requests that if DEC adopts the regulations as proposed that it renegotiate the MOU with DEP prior to the revisions taking effect to ensure that there is no interruption to DEP's ongoing review of these activities when they take place in the Watershed.

By contrast, the City suggests that the list of minor projects should be expanded to include an additional category of projects not contemplated by the revisions. The City's experience shows that legal notices for ecological restoration projects, such as wetland and adjacent area restoration classified as "major" under UPA have generated little public interest. These projects benefit the environment and typically involve excavation of anthropogenic fill, clean fill placement, and vegetation establishment and management, among other beneficial improvements. The City's ecological restoration projects improve climate change resiliency for human and ecological communities, including but not limited to buffering storm surge, increasing biodiversity, removal of defunct and hazardous structures, and mitigating sea level rise. The City has shown that ecological restoration projects do not result in significant adverse impacts, do not typically generate community concern, and support the objectives of the CLCPA and Community Risk and Resiliency Act (CRRA). Therefore, further consideration should be given to classifying some ecological restoration as "minor" under UPA so that permitting timelines and costs are reduced. 4

*Section 621.4(a)(1)(ii) Minor stream bed or bank disturbance actions include [the following:] repair, replacement, rehabilitation or reconstruction of a structure or facility, [or] in-kind, on the same site; [replacement of existing structures;] and disturbances of less than [100] 500 lineal feet [(30.48 linear meters)] along any 1,000 feet (304.8 meters) of watercourse.*

Comment:

This approach significantly increases the allowable stream bed or bank disturbance considered "minor" under UPA from 100 lineal feet to 500 lineal feet. A project that results in 500 feet of lineal disturbance along any 1,000 feet of a watercourse is significant and should continue to require a higher level of review. 5

In 2021, the United States Army Corps of Engineers (USACE) and United States Environmental Protection Agency reissued the federal Nationwide Permits (NWPs) for projects subject to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. This included the removal of the 300 linear foot limit for losses of stream bed from 10 NWPs (NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52). As a result, USACE now relies on a ½-acre impact limitation. Removal of the 300-foot limit for losses of stream bed disproportionately impacted lower order streams that have smaller widths, in some cases doubling the amount of impact permitted under a NWP. This weakening of federal authority greatly reduced stream protections across the United States. The combined effect of reduced federal oversight and an increase in the allowable stream bed bank disturbance considered "minor" under UPA would negatively impact New York's waterways and decrease overall regulatory authority.

*Section 621.4(i)(2) Minor freshwater wetlands projects*

Comment:

The proposed changes to the following "minor" freshwater wetland projects thresholds may result in **significant** adverse impacts. DEC should reconsider these changes, or, at a minimum, routinely forward these types of projects for DEP review when the activities occur in the New York City Watershed. 6

The proposed changes also fail to consider the regional location of the wetlands. For example, these changes could result in more impacts where there are fewer wetlands, such in urban areas, where more protection is needed. Similarly, they could result in more impacts where wetlands are necessary to protect the City's drinking water supply.

Comments on specific subsections are as follows:

*Section 621.4(i)(2)(ii) restoring, reconstructing, or modifying existing functional structures or facilities, excluding drainage ditches, that involves a temporary disturbance of less than 0.25 acres (approximately 10,890 square feet) [50 square meters (approximately 540 square feet)] of ground surface;*

Comment:

This change includes an increase in disturbance thresholds from 540 sq ft. to 10,890 sq. ft. for restoring or reconstructing existing structures. Approximately one quarter acre of wetland disturbance is significant and should continue to require a higher level of review and notice to DEP. 7

*Section 621.4(i)(2)(iv) constructing a residential driveway, residential structure or residential accessory structure in the adjacent area of a wetland [to an existing residence];*

Comment:

Proposed changes to 621.4 (i)(2)(iv) would significantly increase allowable disturbance in the adjacent area (AA) to be classified as a minor project. Currently, only constructing a driveway in the AA to an existing residence is considered minor. The proposed changes will allow the construction of a driveway, residential structure, or residential accessory structure in the AA. These disturbances could adversely impact the wetland and should continue to require a higher level of review. Should these activities ultimately be classified as minor, a renegotiation of Addendum A may be necessary so that DEP may secure the opportunity to review these minor activities in the NYC watershed. 8

*Section 621.4(i)(2)(vii) cutting but not elimination or destruction of vegetation [, such that the functions and benefits of the wetland are not significant adversely affected];* 9

Comment:

These disturbances could adversely impact the wetland and should continue to require a higher level of review.

*Section 621.4(i)(2)(xii) installing [electric, telephone or other] utilities from an existing utility distribution facility to a structure [, where no major modifications or construction activities in the wetland are necessary];*

Comment:

621.4 (i)(2)(xii) allows for the installation of utilities from an existing utility distribution facility to a structure. The proposed change deletes the caveat "where no major modifications or construction activities in the wetland are necessary." That stipulation should remain. Minor projects, by definition, should not cause major modifications or construction activities in the wetland. 10

*Section 621.4(i)(2)(xiv) intensive, organized and repetitive use of all-terrain vehicles, air and motorboats, and snowmobiles [in the adjacent area];*

Comment:

By striking the reference to the adjacent area, the proposed changes to 621.4(i)(2)(xiv) would classify as minor activities intensive, organized, and repetitive use of ATVs, air and motorboats, and snowmobiles in freshwater wetlands. These uses, particularly ATVs, pose significant adverse impacts to wetlands and thus should remain as major projects subject to more intensive review. 11

*Section 621.4(i)(2) (xv) clear cutting timber or other vegetation in the adjacent area;*

Comment:

Clear cutting vegetation beyond timber in the adjacent area could adversely impact the wetland and should continue to require a higher level of review. 12

*Section 621.4(i)(2) (xxi) constructing a non-residential structure in the adjacent area of a wetland [placing a non-commercial structure, no larger than 576 square feet (53.51 square meters) gross floor area and no closer than 25 feet (7.62 meters) from the wetland boundary, approximate to an existing single-family residence in the adjacent area of a wetland].* 13

Comment:

These disturbances could adversely impact the wetland and should continue to require a higher level of review. Should these activities ultimately be classified as minor, a renegotiation of Addendum A may be necessary so that DEP may secure the opportunity to review these minor activities in the NYC watershed.

*Section 621.4(i)(2)(iv), (xv), (xxi) Minor Projects in Adjacent Areas* 14

Comment:

The proposed changes categorizing certain projects as minor do not consider the state of the science on wetland buffers and would negatively affect core habitat for state-listed species, increase disturbance to wetlands, and reduce the resiliency of wetlands to climate change. DEC should instead consider development restrictions in the freshwater wetland adjacent area, similar to development restrictions for tidal wetlands. The disturbances classified as "minor" under the proposed revisions would be significant and should continue to have a higher level of review as a "major" project.

The importance of wetland buffers is summarized in the following points:

- Wetland buffers are vegetated areas adjacent to wetlands that can, through various physical, chemical, and/or biological processes, reduce impacts to these resources from adjacent land uses. Buffers also provide some of the terrestrial habitat necessary for wetland dependent species that require both aquatic and terrestrial habitats.[1] Many of these wetland dependent species are considered endangered, threatened, or special concern in New York State.

[1] T, Granger et al., Washington State Department of Ecology, Publication #05-06-008, Wetlands in Washington State - Volume 2: Guidance for Protecting and Managing Wetlands, (2005); D. Sheldon, et al., Washington Department of Ecology, Freshwater Wetlands in Washington State - Vol. 1: A Synthesis of the Science, (2005); T. Hruby, Washington State Department of Ecology Publication #13-06-11 Update on Wetland Buffers: The State of the Science, Final Report (2003).

- Buffers protect the functions and values of the adjacent wetland by removing nutrient pollution (e.g., phosphorous and nitrogen), regulating temperature, removing sediment pollution, removing toxic chemicals bound to sediments, providing wildlife habitat, reducing noise, stabilizing soils, reducing illegal dumping and encroachment, and maintaining hydroperiods and water budgets.[2] Locations with high sediment loads and steep slopes require wide, undeveloped buffers, as sediment removal efficiency decreases as slope increases.[3] Wider buffers may also maintain sediment removal efficiencies over time as buffers become saturated with sediments.[4]

- Wetland buffers provide a barrier to encroachment and illegal dumping. Small, urban wetlands are most susceptible to encroachment and dumping. Several literature reviews recommend restricting development in buffers in highly urbanized areas where other environmental stressors are present.[5]

- Wetland buffers are core habitat for wildlife species that use both wetland and terrestrial habitat types. Buffers provide habitat for nesting, feeding, cover, and hibernation, and support biodiversity.[6] Semi-aquatic frogs, salamanders, snakes, and turtles use areas up to 950 feet from the high water edge as core habitat,[7] while birds and mammals, like the Tri-colored bat (*Perimyotis subflavus*), Gadwall (*Anas strepera*), and Blue-winged Teal (*Anas discors*) use habitat 200 feet beyond the water's edge.[8] It is critical to protect wetland buffers in developed areas where additional environmental stresses are present.[9]

- Protection of buffer zones reduces fragmentation of the natural landscape.[10] Wetland buffers increase landscape connectivity by acting as corridors for species dispersal and movement between different and diverse wetlands. Many wildlife species rely on multiple wetland ecosystems in the landscape to survive and forage for food.[11]

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[2] Environmental Law Institute, Planner's Guide to Wetland Buffers for Local Governments (2008) https://documentcloud.adobe.com/spodintegration/index.html?locale=en-us; Hruby, *supra* note 1; Massachusetts Association of Conservation Commissions (MACC), Wetland Buffer Zone Guidebook (2019).

[3] S. Wenger, A Review of the Scientific Literature on Riparian Buffer Width, Extent, and Vegetation (1999), http://www.rivercenter. uga.edu/service/tools/buffers/buffer_lit_review.pdf; Sheldon et al., *supra* note 1.

[4] Wenger, *supra* note 3.

[5] Hruby, *supra* note 1; MACC, *supra* note 2.

[6] L. Boyd, Buffer zones and beyond: Wildlife use of wetland buffer zones and their protection under the Massachusetts Wetland Protection Act, Wetland Conservation Professional Program Department of Natural Resources Conservation (2001).

[7] R.D. Semlitsch, & J.R. Bodie, *Biological criteria for buffer zones around wetlands and riparian habitats for amphibians and reptiles*, 17(5) Conservation Biology 1219-1228 (2003).

[8] Boyd, *supra* note 6.

[9] MACC, *supra* note 1.

[10] MACC, *supra* note 1.

[11] J.W. Gibbons, J.W, *Terrestrial habitat: A vital component for herpetofauna of isolated wetlands*, 23 Wetlands 630–635 (2003); J.H. Roe, & A. Georges, *Heterogenous wetland complexes, buffer zones, and travel corridors: landscape management for freshwater reptiles*, 135 Biological Conservation 67-76 (2007); E.B. Harper, T.A.G.

- Buffers provide space for wetlands to shift position over time in response to changing environmental conditions such as climate change.

**Comment on § 621.6 Department action on applications**

*621.6(f)(1) If an applicant fails to respond to a notice of incomplete application within one year, the department may mail [send] a follow-up notice of incomplete application requesting[, by a reasonable date,] the necessary items for a complete application or an explanation for the delay. The notice must state that the department will deem the application withdrawn for failure by the applicant to respond within 15 days of mailing or by a later date specified in the notice.*

> *Regulatory Impact Statement p. 5*
>
> *621.6 (Department action on applications)*
>
> *DEC proposes to modify this section to allow DEC to deem an application withdrawn for failure of an applicant to respond to a notice of incomplete application after one year. The current regulation allows for this withdrawal, but only after a reminder notice is followed by a certified mailing advising an applicant that the application has been withdrawn – a two-step process that is overly cumbersome. The proposed change would allow DEC to deem the application withdrawn if there is no response to the initial reminder notice. This change will improve the ability of DEC to maintain accurate records as to active applications.*

Comment:

15

Given that there is an initial notice of incomplete application and that the allowable period for an incomplete application to remain viable is lengthy, it is reasonable that DEC limit the process for notification of withdrawal to one step. However, DEC should provide that joint follow-up notice/withdrawal notification by certified mail to ensure its receipt by applicant.

**Comment on § 621.11. Applications for permit renewals, reissuances, and modifications, including transferring or relinquishing permits**

*621.11 (a) Unless instructed otherwise, applications to renew or modify permits, except SPDES permit renewals, must be submitted to the regional permit administrator of the region in which the facility is located (see section 621.19 of this Part). Applications must provide information supporting the action sought, and, if for a modification, must include a statement of necessity or reasons for modification.*

*(1) Applications for renewal must be [received] submitted no less than 180 [calendar] days prior to permit expiration for the following permit types: HWMF, RAPs, Air State Facility permits, title V facility permits, and title IV facility permits, [and all] SWMF permits, Water Withdrawal*

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Rittenhouse & R.D. Semlitsch, *Demographic Consequences of Terrestrial Habitat Loss for Pool-Breeding Amphibians: Predicting Extinction Risks Associated with Inadequate Size of Buffer Zones*, 22 Conservation Biology 1205-1215 (2008).

*permits, Long Island Well permits, Radiation Control permits, and Mined Land Reclamation permits [or no less than 30 calendar days prior to permit expiration for all other permit types].*

*(2) Applications for renewal of permit types not listed above in paragraph (1) of subdivision (a) of this section and are listed in subdivision (m) of this section must be submitted no less than 30 days prior to the expiration.*

> *Regulatory Impact Statement p. 10*
>
> *DEC proposes to revise the deadline for submitting applications to renew certain permit types from 30 days before expiration to 180 days before expiration. These permits include air state facility air pollution control, water withdrawals, solid waste management facility, mined land reclamation, and radiation control. The requirement to submit renewal applications earlier will align these permit types with others that involve operations of a continuing nature and already have a 180-day submission deadline. DEC also proposes to conform the period for submitting a renewal in Part 421 (mining permits) and Part 601 (water withdrawal) with UPA. The UPA timeframe, would, in any event, control over the existing 30-day provisions in Part 421 and Part 601. See ECL 70-0101 and 70-0107(2). The proposed change to the time to submit renewals will allow more time for the regulated public and DEC to address matters that arise during review of a renewal application and issue a decision on the renewal before expiration of the permit.*
>
> *DEC also proposes to specifically list those permit types that involve activities of a continuing nature and, therefore, are subject to the provisions of the State Administrative Procedure Act (SAPA) for purposes of permit renewal. Other permit types not listed would then be clearly subject to the "reissuance" provision of the regulation. This change will provide clarity where the existing regulation is ambiguous as to those permit types of a continuing nature.*

Comment:

With respect to 621.11(a), given City agencies have large numbers of permitted facilities, the transition period to 180 days lead time from 30 days lead time could be problematic. The revision of the deadline for renewals should be phased in slowly for City facilities (e.g., in 90-day increments). 16

Sincerely yours,

/s/ William Plache

Senior Counsel, Environmental Division
NYC Law Department

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November 14, 2022

Mr. James J. Eldred
New York State Department of Environmental Conservation
Division of Environmental Permits
625 Broadway, 4th Floor
Albany, New York 12233-1750
Submitted via e-mail to: comment.uparulemaking2022@dec.ny.gov.

Dear Mr. Eldred:

The New York Construction Materials Association, Inc. (NYMaterials) is a not-for-profit, statewide trade association representing the business and regulatory interests of companies involved in the production of construction aggregates, ready mixed concrete, and asphalt. NYMaterials appreciates the opportunity to provide comments pertaining to proposed revisions of the Uniform Procedures Act (UPA) regulations that are codified at 6 NYCRR Part 621.

After reviewing the proposed revisions to 6 NYCRR Part 621, NYMaterials offers the attached comments for the Department of Environmental Conservation's (DEC) consideration. NYMaterials understands and appreciates DEC's desire to continually review and revise applicable rules to incorporate new laws, initiatives, and interpretations. Notwithstanding, there are nuances in the proposed changes to the UPA that may directly benefit from engaging in direct conversations with industry.

Accordingly, NYMaterials strongly urges DEC to conduct additional direct outreach with impacted industry and stakeholder groups on the proposed revisions. Please do not hesitate to contact me at 518-441-2585 if you have questions regarding the attached comments.

Sincerely,

Ronald L. Epstein
President and CEO

Attachment.

**New York Construction Materials Association's Comments to the Department of Environmental Conservation on Proposed Revisions of the Uniform Procedures Act as Codified at 6 NYCRR Part 621**

**Attachment**

- Proposed 6 NYCRR 621.2(s): The definition of "minor project" removes the language stating that Type II actions are minor actions. Although the language regarding projects "not likely to have a significant impact" remains, we think it is helpful to leave the Type II language in as it would make clear that those projects are (unless otherwise listed) minor projects. 1

- Proposed 6 NYCRR 621.2(al): the clarification that a variance is granted via a permit mod or new permit, subject to Part 621 procedures, is helpful, however further clarification should be provided on whether a variance request submitted with a permit application, modification or renewal is its own permit application. Those steps would be unnecessary if other permit applications are being considered, as they would be reviewed at the same time. The language would be clearer if it explicitly stated, "granted by means of a permit modification or new permit, if it is the only request submitted to the Department." 2

- Proposed 621.3(a)(3): Enhanced public participation: Despite the Climate Leadership and Community Protection Act (CLCPA) and other statutes adding in disadvantaged community requirements, the Uniform Procedures Act (UPA) is intended to provide "fair, expeditions and thorough administrative review of regulatory permits," with "reasonable time periods for administrative agency action on permits." These mandates, the very purpose of the UPA, should not be dismissed in carrying out enhanced public participation. 3

- 621.3(e): enforcement: the changes to clarify when enforcement warrants suspension of review is helpful, however, the changes appear to allow the Department to suspend processing for formal enforcement against any of an applicant's facilities, for any program, including those unrelated to the permit under review. This is likely broader than many of the substantive Environmental Conservation Law (ECL) statutes allow, and the UPA does not contemplate this as a basis for suspending processing. 4

- Proposed 621.4, header: this adds an express authorization to require "supplemental information" before and after the application has been determined to be complete. This addition could be useful to allow for more expedited processing, however, it should not be used as a basis to delay completeness, or to hold up completeness on the basis of the supplemental information requests. 5

- Proposed 621.11(h)(1), treating renewals/mods as new applications: this language allows DEC to treat an application as a new application for "material changes" in existing permit conditions or the scope of permitted actions. However, it adds language reciting "non-material changes," including administrative changes like transfer of ownership. This needs to be revised. The new language on "non-material changes" should state that those types of changes are administrative and would not 6

require, generally, a permit renewal or modification at all. Actual examples of "non-material" and non-administrative changes should be added instead in the parentheses). 6

- Part 621.3(a) (11)-(13): CLCPA and Community Risk and Resiliency Act (CRRA) additions: the additional information on consistency, mitigation measures, climate risk, disproportionate or inequitable burdens violate due process and allow DEC to arbitrarily determine when they believe they have sufficient standards. These statutes provide no guideposts on what type of information, or at what point, sufficient information is provided. Allowing the Department to hold up completeness on the basis of an arbitrary, standardless standard, contradicts the notion of fair notice and the regulated community knowing what standards they have to meet to get a permit. Now, the regulated community will know only that their permits are at the complete discretion of DEC and satisfaction of DEC's viewpoints on this, without limit, and even for existing facilities. This is exacerbated by not allowing a project to reach completeness until the Department is satisfied, as it would prevent hearings or litigation in nearly all cases, unless the applicant waits for the Department to determine the application should be returned for failure to provide a response. 7

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November 14, 2022

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**Re: Comments on Proposed Part 621**

Mr. Eldred,

The New York Reliable Energy Infrastructure Coalition (NYREIC) submits these comments on proposed amendments to 6 NYCRR Part 621, to be administered by the New York State Department of Environmental Conservation.

Coalition members[1] operate natural gas pipelines, compressor stations, interconnection facilities, meter stations, underground storage fields, and supporting equipment and components that require permits from the Department and therefore will be directly affected by the proposed regulation. Coalition members support sound public policies that protect the environment while simultaneously ensuring a safe, reliable, and resilient energy transmission system that provides the affordable energy that people, business, and communities need.

Thank you,

New York Reliable Energy Infrastructure Coalition

Please direct any comments or questions to:

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[1] NYREIC includes Algonquin Gas Transmission, L.L.C.; Eastern Gas Transmission and Storage, Inc.; Iroquois Pipeline Operating Company; Millennium Pipeline Company, L.L.C.; National Fuel Gas Supply Corporation; TC Energy; Tennessee Gas Pipeline Company, L.L.C.; Texas Eastern Transmission, LP.

**Department of Environmental Conservation**

**Comments**
**of the**
**New York Reliable Energy Infrastructure Coalition**
**On Proposed Amendments to 6 NYCRR Part 621**
**Nov. 14, 2022**

## I. Introduction

The New York Reliable Energy Infrastructure Coalition (NYREIC) ("Coalition") submits these comments on proposed amendments to 6 NYCRR Part 621 ("Proposed Rule"), to be administered by the New York State Department of Environmental Conservation ("DEC"). The individual members of the Coalition[1] own and operate interstate natural gas pipelines and underground natural gas storage facilities that traverse the State of New York, and are subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC") pursuant to the Natural Gas Act.[2] Coalition members operate natural gas pipelines, compressor stations, interconnection facilities, meter stations, underground storage fields, and supporting equipment and components that require permits from the DEC and therefore will be directly affected by the proposed regulation.

Members of the Coalition are committed to safely and reliably operating the nation's interstate natural gas transmission network, while minimizing the impact on the environment and climate. To realize these goals, the Coalition companies are enhancing their efforts to invest in technologies and practices that reduce greenhouse gas emissions, including methane and carbon dioxide; and exploring new opportunities to deliver responsibly sourced natural gas, hydrogen, and renewable natural gas. Natural gas is a reliable partner for renewable energy sources, providing critical support for wind, solar, and hydroelectricity by helping to match supply and demand. We are committed to active engagement with the communities in which we build and operate facilities. The Coalition members support sound public policies that protect the environment while simultaneously ensuring a safe, reliable, and resilient energy transmission system that provides the affordable energy that people, businesses, and communities need.

These comments make the following points:

- The DEC should acknowledge the federally-defined limits on its authority to use a state law, including the Climate Leadership and Community Protection Act ("CLCPA)," to deny or substantially encumber a permit application or renewal for a FERC-jurisdictional interstate natural gas pipeline facility. 1
- The DEC should explain the legal and technical basis for requiring permit applicants to provide information on consistency with attainment of CLCPA emission limits before the DEC's valid promulgation of regulations to implement the CLCPA. 2

[1] NYREIC includes Algonquin Gas Transmission, L.L.C.; Eastern Gas Transmission and Storage, Inc.; Iroquois Pipeline Operating Company; Millennium Pipeline Company, L.L.C.; National Fuel Gas Supply Corporation; TC Energy; Tennessee Gas Pipeline Company, L.L.C.; Texas Eastern Transmission, LP.
[2] The Coalition members participating in these comments are listed on the final page.

- The Proposed Rule's requirement for Section 7(2) "consistency" information is premature because it sidesteps the CLCPA's currently ongoing process for establishing attainment regulations. 3
- The DEC itself has previously acknowledged that CLCPA prohibits the Department from prematurely determining permissible emission levels for individual sources. 4
- Absent the implementation regulations, the DEC runs the risk that any consistency review would have a high degree of uncertainty given the myriad GHG sources throughout the state's economy. 5
- The DEC should acknowledge that it lacks the authority under the Uniform Procedures Act to use the proposed permitting procedures and informational requirements to condition or deny permits. 6
- The DEC should acknowledge that Section 7(2) is a review provision and does not provide authority to condition or deny permits. 7

- The DEC should revise other proposed requirements in the Proposed Rule to make them more proportional, clear, and consistent with the legal and practical realities of infrastructure permitting. 8
  - The proposed requirements are vague as to what demonstration is required to satisfy the New York Community Risk and Resiliency Act ("CRRA"). 9
  - The proposed requirement that applicants submit <u>all</u> operational plans and engineering documents as part of applications are overly burdensome and does not address that these materials that may be protected for security reasons or otherwise considered confidential business information. 10
  - Requiring applicants to submit landowner permission information at the time of the application submittal adds undue burdens to Coalition members and other proponents of linear projects and does not adequately follow or consider the practicalities of the interstate natural gas pipeline permitting process. 11
  - The DEC should add a provision making clear that it will not rescind a "completeness" determination for a permit application. 12
  - More information is needed regarding the proposed public participation requirements, both general requirements and those related to environmental justice. 13
  - The DEC should not suspend processing of a company's permit applications based on an alleged violation at an unrelated facility or project site or for an unrelated area of environmental law. 14
  - The DEC should consider natural gas pipeline permitting requirements in determining whether an application is complete and in issuing its final decisions on applications. 15, 16
  - The DEC should consider adding a new section regarding permit renewals, reissuances, and modifications, including transferring or relinquishing permits. 17

## II. The DEC should acknowledge limits on its authority to use a state law to deny or substantially encumber a permit application or renewal for a FERC-jurisdictional interstate natural gas pipeline facility.

The DEC should recognize that it may not use the permit review procedures to deny or substantially encumber permits or permit renewals for FERC-jurisdictional projects. The Coalition urges the DEC to recognize that the DEC is subject to an important constraint on its authority to apply Section 7(2) of the CLCPA or other proposed permit application review procedures to interstate natural gas facilities that are subject to the jurisdiction of FERC. Specifically, the Department may not use these authorities to deny permit applications for such projects, or otherwise encumber permits issued by the DEC in a way that is inconsistent with the project's FERC certificate or authorization. Such application of the DEC's authorities would be preempted by the Natural Gas Act ("NGA").

The Supreme Court has long recognized that FERC's jurisdiction over interstate commerce is "plenary" (*i.e.* absolute and unqualified).[3] Moreover, the Supreme Court has ruled that by enacting the NGA, "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce."[4] That is plainly the case with the NGA where "preemption may be inferred because Congress has *occupied the field of regulation* regarding interstate gas transmission facilities."[5]

Pursuant to the NGA, FERC regulates all aspects of the construction and operation of interstate natural gas pipelines. Under Section 7 of the NGA, FERC issues a certificate to "any qualified applicant . . . authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application" if it finds "that the proposed service, sale, operation, construction, extension, or acquisition, . . . is or will be required by the present or future public convenience and necessity."[6] As part of the Section 7 process, FERC, working with other relevant federal and state agencies as needed, undertakes a review of the environmental impacts of a proposed project under the National Environmental Policy Act ("NEPA").[7] NEPA requires a comprehensive analysis of direct and indirect environmental impacts, and includes consideration of project alternatives.

Without a Section 7 certificate of public convenience and necessity, the NGA prohibits an entity from engaging in interstate transportation of natural gas, or the construction of facilities for that purpose.[8] Holders of certificates issued by FERC under the NGA are authorized to construct and operate interstate natural gas pipeline facilities.[9] Once the pipeline facilities are constructed, the certificate holders maintain "an obligation, deeply embedded in the law, to continue service."[10] This obligation is consistent

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[3] *FPC v. So. Cal. Edison. Co.*, 376 U.S. 205, 216 (1964).
[4] *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 305 (1988).
[5] *Id*. at 577 (emphasis added). *See also*, *Millennium Pipeline Co., L.L.C. v. Seggos*, 288 F. Supp. 3d 530, 545 (N.D.N.Y. 2017) (finding that state freshwater wetlands and stream disturbance permits are subject to field preemption).
[6] 15 U.S.C. § 717f(e).
[7] 42 U.S.C. § 4321 *et seq*.
[8] *Id*. § 717f(c).
[9] Facilities "certificated" by FERC include those facilities originally authorized by FERC in individual orders issuing certificates under Section 7 of the Natural Gas Act and those facilities authorized under FERC's blanket certificate program. See 18 C.F.R. § 157.203.
[10] *Transcontinental Gas Pipe Line Corp. v. FPC*, 488 F.2d 1325 (D.C. Cir. 1973) (quoting *Michigan Consol. Gas Co. v. FPC*, 283 F.2d 204, 214 (1960)), *cert. denied sub nom., Natural Gas Pipeline Co. v. Transcontinental Gas Pipe Line Corp.*, 417 U.S. 921 (1974)).

with the purpose of the NGA, which is "to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices."[11]

Starting with the Supreme Court's 1942 decision in *Illinois Natural Gas Co. v. Central Illinois Public Service Co.,* federal courts have consistently held that Section 7 of the NGA grants plenary authority to FERC to regulate interstate natural gas facilities, preempting any state authority to impose additional regulations on such facilities.[12] In particular, the Court of Appeals for the Second Circuit has made clear that state environmental regulation of FERC-approved projects is preempted by the NGA. In *National Fuel Gas Supply Corp. v. Public Service Commission of State and N.Y.* ("*National Fuel Gas Supply Corp.*"), a natural gas company subject to FERC jurisdiction challenged the Public Service Commission of New York's ("PSC") attempted regulation of the company's pipeline facilities under Article VII of New York's Public Service Law.[13] The company had already obtained a certificate from FERC under Section 7 of the NGA to construct and operate the section of an interstate pipeline in New York. PSC regulations required the company to obtain from PSC an additional "certificate of environmental compatibility and public need" under Article VII of New York's Public Service Law. The Second Circuit held that Article VII was preempted by the NGA. In particular, the court found that:

> Congress placed authority regarding the location of interstate pipelines—in the present case affecting citizens of four states in addition to New York—in the FERC, a federal body that can make choices in the interests of energy consumers nationally, with intervention afforded as of right to relevant state commissions. *Because FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review*. Allowing all the sites and all the specifics to be regulated by agencies with only local constituencies would delay or prevent construction that has won approval after federal consideration of environmental factors and interstate need, with the increased costs or lack of gas to be borne by utility consumers in other states.[14]

Just as with Article VII of New York's Public Service Law, applying Section 7(2) to FERC-jurisdictional interstate natural gas infrastructure projects would run up against the NGA preemption of concurrent site-specific environmental reviews. While the NGA allows states to exercise limited permitting authority over pipeline projects pursuant to delegation from another federal law, such as the federal Clean Air Act or the federal Clean Water Act, that authority does not extend to implementation of Section 7(2) because the CLCPA is a state-only program. The substantive requirements of the CLCPA are not federally enforceable because they are not part of a federally delegated program.

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[11] *NAACP v. FERC*, 425 U.S. 662, 669-70 (1976).

[12] 314 U.S. 498 (1942). *See also Islander East Pipeline Co. v. Blumenthal*, 478 F. Supp. 2d 289, 294 (D. Conn. 2007) (finding that "[t]he NGA confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale," and that "[b]ecause FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review" (quoting *Schneidewind*, 485 U.S. at 301-01; and *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n of N.Y.*, 894 F.2d 571, 579 (2d Cir. 1990)); *Pub. Serv. Comm'n of W.Va. v. FPC,* 437 F.2d 1234 (4th Cir. 1971). NGA preemption has been commonly found in the context of state and local zoning laws. *See e.g.*, *Algonquin LNG v. Loqa*, 79 F. Supp. 2d 49, 52 (D.R.I. 2000); *AES Sparrows Point LNC, LLC v. Smith*, 470 F. Supp. 2d 586, 601 (D. Md. 2007). Although this case involved FERC's authority under Section 3 and not Section 7 of the NGA, the principle of preemption is the same under both sections; *Dominion Transmission, Inc. v. Town of Myersville Town Council*, 982 F.Supp.2d 570, 579 (D. Md. 2013).

[13] *Nat'l Fuel Gas Supply Corp.*, 894 F.2d at 573–74.

[14] *Id.* at 579 (emphasis added).

While FERC generally encourages certificated projects to comply with relevant state and local requirements, FERC orders also make clear such requirements must not conflict with the FERC certificate. FERC orders typically contain language similar to the following:

> Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. [FERC] encourages cooperation between interstate pipelines and local authorities. However, *this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.*[15]

FERC has found that "a rule of reason must govern both states' and local authorities' exercise of their power and an applicant's bona fide attempts to comply with state and local requirements."[16] This not only means that the DEC is prohibited from using state laws to deny a permit to a FERC-jurisdictional project that otherwise qualifies for the permit; it also means that the Department may not use these authorities to encumber a FERC-jurisdictional project with mitigation requirements or other permit conditions that have the practical effect of delaying or preventing the construction and operation of FERC-authorized projects. Significantly, the DEC may not add conditions on a FERC-jurisdictional project to make the project comply with Section 7(2) that would interfere with the lawful operation of the project under the terms of the FERC certificate or ultimately make the project unfeasible or economically unviable.

Relatedly, the DEC should recognize that a FERC-jurisdictional project is per se "justified" in the meaning of Section 7(2) because FERC has already determined, pursuant to NGA, that such a project is required by the public convenience and necessity. Section 7(2) provides that an agency may approve a proposed project that does not satisfy the CLCPA consistency analysis burden based on a "detailed statement of justification." Assuming for the sake of argument that the DEC determines that a FERC-jurisdictional project (or a renewal or modification of a permit for a FERC-jurisdictional facility) is inconsistent, we urge the DEC to acknowledge that any permitting action related to such a facility nevertheless is *per se* justified because FERC has already determined, pursuant to the NGA, that the project is required by the public convenience and necessity.

Consistent with this suggested approach, the DEC should recognize that a new project, permit renewal or permit modification is justified under Section 7(2) if needed for the safety and reliability of existing systems, or is otherwise found to be in the public convenience and necessity by FERC. [17] In this regard, the Draft CLCPA Scoping Plan (see below) recognizes the need for such reliable and resilient energy infrastructure, acknowledging that any transition away from gas infrastructure will have to be "carefully planned, detailed, and clearly communicated" to ensure, among other things, that "electric

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[15] *Algonquin Gas Transmission, LLC*, 150 FERC ¶ 61,163, at P 151 (2015) (citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988) (emphasis added); *Nat'l Fuel Gas Supply v. Public Service Comm'n* , 894 F.2d 571 (2d Cir. 1990); *Iroquois Gas Transmission System, L.P.*, 52 FERC ¶ 61,091 (1990) and 59 FERC ¶ 61,094 (1992)). FERC typically requires certificate-holders to notify FERC's environmental staff of any environmental noncompliance identified by other federal, state, or local agencies. *Id*. at Ordering Paragraph I.

[16] *Sound Energy Solutions, Order Denying Rehearing,* 107 FERC ¶ 61,263, at P 96 (2004). Although *Sound Energy Solutions* involved FERC's authority under Section 3 and not Section 7 of the NGA, the principle of preemption is the same under both sections.

[17] The DEC appropriately recognized this safety and reliability justification in its proposed DAR-21 guidance. DAR-21, p. 6.

distribution has sufficient capacity for the increased electric load due to electrification of heating and transportation."[18]

The DEC should also recognize that pipeline operators often propose modifications to existing infrastructure in order to improve or maintain safety and reliability. Pipeline operators make these critical decisions based on their operational knowledge and in response to pipeline safety requirements and regulations promulgated by *other federal* regulators—such as FERC and the Pipeline and Hazardous Materials Safety Administration ("PHMSA"). The Department should defer to the safety and reliability judgments of those agencies in evaluating the justification of proposed projects.

Finally, we urge the DEC to take into account that that the Coalition's natural gas infrastructure is not meant to serve *just* New York. Rather, it is part of a fully integrated natural gas transportation network spanning the entire contiguous U.S., and into Canada, and Mexico. For example, much of the natural gas transported on the Coalition member's facilities is intended for local distribution companies, municipalities, and power generators in New England. The NGA preempts state and local regulation of natural gas transmission precisely because such regulation could potentially interfere with the provision of natural gas services across state lines.[19]

A decision by the DEC to apply or impose GHG emission limits, mitigation measures, or other requirements under the CLCPA to FERC-jurisdictional facilities is not only improper but has the potential to affect the energy needs of other states who have no say in how the Act is implemented. Natural gas may play a different role in those other state plans than it does in New York. The DEC has no legal basis to impose views it may have about use of natural gas on other states, particularly where such restrictions would not count toward New York's statewide emission limits.[20]

## III. The DEC should explain the legal and technical basis for requiring permit applicants to provide information on consistency with attainment of CLCPA emission limits before the DEC's valid promulgation of regulations to implement the CLCPA.

Citing Section 7(2) of the CLCPA, the Proposed Rule would require any applicant for one of the covered permits to "provide information to explain whether the project will be inconsistent with, or will interfere with, the attainment of statewide GHG emission limits."[21] The DEC should provide an explanation of the legal and technical basis for requiring permit applicants to supply Section 7(2) "consistency" information *before* the DEC's valid promulgation of regulations required to implement the CLCPA. Absent such basis, the DEC should delete references to Section 7(2) from these procedures until the Department has promulgated such regulations.

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[18] Climate Action Council Draft Scoping Plan, Dec. 30, 2021, https://climate.ny.gov/-/media/Project/Climate/Files/Draft-Scoping-Plan.pdf, at 267.

[19] *See* 15 U.S.C. § 717(a) ("[T]he business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that *Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest*.") (italics added).

[20] *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (a state law violates the Dormant Commerce Clause if its burden on interstate commerce exceeds any local benefits).

[21] Proposed Rule at 621.3(a)(11).

***a. The Proposed Rule's requirement for Section 7(2) "consistency" information is premature because it sidesteps the CLCPA's process for establishing attainment regulations.***

Section 7(2) of the CLCPA calls for a determination of whether a project "is inconsistent with or interferes with the *attainment*" of the state-wide emission limits (emphasis added). The CLCPA is clear that the mechanism for "attainment" is the suite of regulatory measures that the DEC will promulgate *after* it reviews and considers the final Scoping Plan. Under the process outlined in the CLCPA, there are still a number of steps to go before these attainment regulations are in place.

Although the DEC has adopted the state-wide emission limits of 40% below 1990 levels by 2030 and 85% below 1990 levels by 2050,[22] there are not sector-specific regulations in place to meet those limits, and the CLCPA requires a number of steps to establish the regulations. For example, the CLCPA establishes a Climate Action Council, which is given three years (by January 1, 2023) to finalize a Scoping Plan providing recommendations for policies to meet the emission limits.[23] The DEC then has until January 1, 2024, to promulgate regulatory measures for attainment.[24] The DEC may not promulgate regulatory measures before finalization of the Scoping Plan because the CLPCA requires that any measures promulgated by the DEC must "reflect, in substantial part" the findings of the final Scoping Plan.[25]

After publication of the final Scoping Plan, the CLCPA mandates a *further*, extensive public process that the DEC and other agencies must use to develop regulatory measures—involving consultation with the Climate Action Council, the environmental justice advisory group, and the climate justice working group established pursuant to § 75-0111 of the CLCPA; as well as representatives of regulated entities, community organizations, environmental groups, health professionals, labor unions, municipal corporations, trade associations, and other stakeholders.[26] The Climate Action Council has set up a separate subgroup for Gas System Transition to help establish "a coordinated plan to reduce emissions from the gas system through an orderly transition that is equitable, cost-effective, and maintains system safety and reliability."[27]

It is the regulatory measures promulgated by the DEC at the end of this process that will determine any individual facility's required relative contribution to attaining the 2030 and 2050 emission limits.

Absent such measures, it is far from clear that the DEC has a legal basis for mandating that an applicant supply information on whether a proposed project (or permit renewal) at a particular facility interferes with or is inconsistent with "attainment" of the state-wide emission limits.

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[22] Environmental Conservation Law (ECL) § 75-0107(1).
[23] ECL § 75-0103.
[24] ECL § 75-0109(1).
[25] ECL § 75-0109(2)(c).
[26] ECL § 75-0109(1).
[27] Climate Act Council Meeting Minutes, Apr. 18, 2022, https://climate.ny.gov/-/media/Project/Climate/Files/2022-04-18-CAC-Meeting-Minutes.pdf, p. 3.

***b. The DEC itself has previously acknowledged that the CLCPA prohibits the Department from prematurely determining permissible emission levels for individual sources.***

It is difficult to square the DEC's Proposed Rule with the express language of the CLCPA, or with its intent and structure. In a prior proceeding, the DEC itself acknowledged that the CLCPA prohibits the Department from prematurely determining permissible emission levels for individual emission sources or other facilities. In its Fall 2020 rulemaking to establish the 2030 and 2050 statewide emission limits, the Department rejected comments arguing that the rule should also set regulatory limits on emissions of individual GHGs. In its response to commenters, the Department explained that such an approach would be inconsistent with the CLCPA:

> [T]he CLCPA contemplates that the Climate Action Council (Council) will make recommendations as part of the Scoping Plan regarding measures to achieve the statewide emission limits, including subsequent rulemaking by the Department or other State agencies. Both the Council's recommendations in the Scoping Plan and future substantive rulemaking by the Department and other State agencies must include measures that impose enforceable requirements on individual sources of greenhouse gases. At this preliminary stage in the overall implementation of the CLCPA, consistent with this overall structure of the statue, the Department is not seeking through this rulemaking to make significant policy decisions regarding the level of emission reductions required for each type of GHG emission source. *If the Department were to establish limits on individual types of greenhouse gases, it would conflict with this statutory objective and structure, because it may prematurely suggest or establish the relative amount of emission reductions necessary from each sector or type of source*.[28]

In other words, the DEC declared that it could not set statewide limits on individual GHGs or GHG sources prior to finishing the rulemakings for attainment regulations. This analysis reflects the DEC's appropriate legal conclusion that that it may not impose emission limits or other requirements on sources in the absence of rules governing how the decisions concerning those limits and other requirements should be made. The same concerns outlined in the language quoted above should guide the DEC's interpretation of the Section 7(2) review requirement. The DEC should not be mandating Section 7(2) reviews as part of its permit review process until it has validly adopted regulations establishing criteria and procedures for deciding how those limits should be set.

***c. Absent the implementing regulations, the DEC runs the risk that any consistency review would have a high degree of uncertainty given the myriad GHG sources throughout the state's economy.***

Based on the lack of a final Scoping Plan and the implementing regulations, any CLCPA consistency review would be highly uncertain given the geographic and temporal scope of the inquiry. Significant sources of GHG emissions are found in sectors throughout the state's economy—including transportation; buildings; electricity; industry; agriculture and forestry; and waste. Even the draft version

[28] New York State Department of Environmental Conservation, Assessment of Public Comments, 6 NYCRR, Part 496, Statewide Greenhouse Emission Limits (2020), pp. 9-10 (emphasis added).

of the Scoping Plan outlines no fewer than four scenarios for attaining the limits, each with very different implications for economic activities in the different sectors of the state's economy.[29]

The Draft Scoping Plan underscores that there are myriad pathways to attainment of the 2030 and 2050 emission limits, and each has different implications for cost-effectiveness and for meeting the goals of a just and equitable transition. That is why the CLCPA contemplates a comprehensive policy development process. Putting aside that a single project or facility is unlikely to meaningfully impact New York's total greenhouse gas emissions, prior to completion of this process, it will be difficult to determine with certainty that any such project or facility would be inconsistent with or will interfere with attainment of the 2030 and 2050 limits in isolation from all other existing and future activities by other facilities and sectors.

***d. The DEC should acknowledge that it lacks the authority under the Uniform Procedures Act to use the proposed permitting procedures to condition or deny permits.***

If the DEC maintains that it has the authority to request Section 7(2) consistency information in connection with applications for permits, permit renewals and modifications, the DEC must acknowledge that it may not use the informational requirements of Part 621 to impose conditions on projects or reject permits.

The Department's Regulatory Impact Statement ("RIS") for the proposed regulations supports the Coalition's position in this regard. The RIS states that amendments in the Proposed Rule are "procedural in nature" and "do not include changes to the standards for permitting issuance."[30] The RIS also says that, for federally-delegated or authorized permitting programs, such as Title V permits and State Pollution Discharge Elimination System (SPDES) permits, "substantive changes have not been proposed."[31]

Further, Part 621 is a procedural regulation, establishing a uniform process for issuing state environmental permits. The relevant provision of the proposal requires applicants to "provide information" regarding consistency. Because no substantive standards have been set for assessing the consistency of particular types of projects with the emission limits of the CLCPA, imposing consistency review requirements under Part 621 is premature.

Additionally, the DEC should explain the Proposed Rule's interaction with the proposed DAR-21 and CP-49 guidance, in which the DEC incorrectly asserted that it has the authority to substantially condition or even reject permits on the basis of CLCPA consistency reviews. The DEC has never finalized the guidance or stated publicly that it is not moving forward with the guidance. The Coalition filed extensive comments on the legal and technical issues with the guidance, which we have attached to these comments and incorporate by reference. We urge the DEC to explicitly revoke those prior proposals.

[29] New York State Climate Action Council, Draft Scoping Plan (Dec. 31, 2021) (hereinafter "Draft Scoping Plan").
[30] Regulatory Impact Statement for Amendments to 6 NYCCR Parts 621, 421, and 601, p. 2.
[31] *Id*. at p. 7.

***e. The DEC should acknowledge that Section 7(2) is a review provision and does not provide authority to condition or deny permits.***

Section 7(2) does not grant authority to agencies such as the DEC to reject projects that otherwise conform to state and federal laws. The statewide emission limits adopted by the DEC are not binding on *individual projects* such that "interfering with" those limits provides a basis for invalidating a project. Rather, by its terms, Section 7(2) is a mandate *on state agencies* to conduct a *review*. Had the legislature intended to authorize state agencies to deny permits for individual projects based on a CLCPA consistency review it would have used different and more direct language.[32]

By proposing to reject permit applications pursuant to Section 7(2), the DEC effectively has claimed to find, in a vague and ancillary provision of the CLCPA, transformative regulatory authorities that would have broad economic consequences.[33] Yet, the legislature "could not have intended to delegate such a sweeping and consequential authority in so cryptic a fashion."[34] The DEC should acknowledge that it may not use the procedures outlined in the Proposed Rule for such actions.

## IV. The DEC should revise other proposed requirements in the Proposed Rule to make them more proportional, clear, and consistent with the legal and practical realities of infrastructure permitting.

The Coalition appreciates the DEC's need for sufficient information to meet its legal requirements to fully review permit applications and understand the impacts of regulated activities. Our member companies are accustomed to comprehensive permitting procedures, including developing detailed Environmental Assessments and Environmental Impact Statements and engaging in extensive public consultation processes at the federal, state, and local levels.

However, some of the proposed new requirements are excessive, unclear, or inconsistent with the legal or practical realities of permitting infrastructure projects. Given the important role that natural gas plays in ensuring affordable and reliable energy for New York, it is particularly important to ensure that the permitting process for natural gas infrastructure is clear, reasonable, and predictable.

The comments below detail various areas in the Proposed Rule that require the Department's clarification or re-consideration.

***a. The proposed requirements are vague as to what demonstration is required for the CRRA.***

The Proposed Rule includes CRRA requirements to demonstrate that future physical climate risk has been considered, and states that an application is incomplete until the required demonstration is provided to the DEC.[35] The Coalition understands the CRRA requires permit applicants to demonstrate

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[32] New York Courts examine the definitive language in statutes to determine legislative intent. "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." *People v. Golo*, 26 N.Y.3d 358, 361 (2015). *See also People v. Robinson*, 95 N.Y.2d 179, 182 (2000). *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998);

[33] *West Virginia v. EPA,* No. 20-1530, slip op., 20 (2022) *citing Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 468 (2001).

[34] *Id.* at 17, *quoting FDA vs. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

[35] Proposed Rule at 621.3(a)(12).

that future physical climate risks due to sea level rise, storm surge, and flooding have been considered. Consistent with comment below, the Coalition does not believe a one-size-fits-all approach for CRRA analyses is appropriate for all permit applications governed by this proposed rulemaking. To the extent DEC will not remove this proposed requirement from its final regulatory revisions, the Coalition is unsure what this demonstration would entail and encourages the DEC to provide further details. The Coalition requests that the DEC provide parameters that appropriately scale the CRRA analyses to be submitted based on project size and whether it is a new project or a permit renewal for existing facilities.

***b. The proposed general requirements for <u>all</u> operational plans and engineering documents to be submitted as part of applications are overly burdensome and do not address materials that may be classified as confidential business information.***

The proposed text for Section 621.3(a)(1)(iv) requires that applicants submit "all operational manuals, plans, and engineering documents necessary to describe the full scope of regulated activities."

The Coalition supports providing information to the DEC that describes the operation and maintenance of natural gas pipelines and related infrastructure to the extent necessary and pertinent to the Department's review. However, the proposed requirement that the applicant supply *all* operating manuals, plans, and engineering documents is excessive. The DEC has failed to demonstrate why such extensive documentation is necessary for conducting a review of a permit application or renewal. In particular, we do not see any need to apply this requirement to a *renewal* application.

Furthermore, many manuals, plans, and engineering documents contain confidential information that does not belong in a public permitting record, such as detailed drawings of critical infrastructure and facilities. Similar information is regularly protected in other agency proceedings from public disclosure. At the Federal level, permitting agencies—including FERC, Department of Homeland Security (DHS), PHMSA and the EPA—recognize protections under the Freedom of Information Act[36] (FOIA) and restrictions for Security Sensitive Information[37] and Critical Energy/Electric Infrastructure Information.[38] New York state regulations also safeguard records containing trade secrets, confidential commercial information, or information about critical infrastructure from public disclosure.[39]

For these reasons, we urge the DEC to revisit and revise the proposed engineering and operations-related documentation requirement in Section 621.3(a)(1)(iv) to ensure that it is proportional to the Department's actual permit review needs and respectful of valid confidentiality concerns. At a minimum, the DEC should strike the word "all", make the requirement subject to federal and New York State's provisions for labeling records confidential, and exclude renewal applications.

Where these comments recommend specific edits to the text of the Proposed Rule, the recommended deletions are double-struck and recommended additions are shown in boldface.

*(iv) for projects involving operation of a facility regulated under this Part* ***<u>other than renewals</u>****,* ***~~all~~*** *operational manuals, plans, and engineering documents necessary to*

[36] 5 U.S.C. § 552.
[37] 49 C.F.R. § 190.343.
[38] Energy Policy Act (EPAct), Pub. L. No. 109-50 (2005); FAST Act ("FAST-41"), Order No. 833 (Nov. 17, 2016), 42 U.S.C. § 4270m *et seq*.
[39] 6 CRR-NY 616.7(a).

*describe the full scope of regulated activities and the environmental controls necessary to meet the relevant pollution control limits, including any information that may be required in specific program implementing regulations**, subject to State and Federal protections for information related to physical security, cybersecurity and confidential business information;***

***c. Landowner permission requirements add undue burdens to Coalition members and do not adequately follow or consider the practicalities of the natural gas pipeline permitting process.***

The proposed text for Sections 621.3(a)(1)(vi), (a)(15), and 621.6(b) provides that the DEC can declare a permit application incomplete if the Department has not received certain landowner permissions.

The proposed text conditions permits on landowner permission for DEC staff to access the project or facility site for purposes described in subdivision 621.6(b).[40] Additionally, an application is considered incomplete until the property owner consents to provide the DEC access for inspection of the project site.[41] Furthermore, failure of the property owner to allow access to the site or facility may be grounds for the DEC to deem the application incomplete or deny the permit.[42]

As a threshold matter, the DEC has not provided a rationale for this change to its procedures. The DEC has not provided any evidence that its existing authority to conduct environmental reviews is insufficient. Adding an unnecessary, duplicative, and burdensome requirement to the permitting process is unwarranted. We respectfully request that the DEC remove the multiple references to this requirement from the Proposed Rule.

This unnecessary requirement would impose unreasonable burdens on linear infrastructure projects that require coordination of multiple landowners, such as natural gas pipeline projects. In particular, the timing of such landowner permission in support of a permit application is not appropriately considered in the proposal. Often, permits for natural gas infrastructure projects are sought while landowner access and rights are still forthcoming, including as part of FERC processes. For pipelines, project developers are usually not the fee owner of all property, and acquisition of all necessary right-of-way easements may not be complete until after the FERC has authorized the project. Prior to FERC approval of a project, various state and federal permits may be pending. Assuming for the sake of argument that the DEC includes the access requirements in the final rule, the Department should clarify that the applicant only needs to demonstrate survey permission or right-of-way acquisition, as applicable, from those landowners from which the applicant has been successful in obtaining access or rights as of the time of the application.

The Proposed Rule is also silent on how the proposed access requirement would be impacted by eminent domain and condemnation proceedings that may be underway at the time of the application. Although interstate pipeline operators make substantial efforts to obtain land rights from property owners along the project route without commencing these proceedings, there remain instances in which

[40] Proposed Rule at 621.3(a)(1)(vi).
[41] *Id*. at 621.3(a)(15).
[42] *Id*. at 621.6(b).

condemnation is necessary on certain parcels. In such instances, the pipeline applicant would not be able to evidence landowner permission or consent as described in the Proposed Rule. As drafted, the Proposed Rule would make it possible for a single landowner along the course of a proposed pipeline to effectively suspend all state permitting processes for the project—a result that would put the reliability of energy in New York State at risk.

Based on the above, the Proposed Rule should clarify that DEC access to the parcels via an easement or right-of-way, survey permission, or as a result of judicial proceedings satisfies the respective permission and consent requirements for purposes of permitting.

The DEC should also provide for an alternative approach. Under this alternative approach, if the permit applicant is not the fee owner of property, or does not otherwise have the right to access the property at the time of the application, the applicant may satisfy the access requirements if it: (1) documents reasonable good faith efforts to obtain landowner permission; and (2) provides desktop data in lieu of site-specific review. Desktop data includes scientific information, development statistics, and other similar data that is sufficient for the Department to declare a permit application complete and begin its review, pending permission for access. Failure of an applicant to obtain access, where the applicant has made reasonable efforts to obtain such access and desktop data is otherwise available, should not stop the DEC from declaring a permit application complete for purposes of beginning to process that application. To do otherwise would unreasonably delay much needed infrastructure.

For the reasons discussed above, the Coalition respectfully requests that the DEC delete the access requirements. If the DEC nevertheless goes forward with such requirements, we recommend the following edits[43]:

In 621.3(a)(vi):

*Landowner permission for DEC staff to access the project or facility site for purposes described in subdivision 621.6(b) of this Part**, including by means of an easement or right-of-way, survey permission, or as a result of judicial proceedings; provided that, if the scope of a project involves multiple landowners different than the applicant and one or more of the non-applicant landowners does not consent to provide permission for DEC staff access, the applicant may satisfy this requirement by: (i) demonstrating consent from those landowners from which the applicant has been successful in obtaining consent as of the time of the application; and (ii) providing desktop data for property owned by any non-consenting landowners.***

In 621.3(a)(15):

*An application is incomplete until the applicant, and the property owner if different than the applicant, consents to provide the department access for inspection of the project site or facility**, including by means of an easement or right-of-way, survey permission, or as a result of judicial proceedings; provided that, if the scope of a project involves multiple landowners different than the applicant and one or more of the non-applicant***

[43] As noted above and moving forward, in addition to the DEC's formatting of bracketed text representing deletions and underlined text representing additions, our recommended language for removal is double-struck through while recommended language to be added is written in bold.

***landowners does not consent to provide permission for DEC staff access, the applicant may satisfy this requirement by: (i) demonstrating consent from those landowners from which the applicant has been successful in obtaining consent as of the time of the application; and (ii) providing desktop data for property owned by any non-consenting landowners****. Such inspections may be necessary for review-related reasons, including to confirm environmental conditions, assess potential effects, and determine whether the project satisfies permitting standards.*

In 621.6(b):

*Failure of an applicant, or the property owner if different than the applicant, to* ~~***allow***~~ ***provide*** *access* ***(including by means of an easement or right-of-way, survey permission, or as a result of judicial proceedings)*** *to the site or facility can be grounds for, and may result in, the department deeming the application incomplete or permit denial* [sic]**;** ***provided that, if the scope of a project involves multiple landowners different than the applicant and one or more of the non-applicant landowners does not consent to provide permission for DEC staff access, the applicant may satisfy the access requirement by: (i) demonstrating consent from those landowners from which the applicant has been successful in obtaining consent as of the time of the application; and (ii) providing desktop data for property owned by any non-consenting landowners.***

***d. The DEC should add a provision making clear that it will not rescind a "completeness" determination for a permit application.***

To promote the integrity and predictability of permitting, the Coalition urges the DEC to include new provisions respecting the completeness of applications.

Regarding the notice of a complete application (NOCA), we recommend adding the following provision:

***Once a notice of complete application (NOCA) has been issued for the application in writing or the applicable deadline for issuing the notice of complete application has passed without action by the Department, the notice of complete application is considered final and cannot be withdrawn.***

Regarding the notice of an incomplete application (NOIA), we recommend adding the following provision:

***Upon receipt of the response to the notice of an incomplete application, department staff may require additional information to clarify or supplement the applicant's response to its original request. However, department staff may not issue a new NOIA on topics not addressed in the original notice. Once the issues raised in the NOIA have been resolved, the DEC must issue a completeness determination. Information regarding subjects not addressed in the notice may be requested pursuant to 6 NYCRR 621.14(b).***

***e. More information is needed regarding public participation requirements, both general requirements and those related to environmental justice.***

The proposed regulation states that the DEC may require the applicant to submit and carry out a public participation plan, including meetings before an application is deemed complete, in addition to any public notice or hearing that may otherwise be required.[44] The plan may include various means of communication and various outreach efforts.

Members of the Coalition appreciate the need for public consultation. We regularly engage multiple stakeholders in public participation processes—particularly for major projects. However, we respectfully request that the DEC provide more information for developers to meet this potential requirement. Specifically, the Proposed Rule should provide additional detail about who must be included in the community outreach. In addition, the DEC should calibrate the extent of the public participation requirement to the size and scope of the project.

Furthermore, the DEC should take note that, for projects subject to FERC approval, FERC already requires extensive public engagement pursuant to the Natural Gas Act (NGA). The FERC-required NGA processes should satisfy the DEC's public participation needs; additional requirements would be redundant. Any permitting requirements should be scaled to the scope of the project and be consistent with existing applicable Federal notification requirements, including FERC requirements. For permitting of already-operating infrastructure, the public participation requirements must allow continued operations and should be consistent with notification and outreach requirements set forth by FERC. Existing natural gas infrastructure must continue providing safe and reliable service pursuant to regulatory requirements and operating conditions authorized by FERC, PHMSA, and the Public Service Commission.

To the extent required, the DEC should provide procedures and timeframes for reviewing and approving public participation plans for consistency and to avoid delays. A public participation plan shall be deemed approved within thirty (30) days of the application submission, unless the DEC requires supplemental information or revisions from the applicant. DEC should also define a time period for instances where it will require applicants to carry out public participation plans. This approach would establish consistency and predictability in energy infrastructure development.

The Coalition appreciates and supports the environmental justice provisions of 621.3(a)(13), including "enhanced" public opportunities and additional information necessary for natural gas infrastructure developers to support environmental justice initiatives. However, the Coalition respectfully requests that the DEC provide additional guidance about the public participation plan requirements and its interaction with the public participation plan development requirements of 621.3(a)(3). The general public participation plan appears to be at the discretion of the DEC, while the environmental justice plan appears to be required as part of the permitting process.

The Environmental Justice Act of 2019 requires environmental justice to be taken into consideration in permitting processes.[45] The Act states that citizens shall be involved in the development, implementation, and enforcement of laws, regulations, and policies that affect the quality of the environment along with diversity and justice goals.[46] The requirements include notifying stakeholders as

[44] Proposed Rule at 621.3(a)(3).
[45] E.C.L. § 48-0101 – 48-0113.
[46] *Id*.

early as possible prior to the selection of a preferred course of action by the state agency, as well as disclosure and sharing of information and allowance of all people to have their views and voices heard.[47]

As the requirements of the Environmental Justice Act are more detailed and extensive than the requirements under the Proposed Rule, the interaction of the existing environmental justice policy and that of the Proposed Rule—and the two public participation plans in the Proposed Rule—should be explained, and the specific requirements outlined and differentiated.

The Coalition agrees that coordinating with the public is an important part of the permitting process and understands that the processes and tools are evolving. The Coalition requests, however, that the DEC work with applicants on an agreed-upon strategy to carry out public participation plans effectively, and with a level of certainty for all stakeholders, rather than offering scant details as currently set forth in the Proposed Rule. The Coalition also requests, as with other initiatives, that the various public participation processes be proportionate to the size, scope, and anticipated impacts of a project. In addition, DEC should add language that states where a project requires FERC approval, any state-specific environmental justice requirements and engagement provisions will be consistent with or not compete with federal environmental justice requirements set forth by FERC or another federal agency and that such federal requirements will govern such projects.

For the reasons discussed above, the Coalition recommends the following modifications to the proposed requirements:

In 621.3(a)(3):

> *The department may require [that] the applicant to submit and carry out a public participation plan that would include the applicant conducting public participation meetings before an application is determined or deemed to be complete [prepare a public participation plan for additional public outreach.] This is in addition to any public notice or hearing that may otherwise be required under this part. The public participation plan is intended to enhance community awareness of the project* ***by the community directly affected by the project****. It may include various means of communication with the affected public through different media, and local outreach actions, including distributing project information in the community, and conducting public project information meetings in appropriate languages.* ***The scope of the public participation plan shall correspond to the size, scope and expected impacts of the project. A public participation plan implemented pursuant to the federal regulations promulgated under the Natural Gas Act shall satisfy the requirements of this provision. If the department does not respond to an applicant's public participation plan within thirty days (30) of submission by the applicant, the plan shall be deemed approved.*** *[Such additional public outreach may include, but is not limited to, the distribution or posting of information about the proposed project in the area in which the proposed project is to be located, conduct of public information meetings, translation of notices for non-English speaking communities and the establishment of document repositories in the area in which the proposed project is to be located.]*

[47] *Id*. at 48-0101.

In 621.3(a)(13):

*The Environmental Justice Act of 2019 and CLCPA require the department to consider environmental justice concerns in permitting decisions subject to this Part and provide enhanced public participation opportunities. Therefore, where applicable, an application is incomplete until the following information is provided to the department: (i) an enhanced public participation plan* ***as provided in 621.3(a)(3)****; and (ii) additional information deemed necessary by the department to evaluate and, where necessary, mitigate environmental impacts on the identified environmental justice area(s) or disadvantaged communities* ***consistent with the size, scope, and expected impacts of the project.; provided that a review implemented pursuant to the environmental justice requirements of an applicable Federal law or policy shall satisfy the requirements of this provision.***

***f. Any permit decisions based on violations at a company site other than those at issue with the present permit should be limited.***

The Proposed Rule contains provisions that allow the DEC to suspend review of an operator's permit application in the event that another site owned or controlled by the operator is subject to an enforcement proceeding for a violation.[48] While the alleged violations must relate to the activity for which the permit is sought, under the Proposed Rule, a permit application may be suspended for alleged violations at infrastructure wholly unrelated to the facility or project for which the application is submitted – potentially hundreds of miles away from the alleged violation.[49]

Expanding the focus of permitting analysis beyond a project for which an application is sought is potentially a significant overreach of the agency's regulatory power. The suspension provision should only apply for an alleged violation directly related to the activity for which the permit is sought (*i.e.* the same project or facility site and same type of permit), and the regulation should clarify that suspension is only required for significant violations. A suspension for a minor violation at a separate and unrelated site is not consistent with due process.

In addition, the DEC should provide more details on how the DEC will analyze enforcement decisions in comparison to the permit application in question. If a permit is suspended under this provision, the Department should provide a timeframe for resolution of the issue. Scenarios involving emergency permits should also be considered.

For the reasons discussed above, the Coalition recommends the following modifications to 621.3(e):

*[Enforcement actions. Processing and] The department may suspend review of an application [of an application may be suspended by written notice to the applicant if] when an enforcement proceeding or action [has been or] is formally commenced against [the] an applicant for alleged* ***significant*** *violations of a provision of the ECL, regulation or permit, ~~l~~at the facility or site that is the subject of the application~~.~~. The alleged violations [may] must be related to the activity for which the permit is sought and have*

[48] Proposed Rule at 621.3(e).
[49] *Id.*

*occurred at the facility or site that is the subject of the application* ~~***or at a site owned or controlled by the applicant***~~.

*(1) The applicant must be informed of the suspension in writing and provided with a copy of the complaint.*

*([1] 2) [Such] The application may be suspended [suspension of processing and review may remain in effect pending final resolution of the]* ***only*** *until the enforcement action[s] has been resolved through an order on consent, Commissioner's or judicial order and any necessary compliance obligations are fulfilled to the department's satisfaction****, subject to the condition in 621.3(e)(3) and any requirements for emergency permitting.***

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*([2] 3) [This provision does not relieve] No such suspension releases the department from* ***any requirements under Federal law to make final decisions, including*** *the requirement to make a final decision on title V facility permit applications within 18 months of the date that the application was complete pursuant to title V of the CAA (see section 200.9 of this Title) and this Part.*

***g. The DEC should consider other applicable pipeline permitting requirements in determining whether an application is complete and in issuing its final decisions on applications.***

Once a permit application has been deemed complete, the DEC evaluates the application and determines whether a public comment hearing must be held, as well as whether the DEC will refer the matter for adjudicatory proceedings.[50] The DEC also issues final decisions on applications.[51]

The Proposed Rule includes a threshold for whether a significant degree of public interest exists to hold a public hearing, as determined by the DEC.[52] The Coalition requests a definition of the public interest threshold to hold a public hearing or adjudicatory proceeding. It is unclear how Coalition members would prepare for such proceedings and hearings without a predictable definition from the Department's regulations.

Regarding final decisions on applications, the DEC proposes that the agency will issue final decisions on all applications concurrently unless there is good cause not to do so.[53] Often certain pieces of a project or construction move forward with a subset of permits while awaiting approval on others. Some permit applications are timed differently than others based on assumptions of normal review time. The Coalition requests that permits continue to be processed efficiently and not held up if one permit is ready to be issued, while another requires more time.

***h. The DEC should consider adding a new section regarding permit renewals, reissuances, and modifications, including transferring or relinquishing permits.***

Generally, the Proposed Rule discusses circumstances under which an application for renewal or modification will be treated as a new application. In the past, Coalition members have been required to

[50] Proposed Rule at 621.8.
[51] *Id*. at 621.10.
[52] *Id*. at 621.8(c).
[53] *Id*. at 621.10.

respond to information requests wholly unrelated to the permit being renewed or modified. For example, with respect to routine air permit renewals, the DEC has requested information about traffic, visual, noise, and other impacts unrelated to the projected facility's air emissions. The Coalition recommends that DEC revise the Proposed Rule to clarify that it cannot ask for information that is not directly related to the permit under review when it elects to treat a permit renewal or modification application as a new application.

For the reasons discussed above, the Coalition recommends the following modification to 621.11(h)(i):

> *In such circumstances, on or before 15 days after receipt of an application, the department must mail the applicant notice of its determination, and a determination of whether the application is complete.* ***In addition, the department may only request information related to the environmental conditions directly regulated by the relevant permit.***

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## V. Conclusion

The Coalition appreciates the opportunity to comment on the Proposed Rule and submits these comments and recommended revisions in order to continue providing safe, reliable, and resilient energy infrastructure to serve the people of New York and the surrounding region.

Coalition members participating in these comments include:

- Algonquin Gas Transmission, L.L.C.
- Eastern Gas Transmission and Storage, Inc.
- Iroquois Pipeline Operating Company
- Millennium Pipeline Company, L.L.C.
- National Fuel Gas Supply Corporation
- TC Energy
- Tennessee Gas Pipeline Company, L.L.C.
- Texas Eastern Transmission, LP

* * * * *

Van Ness Feldman LLP

# Attachment 1

**Comments of the New York Reliable Energy Infrastructure Coalition on Proposed Revisions to Commissioner Policy #49 and Program Policy DAR-21**

**February 7, 2022**

**Before the**
**New York State Department of Environmental Conservation**

**Comments**
**of the**
**New York Reliable Energy Infrastructure Coalition**
**on Proposed Revisions to Commissioner Policy #49 and Program Policy DAR-21**

**February 7, 2022**

## I. Introduction

The New York Reliable Energy Infrastructure Coalition ("Coalition") submits these comments for consideration by the New York State Department of Environmental Conservation ("Department" or "DEC") regarding two proposed actions: (1) revisions to Commissioner Policy #49[1] and (2) the issuance of DEC Program Policy DAR-21.[2]

Collectively, these documents outline the DEC's proposed approach for implementing Section 7(2) of the Climate Leadership and Community Protection Act.[3] Section 7(2) provides:

> In considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, all state agencies, offices, authorities and divisions shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas limits established in article 75 of the environmental conservation law. Where such decisions are deemed to be inconsistent with or will interfere with the attainment of the statewide greenhouse gas emission limits, each agency, office, authority or division shall provide a detailed statement of justification as to why such limits/criteria may not be met, and identify alternatives or greenhouse gas mitigation measures to be required where such project is located.

CP-49 outlines general requirements for Section 7(2) analyses across multiple types of DEC decisions. DAR-21 outlines requirements for the DEC's Section 7(2) analyses in the context of applications for air permits.

The Coalition is pleased to provide comments on the proposed CP-49 and DAR-21. The individual members of the Coalition own and operate interstate natural gas pipelines and underground natural gas storage facilities that traverse the State of New York, and are subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC") pursuant to the Natural Gas Act.[4] Coalition members operate natural gas compressor stations, interconnection stations,

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[1] DEC, CP-49/Climate Change and DEC Action, Draft for Public Comment, available at https://www.dec.ny.gov/docs/administration_pdf/cp49revised.pdf (hereafter "CP-49").
[2] DEC, DAR-21, The Climate Leadership and Community Protection Act and Air Permit Applications, Draft for Public Comment (hereafter "DAR-21").
[3] Chapter 106 of the Laws of 2019 (hereafter "CLCPA").
[4] The Coalition members participating in these comments are listed on the final page.

meter stations, underground storage fields, and supporting equipment and components that will be directly affected by the proposed guidance.

Members of the Coalition are committed to safely operating the nation's interstate natural gas transmission network while minimizing the impact on the environment and climate. To realize these goals, the Coalition companies are enhancing their efforts to invest in technologies and practices that reduce greenhouse gas emissions, including methane and carbon dioxide; and exploring new opportunities to deliver responsibly sourced natural gas, hydrogen, and renewable natural gas. The Coalition members support sound public policies that protect the environment while simultaneously ensuring a safe, reliable, and resilient energy transmission system that provides the affordable energy that people, businesses, and communities need. We are looking forward to doing our part to helping New York meet its emission reduction goals.

The Coalition has some concerns about the legal and technical underpinnings of the proposed policies, and we are seeking more information from DEC. These comments highlight the following issues:

A. DEC should explain the basis for its view that Section 7(2) provides the Department with the authority to deny applications for projects that otherwise meet state laws.

B. DEC should explain the legal basis for implementing Section 7(2) through guidance rather than promulgation of a rule.

C. DEC should explain and identify the legal authority and technical basis for implementing Section 7(2) reviews prior to the Department's promulgation of regulations to attain the state-wide emission limits

D. DEC should acknowledge the limits on its authority to use a state law to deny or substantially encumber a permit application or renewal for a FERC-jurisdictional interstate natural gas pipeline facility.

E. The evaluation of CLCPA consistency in a Section 7(2) analysis should focus on whether a project is expected to result in a significant net emission increase.

F. The proposed CP-49 and DAR-21 policies appropriately recognize that, even where a project is not consistent with the CLCPA, said project may be justified to avoid environmental, economic, or social harm—including threats to the reliability or safety of existing energy delivery systems.

G. Consideration of alternatives and mitigation for a FERC-jurisdictional natural gas infrastructure project should take into account any NEPA analysis completed for the project and should follow a rule of reason.

## II. Comments

### *A. DEC should explain the legal basis for using Section 7(2) authority to reject permit applications.*

The Coalition respectfully requests that DEC provide a more thorough legal analysis of the constitutionality of its assertion of authority under Section 7(2) to deny permits or permit renewals. Section 7(2) does not expressly authorize agencies to reject projects that otherwise conform to state and federal laws and can achieve reasonable mitigation of their potential GHG emissions impacts. The statewide emission limits adopted by DEC are not binding on *individual projects* such that "interfering with" those limits provide a basis for invalidating a project. Rather, by its terms, Section 7(2) is a mandate *on state agencies* to conduct a *review* and, as appropriate, prescribe mitigation. Had the legislature intended to authorize state agencies to deny permits for individual projects based on a CLCPA consistency review it would have used different and more direct language.

Yet, DEC construes its authority under Section 7(2) to provide authority not only for project reviews, but also as a mandate to reject proposed projects that the Department concludes (1) are inconsistent with or interfere with attainment of the 2030 and 2050 statewide emission limits; and (2) are not otherwise "justified." CP-49 states: "If a justification is not available, then the Department need not reach the next stage of the CLCPA Section 7(2) analysis regarding alternatives or GHG mitigation."[5] Indeed, even prior to issuance of the proposed guidance, DEC invoked Section 7(2) as the basis for rejecting applications for permits.[6]

DEC's proposed reading of Section 7(2) is unconstitutional because it entails an impermissibly broad delegation of the legislature's authority to the executive branch. The legislature may not authorize DEC to reject a permit for an individual project that otherwise complies with state laws based on a simple finding that the project is "inconsistent" with future statewide GHG emission limits or that it is "unjustified." Unlike other permitting provisions in the state's Environmental Conservation Law that clearly evince the legislature's intent to authorize grant or deny permits, these standards for such agency action in Section 7(2) are no standards at all. In any event, they are simply too vague to provide a basis for such an aggressive and definitive agency action as denial of a permit or imposition of potentially highly cost permit conditions for mitigation. They do not provide "intelligible principles" according to which DEC may reject or substantially condition issuance of a permit.[7]

For these reasons, we urge DEC to either: (i) explain what standards or principles it finds in Section 7(2) to support authority to reject or substantially condition permit applications, or (ii) revise its interpretation of what actions Section 7(2) authorizes the Department to take to avoid an unconstitutional outcome.

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[5] CP-49, p. 7.

[6] *See* DEC, Notice of Denial of Title V Permit for Danskammer Energy Center, DEC ID: 3-3346-00011/00017 (Oct. 27, 2021); and DEC, Notice of Denial of Title V Permit for Astoria Gas Turbine Power, DEC ID: 2-6301-00191/00014 (Oct. 27, 2021).

[7] *Gundy v. U.S.*, 139 S. Ct. 2116, 2123 (2019).

### *B. DEC may not bypass procedural and substantive requirements under the State Administrative Procedure Act by labeling CP-49 and DAR-21 "guidance" rather than rules.*

DEC apparently believes it may interpret and implement Section 7(2) through guidance rather than promulgation of a regulation. Indeed, in CP-49, the Department asserts maximum flexibility in implementing Section 7(2) analyses for individual projects: "[T]he Policy is not intended to create any substantive or procedural rights, enforceable by any party in administrative or judicial litigation. The Department reserves the right to deviate from this Policy when, in its judgment, doing so would result in a net benefit to the people of the New York State."[8]

Notwithstanding DEC's assertions, CP-49 and DAR-21, in particular, have every hallmark of *rules* rather than mere guidance. As such, they are subject to the procedural requirements for rulemaking under the State Administrative Procedure Act (SAPA), including the availability of judicial review once finalized. Also, they are subject to SAPA's substantive standards for agency rules, including the requirement that they must be reasonable and not arbitrary and capricious. The Coalition respectfully requests that DEC explain why the Department has concluded that CP-49 and DAR-21 are guidance and not rules.

The SAPA defines a "rule" as "the whole or part of each agency statement, regulation or code of general applicability that implements or applies law…"[9] New York courts have interpreted this definition to find that a "rule" is "a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers."[10] Guidelines, in contrast, "do not establish substantive standards applicable to agency adjudication, but merely implement, explain or interpret an already existing standard or requirement set forth in a regulation or statute."[11] Finally, "an agency, by law, is not allowed to legislate by adding guidance requirements not expressly authorized by statute."[12]

CP-49 and DAR-21 go well beyond guidance. Perhaps responding to the absence of any intelligible principles in Section 7(2) for agency action, CP-49 and DAR-21 outline (albeit vaguely) a multitude of conditions and cases under which the DEC could determine a proposed activity or permit renewal is inconsistent with the statewide emission limits or unjustified. Thus, CP-49 and DAR-21 are not mere explanations of Section 7(2); rather, they "add[ ] guidance requirements not expressly authorized by" the CLCPA.[13]

DAR-21, in particular, is a rule not guidance. CLCPA Section 7(2) directs state agencies to consider whether permitting decisions "are inconsistent with or will interfere with the attainment of the statewide greenhouse gas limits," justify why such limits/criteria may not be

[8] CP-49, p. 3.
[9] NY STATE ADM PRO § 102(2)(a)(i).
[10] *Household and Commercial Prod. Ass'n v. N.Y. State Dep't of Env't Cons.*, 110 N.Y.S.3d 518, 524 (N.Y. Sup. Ct. 2019) (internal citations and quotations omitted).
[11] *Id.* at 525.
[12] *Id.*
[13] *Id.*

met, and identify mitigation options. However, the CLCPA provides no standards for making those decisions, nor does it establish procedures for integrating these complex decisions into existing permitting processes. DEC is now attempting to fill that gap by issuing "guidance" (in the form of DAR-21) that identifies what types of air permitting decisions must undergo consistency reviews, how such reviews are to be conducted, the criteria for assessing inconsistency, and—very briefly—how the requirements are to be integrated into air permits. DAR-21 thus establishes "a pattern or course of conduct for the future,"[14] specifying how the Section 7(2) permitting requirements will be implemented under the air permitting program going forward. The elements of DAR-21 are more properly characterized as a rule rather than guidance and so should be subject to SAPA review.

In addition, CP-49 and DAR-21 establish substantive standards applicable to agency adjudication of permit applications. CP-49 and DAR-21 declare DEC's intention to apply these conditions to projects across the board, which could result in mitigation requirements or denial of permit applications. Indeed, as discussed above, DEC already has invoked its purported authorities under Section 7(2) to deny permits to two projects. DEC's intended application of CP-49 and DAR-21 therefore would have practical and legal consequences, meaning the documents are regulations, not guidance.[15]

Accordingly, CP-49 and DAR-21 are subject to SAPA's rulemaking procedures. Furthermore, after CP-49 and DAR-21 are finalized, they will be subject to review as final rule. As such, DEC will need to ensure that the final versions of CP-49 or DAR-21 have a rational basis, and are not unreasonable, arbitrary, or capricious.[16] As discussed below, the Coalition has concerns that the current proposals do not clear this bar.

### *C. DEC should explain the legal and technical basis for implementing Section 7(2) reviews prior to the Department's valid promulgation of regulations to attain the state-wide emission limits.*

The crux of a Section 7(2) review is a determination of whether a proposed project is consistent with "attainment of the [Section 75] Emission Limits."[17] CP-49 provides that if an agency action conforms to the DEC's CLCPA regulations for attainment, then the project is consistent with the CLCPA under Section 7(2) without the need for further analysis.[18] Once these regulations are in place, such an approach could reflect a reasonable interpretation of

[14] *Alca Industries, Inc. v. Delaney*, 92 N.Y.2d 775, 778 (N.Y. 1961).
[15] *See e.g., Consumer Directed Personal Assistance Ass'n of N.Y. State v. Zucker*, 111 N.Y.S.3d 826, 831 (N.Y. Sup. Ct. 2019) (policy document at issue was found to be a regulation subject to SAPA as the policy document was a fixed, general principle to be uniformly applied to govern the reimbursement rate under a social services program, rather than a mere explanatory or interpretive statement of general policy which itself has no legal effect); *Household and Commercial Products Association*, 110 N.Y.S.3d at 525 (DEC "guidelines" were found to be regulations subject to SAPA as the "guidelines" dictated a new set of rules governing the types of ingredients in household cleaning products subject to disclosure as well as rules on the manner of disclosure).
[16] *Matter of Consol. Nursing Home v. Comm'r of N.Y. State Dep't of Health*, 85 N.Y.2d 326, 331 (1995); *Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (1991).
[17] CP-49, p. 4.
[18] CP-49, p. 5.

Section 7(2) as these regulatory measures will be, after all, the valid and established means of "attaining" the 2030 and 2050 emission limits.

However, DEC's proposed CP-49 policy also provides that agencies should carry out Section 7(2) analyses *before the CLCPA regulatory measures to attain the emissions are in effect*—and that agencies may impose mitigation measures and even deny applications on the basis of such analyses. CP-49 further proposes that, during this "interim period" prior to the promulgation of such measures, an agency's Section 7(2) analysis of a project will be "guided by consistency" with the emission limits themselves, with the annual GHG emissions inventory, and—when finalized—with the Scoping Plan.[19]

The Coalition respectfully requests that DEC provide a more detailed explanation of the legal and technical basis for implementing Section 7(2) reviews prior to the Department's valid promulgation of the attainment regulations pursuant to the CLCPA. Absent such attainment regulations, it is unclear whether and how the DEC could make a determination that any project is "inconsistent with or will interfere with the attainment of" the statewide emission limits.

The CLCPA outlines a particular process for establishing the emission limits and regulatory measures for attaining those limits. First, the CLCPA establishes state-wide emission limits of 40% below 1990 levels by 2030, and 85% below 1990 levels by 2050.[20] The law then directs DEC to specify state-wide limits on emissions that correspond to these requirements.[21] The DEC has adopted these limits, which are set forth at 6 NYCRR Part 496. The CLCPA establishes a Climate Action Council, which is given three years (by January 1, 2023) to finalize a Scoping Plan providing recommendations for policies to meet the emission limits.[22] The DEC then has until January 1, 2024, to promulgate regulatory measures for attainment.[23] The DEC may not promulgate regulatory measures before finalization of the Scoping Plan because the CLPCA requires that any measures promulgated by the DEC must "reflect, in substantial part" the findings of the Scoping Plan.[24] Accordingly, valid DEC regulation to attain the limits are not yet in place, and DEC lacks authority to implement these policies.

Section 7(2) explicitly ties the analysis to a determination of whether a project "is inconsistent with or interferes with the *attainment*" of the state-wide emission limits. The CLCPA is clear that the mechanism for "attainment" is the suite of regulatory measures that DEC will promulgate *after* it reviews and considers the final Scoping Plan. The Scoping Plan is not itself a regulatory program for attainment, but rather a set of recommendations for future development of regulatory measures.[25] It is these future regulatory measures promulgated pursuant to the CLCPA that will determine any individual facility's required relative contribution to attaining the 2030 and 2050 emission limits. Absent such measures, it is far from clear that the DEC has a legal basis for evaluating the consistency of a project at any individual facility with "attainment" of the state-wide emission limits.

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[19] CP-49, pp. 5-6.
[20] N.Y. ENV'T CONSERV. LAW § 75-0107(1) (2020).
[21] *Id.*
[22] N.Y. ENV'T CONSERV. LAW § 75-0103.
[23] N.Y. ENV'T CONSERV. LAW § 75-0109(1).
[24] N.Y. ENV'T CONSERV. LAW § 75-0109(2)(c).
[25] N.Y. ENV'T CONSERV. LAW § 75-0103(11).

It is difficult to square DEC's proposed "phased-in" interpretation of Section 7(2) articulated in CP-49 with the express language of the CLCPA, or with its intent and structure. In a prior proceeding, DEC itself acknowledged that the CLCPA prohibits the Department from prematurely determining permissible emission levels for individual emission sources or other facilities. In its Fall 2020 rulemaking to establish the 2030 and 2050 statewide emission limits, the Department rejected comments arguing that the rule should also set regulatory limits on emissions of individual GHGs. In its response to commenters, the Department explained that such an approach would be inconsistent with the CLCPA:

> [T]he CLCPA contemplates that the Climate Action Council (Council) will make recommendations as part of the Scoping Plan regarding measures to achieve the statewide emission limits, including subsequent rulemaking by the Department or other State agencies. Both the Council's recommendations in the Scoping Plan and future substantive rulemaking by the Department and other State agencies must include measures that impose enforceable requirements on individual sources of greenhouse gases. At this preliminary stage in the overall implementation of the CLCPA, consistent with this overall structure of the statue, the Department is not seeking through this rulemaking to make significant policy decisions regarding the level of emission reductions required for each type of GHG emission source. *If the Department were to establish limits on individual types of greenhouse gases, it would conflict with this statutory objective and structure, because it may prematurely suggest or establish the relative amount of emission reductions necessary from each sector or type of source*.[26]

In other words, DEC declared that it could not set statewide limits on individual GHGs prior to finishing the rulemakings for attainment regulations. This analysis reflects DEC's appropriate legal conclusion that it may not impose emission limits or other requirements on sources in the absence of rules governing how the decisions concerning those limits and other requirements should be made. The same concerns outlined in the language quoted above should guide DEC's interpretation of the Section 7(2) review requirement. DEC should not be imposing GHG emission limits on sources as part of its permit review process until it has validly adopted regulations establishing criteria and procedures for deciding how those limits should be set. Yet, under the proposed "phased-in" approach outlined under CP-49, DEC would go even farther than setting limits on individual GHGs. Specifically, CP-49 would require DEC to determine whether the emissions impact from a project at a particular facility exceeds the "correct" amount of emissions for that type of facility *before* the DEC has completed a notice-and-comment rulemaking establishing regulations for such facilities. The Department would be even more directly—and prematurely—making "c" and establishing "the relative amount of emission reductions necessary from each sector [and] type of source."

The proposed approach would sidestep the Council, the Scoping Plan, and the notice-and-comment process involved in promulgating regulatory measures for sectors and source types.

[26] New York State Department of Environmental Conservation, Assessment of Public Comments, 6 NYCRR, Part 496, Statewide Greenhouse Emission Limits (2020), pp. 9-10 (2020) (emphasis added).

Aside from the State Administrative Procedure Act, the CLCPA itself outlines a detailed public consultation process for DEC to follow in promulgating regulations for attainment.[27]

Indeed, as outlined in CP-49 and DAR-21, DEC's Section 7(2) actions *themselves would be regulatory* because, as discussed above, DEC proposes to use its Section 7(2) authority not just for environmental impact reviews of permit applications but also as a basis for imposing mitigation requirements or even denying applications altogether. As such, CP-49 and DAR-21 fall within the CLCPA's definition of agency regulatory actions intended to attain the statewide emission limits. Yet, as discussed above, the CLCPA makes clear that the DEC may not promulgate CLCPA-implementing regulations until after finalization of the Scoping Plan and only after the further public consultation process.

Furthermore, based on the lack of a final Scoping Plan, and implementing DEC regulations, DEC runs the risk that any CLCPA consistency determination would be highly arbitrary given the geographic and temporal scope of the inquiry. Significant sources of GHG emissions are found in sectors throughout the state's economy—including transportation; buildings; electricity; industry; agriculture and forestry; and waste. Even the recently-issued draft version of the Scoping Plan outlines no fewer than four scenarios for attaining the limits, each with very different implications for economic activities in the different sectors of the state's economy.[28] The draft Scoping Plan underscores that there are myriad pathways to attainment of the 2030 and 2050 emission limits, and each has different implications for cost-effectiveness and for meeting the goals of a just and equitable transition. That is why the CLCPA contemplates a comprehensive policy development process. It would be arbitrary to determine—prior to completion of this process—that any individual project at any individual facility would be inconsistent with or will interfere with attainment of the 2030 and 2050 limits in isolation from all other existing and future activities by other facilities and sectors.

For these reasons, we respectfully request that the DEC provide a more thorough analysis of its legal authority and technical capacity to conduct Section 7(2) analyses prior to promulgation of regulatory measures to attain the 2030 and 2050 emission limits. (The subsequent sections of these comments assumes for the sake of argument that the DEC does have such authority.)

### *D. DEC should acknowledge the limits on its authority to use a state law to deny or substantially encumber a permit application or renewal for a FERC-jurisdictional interstate natural gas pipeline facility.*

The Coalition urges DEC to recognize that DEC is subject to an important constraint on its authority to apply Section 7(2) to its review of interstate natural gas facilities that are subject

[27] Under the CLCPA, even the Scoping Plan is not itself a set of policies but rather a set of "recommendations" for policies. N.Y. ENV'T CONSERV. LAW § 75-0103(11). After publication of the Scoping Plan, the CLCPA mandates a *further*, extensive public process that the DEC and other agencies must use to develop regulatory measures—involving consultation with the Climate Action Council, the environmental justice advisory group, and the climate justice working group established pursuant to § 75-0111 of the CLCPA; as well as representatives of regulated entities, community organizations, environmental groups, health professionals, labor unions, municipal corporations, trade associations, and other stakeholders. N.Y. ENV'T CONSERV. LAW § 75-0109(1).

[28] New York State Climate Action Council, Draft Scoping Plan (Dec. 31, 2021) (hereinafter "Draft Scoping Plan").

to the jurisdiction of FERC. Specifically, the Department may not use Section 7(2) authority to deny permit applications for such projects, or otherwise encumber permits issued by the DEC in a way that is inconsistent with the project's FERC certificate. Such application of Section 7(2) authority by the Department would be preempted by the Natural Gas Act ("NGA").

The Supreme Court has long recognized that FERC's jurisdiction over interstate commerce is "plenary" (*i.e.* absolute and unqualified).[29] Moreover, the Supreme Court has ruled that by enacting the NGA, "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce."[30]

Pursuant to the NGA, FERC regulates all aspects of the construction and operation of interstate natural gas pipelines. Under Section 7 of the NGA, FERC issues a certificate to "any qualified applicant . . . authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application" if it finds "that the proposed service, sale, operation, construction, extension, or acquisition, . . . is or will be required by the present or future public convenience and necessity."[31] As part of the Section 7 process, FERC, working with other relevant federal and state agencies as needed, undertakes a review of the environmental impacts of a proposed project under the National Environmental Policy Act ("NEPA").[32] NEPA requires a comprehensive analysis of direct and indirect environmental impacts, and includes consideration of project alternatives.

Without a Section 7 certificate of public convenience and necessity, the NGA prohibits an entity from engaging in interstate transportation of natural gas, or the construction of facilities for that purpose.[33] Holders of certificates issued by FERC under the NGA are authorized to construct and operate interstate natural gas pipeline facilities.[34] Once the pipeline facilities are constructed, the certificate holders maintain "an obligation, deeply embedded in the law, to continue service."[35] This obligation is consistent with the purpose of the NGA, which is "to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices."[36]

Any action by DEC that interferes or conflicts with FERC's jurisdiction would be inconsistent with the NGA and preempted by the doctrine of "field preemption." Field preemption stems from the Supremacy Clause of the Constitution[37] and applies where Congress has "occupied the field" of regulation, leaving no room for a state to supplement the federal

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[29] *FPC v. So. Cal. Edison. Co.*, 376 U.S. 205, 216 (1964).
[30] *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 305 (1988).
[31] 15 U.S.C. § 717f(e).
[32] 42 U.S.C. § 4321 *et seq*.
[33] 15 U.S.C. § 717f(c).
[34] Facilities "certificated" by FERC include those facilities originally authorized by FERC in individual orders issuing certificates under Section 7 of the Natural Gas Act and those facilities authorized under FERC's blanket certificate program. *See* 18 C.F.R. § 157.203.
[35] *Transcontinental Gas Pipe Line Corp. v. FPC*, 488 F.2d 1325, 1328 (D.C. Cir. 1973) (quoting *Michigan Consol. Gas Co. v. FPC*, 283 F.2d 204, 214 (1960)), *cert. denied sub nom., Natural Gas Pipeline Co. v. Transcontinental Gas Pipe Line Corp.*, 417 U.S. 921 (1974)).
[36] *NAACP v. FERC*, 425 U.S. 662, 669–70 (1976).
[37] U.S. Const. Art. VI, cl. 2.

law.[38] That is plainly the case with the NGA where "preemption may be inferred because Congress has *occupied the field of regulation* regarding interstate gas transmission facilities."[39]

Starting with the Supreme Court's 1942 decision in *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, federal courts have consistently held that Section 7 of the NGA grants plenary authority to FERC to regulate interstate natural gas facilities, preempting any state authority to impose additional regulations on such facilities.[40] In particular, the Court of Appeals for the Second Circuit has made clear that state environmental regulation of FERC-approved projects is preempted by the NGA. In *National Fuel Gas Supply Corp. v. Public Service Commission of State and N.Y.* ("*National Fuel Gas Supply Corp.*"), a natural gas company subject to FERC jurisdiction challenged the Public Service Commission of New York's (PSC) attempted regulation of the company's pipeline facilities under Article VII of New York's Public Service Law.[41] The company had already obtained a certificate from FERC under Section 7 of the NGA to construct and operate the section of an interstate pipeline in New York. PSC regulations required the company to obtain from PSC an additional "certificate of environmental compatibility and public need" under Article VII of New York's Public Service Law. The Second Circuit held that Article VII was preempted by the NGA. In particular, the court found that:

> Congress placed authority regarding the location of interstate pipelines—in the present case affecting citizens of four states in addition to New York—in the FERC, a federal body that can make choices in the interests of energy consumers nationally, with intervention afforded as of right to relevant state commissions. *Because FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review*. Allowing all the sites and all the specifics to be regulated by agencies with only local constituencies would delay or prevent construction that has won approval after federal consideration of environmental factors and interstate need, with the increased costs or lack of gas to be borne by utility consumers in other states.[42]

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[38] *Nat'l Fuel Gas Supply Corp. v. Public Serv. Comm'n of N.Y.*, 894 F.2d 571, 575–76 (2nd Cir. 1990) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

[39] *Id*. at 577 (emphasis added). *See also*, *Millennium Pipeline Co., L.L.C. v. Seggos*, 288 F. Supp. 3d 530, 545 (N.D.N.Y. 2017) (finding that state freshwater wetlands and stream disturbance permits are subject to field preemption).

[40] 314 U.S. 498 (1942). *See also Islander East Pipeline Co. v. Blumenthal*, 478 F. Supp. 2d 289, 294 (D. Conn. 2007) (finding that "[t]he NGA confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale," and that "[b]ecause FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review") (quoting *Schneidewind*, 485 U.S. at 301-01 and *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n of N.Y.*, 894 F.2d 571, 579 (2d Cir. 1990)); *Pub. Serv. Comm'n of W.Va. v. FPC,* 437 F.2d 1234 (4th Cir. 1971). NGA preemption has been commonly found in the context of state and local zoning laws. *See e.g., Algonquin LNG v. Loqa*, 79 F. Supp. 2d 49, 52 (D. R.I. 2000); *AES Sparrows Point LNC, LLC v. Smith*, 470 F. Supp. 2d 586, 601 (D. Md. 2007); *Dominion Transmission, Inc. v. Town of Myersville Town Council*, 982 F.Supp.2d 570, 579 (D. Md. 2013).

[41] *Nat'l Fuel Gas Supply Corp.*, 894 F.2d at 573–74.

[42] *Id*. at 579 (emphasis added).

Just as with Article VII of New York's Public Service Law, applying Section 7(2) to FERC-jurisdictional interstate natural gas infrastructure projects would run up against the NGA preemption of concurrent site-specific environmental reviews.

While the NGA allows states to exercise limited permitting authority over pipeline projects pursuant to delegation from another federal law, such as the federal Clean Air Act or the federal Clean Water Act, that authority does not extend to implementation of Section 7(2) because the CLCPA is a state-only program. The substantive requirements of the CLCPA are not federally enforceable because they are not part of a federally delegated program.

While FERC generally encourages certificated projects to comply with relevant state and local requirements, FERC orders also make clear such requirements must not conflict with the FERC certificate. FERC orders typically contain language similar to the following:

> Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. [FERC] encourages cooperation between interstate pipelines and local authorities. However, *this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission*.[43]

FERC has found that "a rule of reason must govern both states' and local authorities' exercise of their power and an applicant's bona fide attempts to comply with state and local requirements."[44] This not only means that the DEC is prohibited from using its Section 7(2) authority to deny a state permit to a FERC-jurisdictional project that otherwise qualifies for the permit; it also means that the Department may not use Section 7(2) to encumber a FERC-jurisdictional project with mitigation requirements or other permit conditions that have the practical effect of delaying or preventing the construction and operation of FERC-authorized projects. Significantly, the DEC may not add conditions on a FERC-jurisdictional project to make the project comply with Section 7(2) that would interfere with the lawful operation of the project under the terms of the FERC certificate or ultimately make the project unfeasible or economically unviable.

For these reasons, FERC-jurisdictional projects should be considered *per se* justified under Section 7(2) and DEC may not use Section 7(2) reviews to deny or substantially constrain such projects.

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[43] *Algonquin Gas Transmission, LLC*, 150 FERC ¶ 61,163, at P 151 (2015) (emphasis added). FERC typically requires certificate-holders to notify FERC's environmental staff of any environmental noncompliance identified by other federal, state, or local agencies. *Id*. at Ordering Paragraph I.

[44] *Sound Energy Solutions, Order Denying Rehearing*, 107 FERC ¶ 61,263, at P 96 (2004). Although *Sound Energy Solutions* involved FERC's authority under Section 3 and not Section 7 of the NGA, the principle of preemption is the same under both sections.

### *E. The evaluation of consistency in a Section 7(2) analysis should focus on significant net emission increases.*

#### *1. The proposed "inconsistency" benchmarks are arbitrary and vague.*

The core analysis under Section 7(2) is a determination of whether a proposed project is "inconsistent with or will interfere with the attainment" of the 2030 and 2050 emission limits. The proposed CP-49 and DAR-21 benchmarks suggest that a project that could result in practically *any* emissions increase—regardless of how small or how attenuated the causal link—could be found to be inconsistent with the CLCPA under Section 7(2). The DEC's proposed interpretation with respect to inconsistency is arbitrary and vague.

As explained above, any analysis of a proposed project's consistency with attainment of the state-wide GHG emission limits inherently involves consideration of the project's potential impacts: (1) relative to other activities throughout the state and (2) over a multi-year—and, in the case of the 2050 limit, a multi-decadal—period. Based on the speculative nature of these parameters, it is virtually impossible to develop a program for assessing consistency that can be applied fairly and appropriately across projects.

Yet, DAR-21 suggests that a proposed project could be deemed inconsistent under Section 7(2) if it merely "makes it more difficult or more expensive for the State to reduce GHG emissions."[45] As currently drafted, a project that leads to *any* increase in emissions could be deemed inconsistent with the DAR-21 benchmark. The DEC also arrogates to itself the authority to reject proposed projects based on a determination that the project increases market demand for GHG-emitting sources or decreases demand for GHG-reducing technologies—without any requirement to even forecast whether a project would *actually cause* an increase in emissions. DEC establishes no criteria or standards for making those determinations. The "any increase" threshold sets a bar for permit approvals that is exceedingly high and also exceedingly vague, inviting arbitrary determinations across reviews.

Furthermore, Section V.B. of DAR-21 states, "A permit renewal that does not include a significant modification and would not lead to an increase in actual or potential GHG emissions would in most circumstances be considered consistent with the CLCPA pending finalization of the scoping plan and future regulations." Yet, the following sentence goes on to say, "However, DEC staff may require an applicant to submit to a CLCPA analysis for a permit renewal to ensure the requirements of Section 7(2) are met, if the facts surrounding the project indicate that an analysis is warranted." There is no reasonable basis for using Section 7(2) reviews to deny or impose unreasonable conditions on a permit renewal for an already-operating facility if there is no associated increase in GHG emissions from that facility—many of which are minor sources or facilities operating under air registrations. Section 7(2) does not provide any authority, express or implied, to determine that the mere continued operation of a particular facility—without any increase in its GHG emissions—is inconsistent with the statewide emission limits.

Finally, we respectfully request that DEC provide examples illustrating how it would apply the consistency analysis under Section 7(2).

[45] DAR-21, p. 5.

***2. It is unreasonable and inaccurate to determine that any natural gas infrastructure project is <u>per se</u> inconsistent or will interfere with attainment of the 2030 and 2050 emission limits.***

The DEC appears to propose that it may find, without further analysis, that any natural gas infrastructure project—whether new, modified, or simply subject to a permit renewal—is inconsistent or will interfere with attainment of 2030 and 2050 emission limits. Specifically, DAR-21 provides that a project is a potential cause of inconsistency or interference if the project "facilitates the expanded or continued use of fossil fuels through infrastructure development."[46]

This *per se* determination of inconsistency or interference is arbitrary, inaccurate, unsupported within the policies, and should be rejected. Some amount of continued use of natural gas through improved, enhanced, or extended infrastructure is consistent with—and even necessary for—the attainment of the 2030 and 2050 emission limits. The Draft Scoping Plan recognizes that any transition away from gas infrastructure will have to be "carefully planned, detailed, and clearly communicated" to ensure, among other things, that "electric distribution has sufficient capacity for the increased electric load due to electrification of heating and transportation."[47] At a minimum, any carefully planned transition will necessarily require: (1) some replacement of aging infrastructure to ensure the ongoing reliability of the natural gas delivery system, which will remain critical to serve customer demands during at least portions of the winter heating season; (2) targeted expansions to address pockets of gas local distribution company ("LDC") load growth, and (3) also discrete extensions of pipelines to support the added electricity capacity needed to electrify heating and transportation. Accordingly, there is no reasonable basis for determining that such projects are *per se* inconsistent with the statewide emission limits.

In addition, both the Draft Scoping Plan and proposed DAR-21 unreasonably discount the possibility that natural gas-fired generators ultimately will face requirements to either operate with carbon capture, utilization, and storage technology or shut down. In any event, a policy that calls for project-by-project review yet allows for determinations that new gas infrastructure projects are per se inconsistent with the CLCPA's statutory targets is both arbitrary, inaccurate, and inconsistent with the imperative to establish a carefully considered, comprehensive plan.

Furthermore, both the proposed Section 7(2) policies and the Draft Scoping Plan make an unsupported and categorical error by assuming that any new pipeline infrastructure project necessarily induces continued or increased use of fossil fuels. Pipelines are also vessels for hydrogen, responsibly sourced natural gas, and renewable natural gas (RNG), all of which will be critical fuels for attainment of the 2030 and 2050 emission limits. In her recent "State of the State" address, Governor Hochul advocated that New York become a federally funded hydrogen "hub" with supporting facilities located throughout the state.[48] Such a hub approach will necessitate infrastructure to transport hydrogen. In addition, at least one of the scenarios outlined

[46] CP-49, p. 5.
[47] Draft Scoping Plan, p. 267.
[48] State of the State 2022: Hochul Eyes Clean Hydrogen Hub in Auburn, Other Cities, auburnpub.com (Jan. 6, 2022).

in the Draft Scoping Plan relies on "significant investment" in RNG, which can be transported utilizing existing natural gas pipeline infrastructure.[49]

Finally, we urge DEC to take into account that that the Coalition's natural gas infrastructure is not meant to serve *just* New York. It is part of a fully integrated natural gas transportation network spanning the entire contiguous U.S., and into Canada and Mexico. For example, much of the natural gas transported on the Coalition member's facilities is intended for local distribution companies, municipalities, and power generators in New England. The NGA preempts state and local regulation of natural gas transmission precisely because such regulation could potentially interfere with the provision of natural gas services across state lines.

A decision by DEC to impose GHG emission limits, mitigation measures, or other requirements under the CLCPA has the potential to affect the energy needs of other states who have no say in how the Act is implemented. Under the CLCPA, downstream emissions in other states do not count toward the calculation of the statewide emission limits. In addition, other states have their own policies for managing energy transitions and for limiting GHG emissions. Natural gas may play a different role in those other state plans than it does in New York. New York State policies and the CLCPA cannot be applied to deprive people in other states access to natural gas supplies. DEC has no legal basis to impose views it may have about use of natural gas on other states, particularly where such restrictions would not count toward its statewide emission limits.[50]

For these reasons, it is unreasonable for the DEC to categorically determine under Section 7(2) that any proposed natural gas pipeline infrastructure project is inconsistent with the statewide emission limits.

### *3. Section 7(2) reviews should determine whether a proposed project will result in a significant net emissions increase.*

To avoid wasteful reviews and arbitrary discrimination against new projects, the DEC should establish a "significance" threshold for determining what level of potential emissions increase resulting from a proposed project is "inconsistent with or will interfere with" the attainment of the 2030 and 2050 emission limits. As previously noted, under the draft guidance, DEC can require a CLCPA analysis if a project requiring an air permit (whether major or minor) could result in *any* increase in GHG emissions. Indeed, as discussed above, the guidance suggests that even a permit renewal for an already operating facility with *no* associated emissions increase could trigger a Section 7(2) analysis and potential rejection. Establishing a "significance" threshold would eliminate small projects and simple permit renewals from review and focus DEC's limited resources on those projects with significant potential GHG impacts. Adopting a significance threshold would be consistent with how the Department implements other air permitting analyses, in particular reviews under the nonattainment New Source Review and Prevention of Significant Deterioration programs. It would create a bright line threshold that

[49] Draft Scoping Plan, p. 81 (referring to Scenario 2: "Strategic Use of Low-Carbon Fuels").
[50] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (a state law violates the Dormant Commerce Clause if its burden on interstate commerce exceeds any local benefits).

will ensure consistent agency application for all types of facilities and infrastructure development and ample notice for potential permit applicants.

Such a threshold should be based on a "net" emissions analysis that takes into account any potential displacement of emissions or emissions sources resulting from a project. For example, many natural gas infrastructure projects support natural gas-fired electric power generation that provides "firming" support to intermittent wind or solar generation, thereby making it possible to expand generation from such resources. In addition, some projects make it possible to displace carbon-intensive uses of fuel oil with natural gas, resulting in a reduction in GHG emissions. Such a threshold would also eliminate the sweeping and arbitrary authority of DEC to "require an applicant to submit a CLCPA analysis *regardless of the applicability* stated" in Section V.A. of DAR-21 and would create more certainty around DEC's permitting process.

Furthermore, to the extent that the DEC considers upstream or downstream emission impacts from a proposed project, it should limit the analysis to impacts that are reasonably foreseeable and caused by the project. The Department should recognize, in the case of natural gas infrastructure projects, it is often not known in advance whether a pipeline project will be utilized to support existing production levels or will drive increased overall production levels, or precisely where a producer's natural gas development will occur. This is particularly true in New York, since most of the low-cost natural gas supplied in or transported through the state is produced out of state, by a host of producers within Appalachia. Such uncertainty should be taken into account in a calculation of emission impacts from a proposed pipeline project.

Though the DEC may request measurement of downstream emissions that are reasonably foreseeable and caused by a project, it should acknowledge that such emissions are not relevant to attainment of the statewide emission limits. The only out-of-state emissions relevant to the statewide emission limits are those attributable to production of electricity or fossil fuels *imported into* the state.[51] Therefore, in connection with Section 7(2) consistency analysis, a natural gas project's downstream out-of-state emissions do not provide a basis for rejection of a permit request or imposition of mitigation requirements.

In addition, the guidance would benefit from greater clarity on the scope of "indirect" emissions subject to analysis. We urge the Department to provide illustrative examples. Also, the guidance does not address the risk of double-counting with respect to upstream and downstream emissions. For example, if a company were to make pipeline improvements in support of a proposed use(s) of gas downstream, the resulting upstream and downstream emissions would presumably be counted both by the pipeline company and by any end-user that applies for a permit.

### *F. The proposed CP-49 and DAR-21 policies appropriately recognize that a project may be justified to avoid environmental, economic, or social harm—including threats to the reliability or safety of existing systems.*

Section 7(2) provides that an agency may approve a proposed project that does not satisfy the CLCPA consistency analysis burden based on a "detailed statement of justification."

[51] *See* N.Y. ENV'T CONSERV. LAW § 75-0101(13) (definition of "statewide greenhouse gas emission limits").

In the first instance, we urge DEC to acknowledge that any permitting action related to a FERC-jurisdictional pipeline facility is *per se* justified because FERC has already determined, pursuant to the NGA, that the project is compelled by public convenience and necessity.

Even DEC appropriately acknowledges in DAR-21 that a permit for a new project or a permit renewal should be considered "justified" under Section 7(2) if it is "needed to improve or maintain the safety and reliability of existing systems."[52] To this end, DEC should also acknowledge that, in the context of pipeline facilities, these determinations are in the purview of *other* regulators, and the Department should defer to the judgments of those agencies. As discussed above, FERC has plenary authority under the NGA to determine the reliability needs of the interstate pipeline system. In the case of intrastate pipelines in New York, the New York Public Service Commission is the reliability regulator. For purposes of safety determinations, the federal Pipeline and Hazardous Materials Safety Administration has authority for both interstate and intrastate pipelines. Under these circumstances, it would be inappropriate for DEC, as an environmental regulator, to second-guess the determination of pipeline operators as to whether a given project maintains safety and reliability. These important decisions are made by pipeline operators taking into consideration various federal pipeline safety requirements and regulations, and their long-standing knowledge as to the details and specifications of their transmission systems.

### *G. Consideration of alternatives and mitigation for a FERC-regulated natural gas infrastructure project should take into account any NEPA analysis completed for the project and should follow a rule of reason.*

As discussed above, Section 7(2) provides that, where a project is deemed inconsistent with attainment of the statewide emission limits, the reviewing agency must provide a detailed statement of justification and identify alternative or mitigation.

In its policy for implementing this requirement, the Department should recognize that, for interstate natural gas projects, FERC already mandates identification of alternatives as part of required NEPA reviews. Such reviews reflect extensive analysis and consultation with affected communities. Accordingly, for such FERC-certified natural gas infrastructure projects, there is no need for a Section 7(2) analysis.[53]

In addition, with respect to mitigation, the Coalition urges the DEC to apply a rule of reason. If a project is deemed justified in order to avoid economic, environmental, and social harms, it should not then be rendered uneconomic by unreasonable mitigation obligations. CP-49 appears to direct agencies to require that a project mitigate 100 percent of the potential increase in emissions attributable to the project.[54] DAR-21 goes even farther. It calls for "at

[52] DAR-21, p. 6.
[53] Pipeline facility projects are only exempted from a NEPA review if their environmental impacts are so modest that FERC determines that a NEPA review is unnecessary. *See* 18 C.F.R.§ 380.4 (establishing certain categorical exclusions from NEPA reviews). It would not be reasonable for DEC to conclude under Section 7(2) that a project with such *de minimis* impacts could be inconsistent or interfere with statewide GHG emission limits.
[54] CP-49, p. 7.

least" 100 percent mitigation of not just the increase attributable to the project but to the facility's total potential-to-emit "wherever possible."[55] At most, mitigation should only apply to the net emissions increase directly attributable to a project.

## IV. Conclusion

We appreciate the opportunity to comment on proposed CP-49 and DAR-21. If you have any questions or need additional information about these comments or about the Coalition, please contact Michael Pincus, Van Ness Feldman, LLP, at mrp@vnf.com or (202) 298-1833.

**Members of the New York Reliable Energy Infrastructure Coalition**

| | |
|---|---|
| Algonquin Gas Transmission, L.L.C. | National Fuel Gas Supply Corporation |
| Eastern Gas Transmission and Storage, Inc. | TC Energy |
| Iroquois Pipeline Operating Company | Tennessee Gas Pipeline Company, L.L.C. |
| Millennium Pipeline Company, L.L.C. | Texas Eastern Transmission, LP |

[55] DAR-21, p. 6.

Part 621 Comment Letter L

# TOWN OF SMITHTOWN



**Department of Environment & Waterways**
DAVID A. BARNES, DIRECTOR
124 West Main Street
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VIA E-MAIL TO
comment.uparulemaking2022@dec.ny.gov

November 14, 2022

Mr. James J. Eldred
NYS DEC – Division of Environmental Permits
625 Broadway
Albany, NY 12233-1750

Re: Comments on Proposed Part 621
Uniform Procedures Act Regulations

Dear Mr. Eldred:

The Town of Smithtown has reviewed the proposed amendments to 6 NYCRR Part 621, Uniform Procedures Act Regulations, and offers the following comments for your consideration.

According to the State's summary of proposed amendments, the 2022 proposed changes are based on DEC's experience with implementing the UPA regulations since 2006, as well as recent legislative changes to the UPA. The summary states, "the proposed rule would implement the Climate Leadership and Community Protection Act (CLCPA; Laws of 2019, Chapter 106, as codified in ECL Article 75), including consideration of environmental justice within the context of CLCPA, and requirements for consideration of climate change (e.g., sea level rise and flooding) consistent with the Community Risk and Resiliency Act (Laws of 2014, Chapter 355, as amended by Laws of 2019, Chapter 6, Section 9)."

Some of the recommended changes to §621.4 appear to be in direct conflict with the intent of the CRRA, in that they classify projects known to or anticipated to increase threats of erosion or flooding as "minor" projects[1]. For instance, the proposed amendments would now categorize the construction of residential structures and accessory structures, as well as the clearcutting of vegetation, adjacent to freshwater wetlands as minor projects. Such projects have the potential not only to directly impact these wetlands, but also to encourage further encroachment on the wetland as well as place the structures at risk of flooding. Given the importance that wetlands play in protecting communities from impacts of climate change, and

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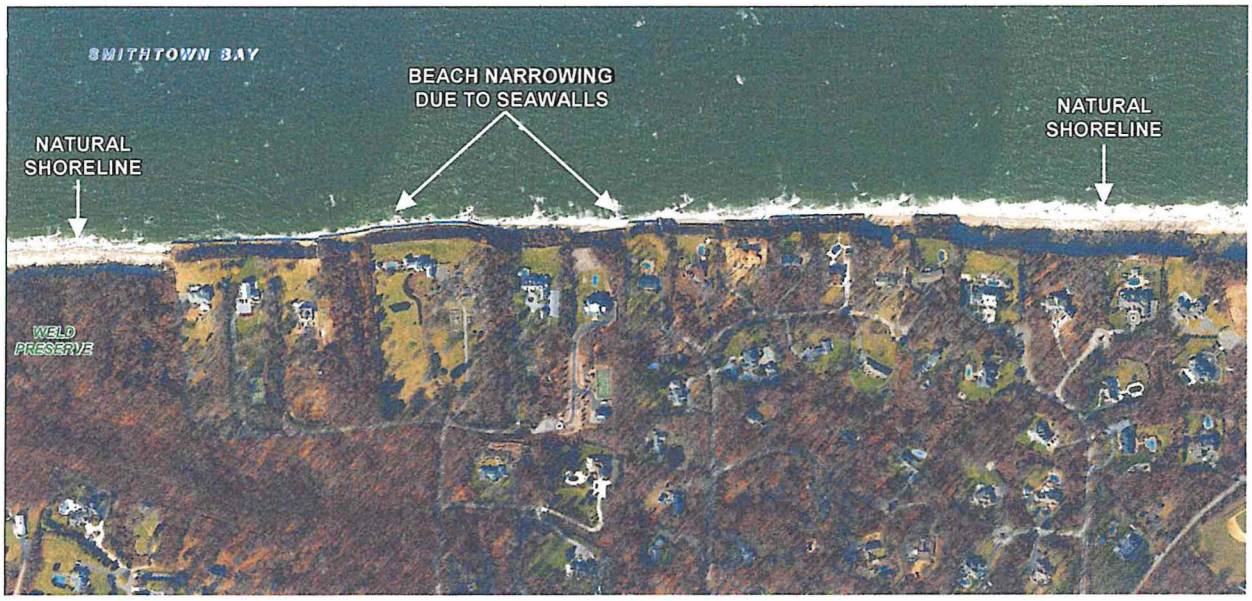
[1] ECL 70-0105 (3) defines a minor project as one, "which by its nature and with respect to its location will not have a significant impact on the environment. [ECL 70-0105 (3)]." This differs from a major project, which requires public notice of the application.

the State's mandate to protect residential property from flooding, it seems that such relaxations in review standards could have a potentially significant impact on the environment. 1

As another example, the proposed amendments would now categorize shoreline stabilization structures of less than 500 linear feet (*§621.4(a)(4)(ii)*) as minor[2]. However, the State's own guidance document, prepared pursuant to the CRRA, states in its findings, "Structural erosion-management, flood-mitigation and stormwater-management strategies that do not rely on or mimic natural systems are often only partially effective over time, may be harmful to adjacent or nearby properties and can compromise the function of natural features and processes that reduce risk."[3] In addition to the CRRA guidance, the State's Coastal Management Program and Long Island Sound Coastal Management Program contain policies that discourage the use of structural erosion control measures. The Town of Smithtown has experienced significant loss of the public foreshore as well as damage to adjoining properties because of erosion control structures, even those that are significantly smaller than the State's proposed threshold (see photos below). 2

The proposed amendments to §621.4 (*§621.4(c)(2)*) also reclassify residential subdivisions as large as ten lots as minor projects for the Wild, Scenic and Recreational Rivers program. This is a five-fold increase above the current threshold of "not more than two lots." Furthermore, the proximity of such projects to a wild, scenic or recreational river often means that there could be potential impacts to significant fish and wildlife habitat, historic structures, or archeologically significant areas. 3




[2] The proposed amendments to Coastal erosion management permits would classify the construction or modification of erosion protection structures up to 200 linear feet as minor (*§621.4(o)(3)*). This is different from the changes to the navigable waters permit program, but still conflicts with the intent of the CRRA and has the potential to impact the public foreshore and adjacent private property.

[3] (NYSDEC and NYSDOS. *Using Natural Measures to Reduce the Risk of Flooding and Erosion*. 2020)

As written, the proposed amendments to §621.4(h)(2)(ii) and (iii) would appear to allow multiple sequential lateral and vertical expansions of an existing mine to be considered as minor projects. It is our recommendation that the proposed language be clarified to allow only one such expansion of each type as a minor project, with subsequent expansions subjected to full review procedures. 4

We have identified several concerns regarding the proposed amendments to §621.4(i)(2), "Minor freshwater wetlands projects", as follows:

As written, paragraph (ii) would allow a twenty-fold increase in disturbance of ground surface. While some increase may be justifiable, the extent of this proposed increase appears excessive; 5

As written, paragraph (viii) would consider dredging "at least once every ten years" to be a minor project. Should this language be "not more than once every ten years"? 6

As written, paragraph (xi) would allow a doubling in the size of a dock, pier, wharf, or similar structure. Due to the multiple known impacts associated with such structures, we would recommend against any increase in size; 7

As written, paragraph (xv) would allow clear cutting of "other vegetation" in adjacent areas to a wetland. Due to the erosion control, shoreline stabilization, wildlife habitat, and 8

pollutant filtering benefits of such vegetation we would recommend against the proposed change; 8

As written, paragraph (xix) would allow disturbance of up to 0.1 acres of wetland for farm ponds. Due to the multiple ecological benefits of wetlands we would recommend against the proposed change; and 9

As written, paragraph (xxi) would allow the construction of "a non-residential structure in the adjacent area of a wetland", absent any required setbacks or size limitations. The lack of such setback and size requirements is of great concern, as is the term "non-residential." If this term is either a typographical error (the existing paragraph prohibits non-commercial structures) or is intended to mean a non-habitable residential structure, then the proposed use would appear to be acceptable with appropriate setback and size requirements. However, the term "non-residential structure" is customarily interpreted as either a commercial or industrial structure, neither of which would be appropriate in the adjacent area of a wetland. We recommend that this paragraph be revised accordingly. 10

As written, the proposed amendments to §621.4(o)(3) would allow substantial increases in the allowable areas of excavation, grading, mining, filling and dredging and in the linear extent of erosion protection structures. Of greatest concern is the proposed new provision which would allow "vertical modification of a structure" with no limitations upon the new height of the structure. The absence of such regulations can be expected to result in adverse visual impacts and degradation of community character and aesthetics. 11

Similar to our comment regarding §621.4(h)(2)(ii) and (iii), §621.4(r)(1) should state that it is limited to a one-time expansion of 10% or less, with subsequent expansions not being considered as minor projects. 12

If you would like to discuss any of these concerns in greater detail, please feel free to contact me. Thank you for your consideration in this matter.

Howard Barton 3rd, Assistant Director
for David A. Barnes,
Environmental Protection Director

HB:hb

cc: David A. Barnes, Environmental Protection Director
Peter Hans, Planning Director
Allyson Murray, Principal Planner
Matthew V. Jakubowski, Town Attorney
Jennifer Juengst, Assistant Town Attorney

Summary of Assessment of Public Comments

The New York State Department of Environmental Conservation ("DEC") has prepared an assessment of public comments to address the comments that were received on the proposed revisions to 6 NYCRR Part 621 ("Part 621"), Uniform Procedures and conforming changes to 6 NYCRR Part 421, Mined Land Reclamation Permits, and 6 NYCRR Part 601, Water Withdrawal Permitting.

The proposed revisions to the regulations were published for public review and comment in the Environmental Notice Bulletin (ENB) on August 17, 2022 and in the State Register on August 17, 2022, Vol. XLIV, Issue 33. The original comment deadline announced in the notice was October 28, 2022, which was extended to November 14, 2022, providing 89 days for the public to comment. In addition, virtual hearings on the proposed rule making were held at 2:00 p.m. and at 6:00 p.m. on October 20, 2022.

There were 12 written comment letters submitted (see list below). The letters received were from various government and industry parties. No individuals made verbal comments at either hearing. The assessment of public comments addresses the comments received and includes an appendix that contains copies of the comments received.

No comments were received related to conforming changes proposed to Parts 421 and 601. Most of the comments received primarily focused on three topics related to the proposed changes to Part 621:

- Incorporation of requirements for complete applications related to the Climate Leadership and Community Protection Act (CLCPA), environmental justice (EJ), and the Community Risk and Resiliency Act (CRRA) (621.3);
- designation of additional minor project categories (621.4); and
- suspensions of applications for enforcement actions occurring beyond the facility or site that is the subject of the application (621.3).

Most of the comments on incorporating CLPA, EJ, and CRRA information for complete applications stated that the provisions were not specific enough and should not be included in the

rule until regulations under each of the statutes were adopted. One commenter also expressed concerns about the lack of specificity, but instead recommended that additional requirements be included in the proposed rule. As explained in the assessment of public comments, DEC is retaining the provisions in the rule, as proposed, recognizing both that the controlling statutes already provide DEC authority to obtain information related to each and that further Part 621 rule making may be necessary to reflect other future regulations that may be adopted. No changes were made to the rule in response to the comments, except to clarify that when an enhanced public participation plan is required, it must be implemented for a complete application.

Comments on the designation of additional minor categories mostly expressed concern that projects falling within minor threshold designations would undergo a lower level of review. As explained in the assessment of public comments, the designation of major and minor projects under Part 621 primarily affects 1) whether an application is subject to public notice and 2) the review time frames for final decisions. Most importantly, the designations do not change the underlying permit issuance standards and, in that regard, the same level of review is undertaken by DEC for both major and minor permit applications. DEC maintains its existing discretion to treat minor projects as major projects if circumstances warrant it. The majority of additional minor designations were retained as proposed, but a few were revised to provide minor clarifications.

A few commentors expressed concern that DEC was expanding its ability to suspend the processing of applications for enforcement actions commenced at facilities or sites not the subject of the applications. As explained in the assessment of public comments, the rule revision aligns with DEC's existing "Record of Compliance Enforcement Policy (DEE-16) and court decisions. In response to comments, DEC made a revision clarifying that the suspension of application processing was limited to enforcement actions at facilities or sites within New York State.

List of comment letters received:

| Date | Commenter |
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| Oct. 25, 2022 | Natural Areas Conservancy |
| Oct. 26, 2022 | Cricket Valley Energy Center |
| Oct. 27, 2022 | Genesee County Industrial Development Agency |
| Oct. 27, 2022 | Greater Rochester Enterprise |
| Nov. 13, 2022 | DEEDX, PLLC |
| Nov. 14, 2022 | The Assembly State of New York, Englebright and Quart |
| Nov. 14, 2022 | Environmental Energy Alliance of New York |
| Nov. 14, 2022 | Independent Power Producers of New York |
| Nov. 14, 2022 | New York Construction Materials Association |
| Nov. 14, 2022 | New York Reliable Energy Infrastructure Coalition |
| Nov. 14, 2022 | The City of New York Law Department |
| Nov. 14, 2022 | Town of Smithtown (Suffolk County) |

For the full text of the Assessment of Public Comments and related rule making documents, please see https://www.dec.ny.gov/regulations/125853.html .