APPENDIX

COMMENT LETTER BY THE ENVIRONMENTAL & ENERGY LAW SECTION OF THE NEW YORK STATE BAR ASSOCIATION

In addition to the general comments in the accompanying Comment Letter, the Section hereby submits the following comments, questions, and suggested language revisions for the Department's consideration:

DEP 23-1 / Permitting and Disadvantaged Communities under the Climate Leadership and Community Protection Act

[Sections I through IV are intentionally omitted as no comments are submitted.]

V. PROCEDURE

1. Applicability.

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

> ***Comments:***
> *This policy should define "direct vs. indirect" emissions and describe how indirect GHG emissions associated with the purchase of remotely generated electricity, steam, heat, or cooling (that could even be out-of-state) are to be translated into hyper-local impacts on specific communities.*
>
> *Part 621.4 defines by regulation the "requirements for specific permit applications." If this guidance is intended to modify those duly promulgated rules, it is in effect a regulation and should be subject to public notice and comment.*
>
> *Part 621.6 establishes the Department's options when an application is submitted. If this guidance changes that procedure, it is in effect a regulation and should be subject to public notice and comment.*
>
> ***Question:***
> *Does the Department intend to revise permit applications and SEQRA forms to include these requirements?*

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

Questions:
Does the Policy apply to "pending permit applications" only under the listed Articles of the ECL (15, 19, 23 and 27), or to all pending permit applications? If the latter, only to major permits?

Does the Policy apply to "modifications or renewals to existing permits" even if those existing permits do not relate to GHG emissions?

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

- projects involving construction of energy production, generation, transmission, or storage facilities;
- projects with sources and activities that may result in GHG emissions or co- pollutants, directly or indirectly; and
- non UPA facility registrations, that fall under any applicable permit type listed in V.1.a of this policy, where DEC determines an analysis is necessary or appropriate to ensure CLCPA consistency such as projects with significant GHG or co-pollutant emissions.

Comments:
This policy should define "directly or indirectly" specifying the reference or parameters as it relates to GHG emissions or co-pollutants.

This policy should define "co-pollutants."

As drafted, the language in this Section implies that all energy projects - even those that do not generate GHG emissions - may be covered. This could significantly delay some renewable energy projects.

The third bullet point in this Section ("non UPA facility registrations") should be listed as its own separate Subsection 1.c. as it relates to a different category of permits.

2. Determining Scope of Covered Projects

DEC staff may require an applicant to ensure the requirements of Section 7(3) are met and prioritize emission reductions in the impacted disadvantaged communities, as required by CLCPA Section 7(3). Projects subject to this policy include sources and activities of a continuing nature associated with any new emission sources, permit renewals, or permit modifications that would result in actual increases of GHG and co-pollutants. This includes emissions from stationary and mobile sources directly related to and essential to the proposed action, and those from existing equipment or facilities. Essential operating functions are those functions critical to the operation of a facility or project without which the facility could not operate.

Comments:
The Policy should expressly state if it is intended to apply to mobile sources (i.e., cars and trucks) that are generated by a new facility siting that would require wetlands, stream or stormwater permits.

As drafted, the language in this Section is ambiguous and provides no specific guidance to DEC staff as to the "scope of covered projects." It is suggested, for instance, to incorporate by reference the USEPA guidelines as to Scope 1 and Scope 2 GHG emissions to offer clarity and assurance to the applicants as to which projects are covered.

Suggested language revision:
"This includes emissions from stationary and mobile sources directly related to and constituting essential operating functions of the proposed action, and those from existing equipment or facilities. Essential operating functions are those functions critical to the operation of a facility or project without which the facility could not operate."

3. Preliminary Screening

a. Upon receipt of a permit application subject to this policy, Environmental Permits staff will conduct a preliminary screen to identify whether the proposed action is a covered project and is in, or likely to affect, a disadvantaged community (e.g., where the permit involves a facility that is not located in the disadvantaged community but involves off-site GHG or co-pollutant impacts within a disadvantaged community in close proximity to the proposed action). DEP may request that the applicant provide additional information to indicate whether the project is located in, or likely to affect, a disadvantaged community.

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

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

[Subsections "d" and "e" are intentionally omitted as no comments are submitted.]

Comments:
This Section should define "close proximity," "off-site impacts," "indirect GHG emissions" and how and when an "affected area" is determined.

To the extent that modeling is required, the Policy should reference and/or define the acceptable models and techniques.

As drafted, the language implies that the purpose of the "spatial data" is to identify the location of disadvantaged communities rather than to to determine whether the proposed action or project is likely to affect a disadvantaged community.

Questions:
Can an applicant seek to challenge this preliminary determination - if so, what is the process? If not, is it an appealable final determination?

Is there recourse for permit denial (i.e., re-application or supplemental submission)? If so, what is the process and timeline?

How are the "areas reasonably expected to experience off-site impacts" to be determined?

Can indirect GHG emissions at a remote location become an "affected area" covered under this Policy? Or does the affected area have to be contiguous or adjacent to the facility for which the permit or action is being sought?

Suggested language revision:

a. *Upon receipt of a permit application subject to this policy, Environmental Permits staff[4] will conduct a preliminary screen to identify whether the proposed action is a covered project and whether there is a disadvantaged community within the affected area of the proposed action. The affected area of the proposed action includes the facility itself and areas reasonably expected to experience off-site impacts from GHGs and co-pollutants associated with operation of the facility. Off-site impacts are those that a proposed action may have at a distance from the site based upon modeling. For example, a natural gas fired power plant may impact the air quality of an adjacent or nearby disadvantaged community.*

b. *DEP may request that the applicant provide additional information to indicate whether there is a disadvantaged community within the affected area of the proposed project.*

c. *Spatial data[5] will be used to determine whether there are any disadvantaged communities within the affected area of the proposed action.*

[No suggested revisions as to existing Subsections "c" through "e"]

4. Determination of Disproportionate Burden and Project Design Measures

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

The disproportionate burden report will identify and address disproportionate burdens on the disadvantaged community. As part of a disproportionate burden report, an applicant may propose conditions on the project that would serve to address any disproportionate burden by prioritizing reduction of emissions in that community. Likewise, the Department may impose conditions on the project or other measures that would serve to address any disproportionate burden in that community, including through the Department's obligation in Section 7(3) to prioritize reductions in GHGs and co-pollutants in disadvantaged communities. Any such project conditions or other measures proposed by an applicant or imposed by the Department, along with any input from members of the community regarding the proposed project, may be considered in the ultimate determination of whether the project imposes a disproportionate burden on disadvantaged communities.

Comments:

This Section should define the specific parameters and threshold that would trigger the requirement to submit a disproportionate burden report. As drafted, the language implies virtually all applicants will likely be required to do so.

The Section should specify the data (quantitative v. qualitative) that is required to be reported by the applicant along with the disproportionate burden report and what specific geographic footprint is to be considered.

The Section should also specify the requirements by each specific project category and size of operations (air quality v. waste management), as the applicable data will vary significantly.

The Section should define the intended meaning of "address any disproportionate burden" to clarify as to whether it requires eliminating, minimizing or mitigating GHG emissions. Per the language in Section 6.b. it appears that "address" is intended to mean providing "equivalent reductions."

Questions:

Do these requirements supplant the co-pollutant analysis that the Department has been requiring as part of the CLCPA analysis for those projects located within disadvantaged communities?

In practice, are there limitations or other guidelines for what "conditions" could be imposed?

Does "input from members of the community regarding the proposed project" have a different meaning from "public comments on the application" under 6 NYCRR 621.3(a)(3) and/or CP-29?

How will the Department use "project conditions or other measures proposed by an applicant or imposed by the Department, along with any input from members of

the community" to make "the ultimate determination of whether the project imposes a disproportionate burden on disadvantaged communities"?

5. Enhanced Public Participation

Comment:
This Section should clarify whether the applicant should follow the requirements under 6 NYCRR 621.3(a)(3) or CP-29 for a Public Participation Plan.

6. Guidance to Permit Applicants

Where an action likely to affect a disadvantaged community is identified by the preliminary screen, Environmental Permits staff will provide notice to the applicant of the information required to satisfy the requirements of Section 7(3). This may include notice that the applicant's project falls within or is likely to affect a disadvantaged community, guidance to comply with CP-29, and any other information relevant to the proposed action in preparing a disproportionate burden report.

Comments:
The Section should clarify if an applicant should wait for the results of the preliminary screen to prepare and submit the disproportionate burden report in instances when the applicant knows that the project is located within a DAC or submit the report concurrently with the permit application (similar to the current process under DAR-21).

Questions:
When will applicants receive the notice and how does the notice impact the review and processing of the application?

Are the completeness times in 6 NYCRR 621.6 suspended or extended? If so, will those rules be modified? Or will the application be automatically incomplete until the screening is conducted.

a. Disproportionate Burden Report

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

Comments:
The Policy should reconcile the typical situation where an application is made to a local government prior to a DEC regional permit office. For the vast majority of SEQRA actions, a local government is the first involved agency to receive an application and ultimately serves as SEQRA lead agency.

DEC Regional offices should be instructed to provide the local agency with notice of the need for a disproportionate burden report and to stay the determination of significance, pending submission of the disproportionate burden report.

DEC regional offices must be ready to assume the lead agency role since the Department's statutory obligation under CLCPA Section 7(3) mandates specific actions independent of SEQRA findings.

The Policy should take into consideration the precedent under Matter of Roman Catholic Diocese of Albany v. New York State Dept of Health, 66 NY2d 948, 951 (1985): "[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" must be treated as a rule and undergo SAPA notice and comment rulemaking.

b. Project Design Considerations

Where a proposed project results in a determination of disproportionate burden on a disadvantaged community, the disproportionate burden report must include project design measures that ensure that the project will not disproportionately burden the disadvantaged community. The availability of the disproportionate burden report will be an element of completeness under UPA.

Suggested language revision:
"Where it is determined that a proposed project will result in a disproportionate burden on a disadvantaged community…"

Comment:
The Section should acknowledge that under these circumstances, a SEQRA positive declaration would be warranted.

Questions:
Must all project design measures take place within the proposed project area? For example, could an applicant propose "physical mitigation, such as the planting and upkeep of trees" outside the project area to offset total GHG emissions?

Do these "project design considerations" apply equally to permit renewals and permit for proposed new activities?

Can applicants propose a schedule to implement the design considerations as design measures cannot be incorporated into existing projects in the same way that they can for proposed new activities?

c. Public Review and Comment

Comment:
This paragraph should reflect the circumstances where the Department is the lead agency and a DEIS/FEIS has been prepared. It should also reflect the circumstances where the Department is an involved agency.