

**New York State Bar Association
Environmental & Energy Law Section**

**Comments on the Draft Scoping Plan Prepared by
the New York State Climate Action Council**

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Introduction

These comments on the draft scoping document released for public comment by the Climate Action Council (“CAC”) under the Climate Leadership and Community Protection Act (“CLCPA”) on January 1, 2022 (the “Draft Scoping Plan,” the “draft plan” or “DSP”) are submitted on behalf of the Environmental and Energy Law Section (the “Section”) of the New York State Bar Association.¹ The Section is comprised of more than 940 lawyers practicing in the area of environmental and energy law, many of whom are recognized leaders in their fields of practice.

The Section commends the CAC for its diligence in producing the Draft Scoping Plan in the short period required by the CLCPA. The DSP is an important first step toward the roadmap needed to decarbonize the economy of the State of New York over the next three decades. The DSP identifies a host of strategies to reduce emissions from each of the sectors contributing to the carbon load in our State and provides a thoughtful discussion of the benefits that could be achieved through those strategies. However, we believe it important that the final version of the scoping plan focus in greater detail on the specifics of New York’s emissions sources, the feasibility of implementing the preferred mitigation strategies in view of their very substantial costs and complexity, the likelihood of public opposition if those costs are not allocated equitably (or assumed by the state or federal government) and the lengthy periods likely required to permit the decarbonization of New York’s economy.

The Section has many comments on the Draft Scoping Plan, which are set forth below. We are providing these comments recognizing how important it is for New York State – a jurisdiction with enormous legal, technical, and economic resources - to succeed in meeting the goals of the CLCPA, and to do so while maintaining a vibrant and growing economy. We hope that our comments will contribute to the success of this critical effort.

¹ We note that in providing these comments, the Section is not providing legal advice to the State or any of its agencies or creating an attorney-client relationship. The views expressed herein have been approved by the Executive Committee of the Section as a whole and they are not necessarily shared by the individual members of the Section or its Executive Committee, or any of their employers.

General Comments

The strategies set forth in the Draft Scoping Plan touch on virtually every aspect of New York's economy. However, due in large measure to its remarkable breadth the document does not assess in depth the viability of many of the strategies it identifies. For example, the draft plan states that "single family homes and other low-rise residential buildings ... are relatively straightforward to ... convert to zero emissions heating and hot water systems," DSP at 127. On this basis, it envisions that 1-2 million homes would be electrified through the installation of air heat pumps by 2030, with heat pump technology thereafter being installed at the rate of a quarter million homes each year for the next several decades. Equally ambitious goals have been set for the transportation sector. The draft plan envisions that 3 million light duty vehicles on the roads in New York will be electric by 2030, and that virtually all of New York's light-, medium- and heavy-duty vehicles will be zero-emission by 2050.

The Section cautions the CAC not to underestimate the challenges the State may face in implementing the many actions and programs needed to achieve the long-term goals of the draft plan. In light of the dramatic nature of the changes contemplated, it is likely that the State will confront significant legal, political and financial headwinds in seeking to implement the necessary actions and programs. The final scoping plan should be considerably more detailed in its identification and discussion of such issues in order to guide the New York State Department of Environmental Conservation ("NYSDEC") and other state agencies in developing legally defensible, politically sustainable, economically responsible and environmentally effective GHG reduction programs.

These issues include the financing of the proposed changes, the financing of the additional governmental staff and resources needed to implement the draft plan, the administrative complexities associated with the multi-jurisdictional nature of many of the suggestions, including the additional staff at each of the involved agencies and the interrelationship of these goals with existing regulatory requirements, such as those required under the State Environmental Quality Review Act ("SEQRA").

Many members of the New York State Bar have been grappling with the legal issues associated with achieving GHG emission reductions through their participation in the Legal Pathways to Deep Decarbonization initiative launched by the Sabin Center for Climate Law at Columbia Law School (the "LPDD Initiative"). Thus far, lawyers in more than 30 firms working under the LPDD Initiative have produced approximately 50 model federal, state and local laws, executive orders and other

legal documents to implement a wide range of strategies to reduce emissions in the sectors addressed by the Draft Scoping Plan. The Section suggests that the CAC and involved state agencies draw on this resource in their implementation of the CLCPA. The LPDD documents (some of which are more particularly cited in the following sections of these comments) can be found at <https://lpdd.org/model-laws/> (the “LPDD website”).

The Section concurs that “engagement from all New Yorkers” will be needed if the CLCPA is to achieve its goals. DSP at 28. The statewide decarbonization effort must have the unwavering support of the public because the work under the CLCPA must advance continuously over the course of decades. Thus far, climate action has not been a partisan issue in our State, but long-term political support cannot be assumed in light of the dramatic and potentially controversial transformation called for by the Draft Scoping Plan. For this reason, the Section is concerned that, according to the draft plan, the public is not generally aware of the CLCPA or the State’s plans for addressing climate change. DSP at 141. Scattered throughout the Draft Scoping Plan are statements noting the need for campaigns to inform the public of the climate problem, but merely acknowledging the issue is not enough. It is essential that a well-funded and cohesive public information initiative be implemented to assure that the public is kept abreast of the evolving climate crisis, the contribution the State is making to address it, and the critical importance of maintaining continuous progress over the years in doing so. Moreover, the public engagement should be a two-way street, not simply a presentation of the State’s plans and what they mean for each community or interest group. The CAC and each of the State’s responsible agencies can learn much from the public about the wisdom and feasibility of individual plan components, especially as the final scoping plan is adjusted over time to reflect new information about technical advances, available resources and progress toward CLCPA’s goals.

This public information campaign should go hand in hand with a *second* campaign designed to exchange information with other jurisdictions regarding New York’s experience in reducing carbon emissions. The Draft Scoping Plan correctly notes that New York’s work under the CLCPA can serve as a model for decarbonization efforts elsewhere. DSP at 21. But one state’s emission reductions will be of little value in addressing the climate crisis if the rest of the country – and the world – does not follow suit. Accordingly, New York’s leadership on climate change should be characterized by *active collaboration* rather than quiet example. Through the U.S. Climate Alliance and other organizations, the State should engage closely with other jurisdictions, exchanging on a regular basis detailed information with respect to New York’s progress and

problems in decarbonizing, and learning from other states' successes and failures. These lessons too should be shared with the public.

The Draft Scoping Plan is replete with recommendations for financial assistance programs that will cost the State enormous sums of money. If public support for the decarbonization effort is to be garnered and maintained, it is critical that such assistance be made widely available. The draft plan floats a number of ideas as to where such funding could come from but does not examine the viability or effectiveness of such ideas in any depth. It is of the utmost importance that the State draw on the considerable expertise, capital, and intellectual resources of New York's financial industry to come up with practical and economically responsible programs to raise and allocate the vast sums that will be needed to achieve the goals of the CLCPA. Moreover, the State should assure that the incentives it provides are readily accessible. Currently, State energy efficiency, renewable energy and alternative fuel vehicle incentives are provided through a multiplicity of state agencies and authorities, utilities, and other entities under a wide array of programs. Rather than simply adding more branded programs to this dizzying array of incentives, the State should focus on creating a rationalized incentives process that will allow the public, including in particular Disadvantaged Communities, to tap into funding with a minimum of red tape. The programs of the New York State Environmental Facilities Corporation provide a resource for these needed financings. The final scoping plan should also make clear which mitigation strategies will need to be curtailed if the required funding is not available and how that curtailment would affect the State's ability to meet the CLCPA's statutory objectives.

Set forth below are the Section's more detailed comments on the Draft Scoping Plan.

Consistency Mandate of the CLCPA

Section 7(2) of the CLCPA requires state entities to consider whether their decisions are inconsistent with or will interfere with attainment of the statewide emission limits adopted under the statute, and if so, explain why the decision should be made anyway. This is a powerful and extremely consequential provision, but it is also very vague. The Draft Scoping Plan provides little guidance for agencies to follow in complying with this mandate – it states only that “[u]ntil such time as the final scoping plan is adopted ... agencies will ensure compliance ... by reviewing a decision’s consistency with the statewide GHG limits” established by NYSDEC. (p. 153). By its terms the vaguely worded mandate under Section 7(2) is immediately binding on state agencies. Accordingly, it is critical that guidance or regulations subject to public comment be issued promptly on how state agencies are to assess the consistency of their actions with the CLCPA limits and whether that assessment should be set forth in formal findings, internal memos, board resolutions or in some other manner. The Section commends NYSDEC for issuing draft CP-49 to guide its own actions in complying with CLCPA Section 7(2) and looks forward to the finalization of that guidance now that the public comment period has closed. However, the State should issue more broadly applicable guidance for state agencies as soon as possible. Resolution of this issue should not await completion of the final scoping plan or a decision in a court challenge to an agency decision that does not adequately reflect the required consideration. Confusion and conflict will arise with other governmental entities if the State does not issue more broadly applicable guidance for state agencies as soon as possible.

Chapters 6 and 7 Environmental Justice and Just Transition

Overall, the draft plan provides a thorough description of the steps the CAC is contemplating to implement the mandates of the CLCPA with respect to Disadvantaged Communities and Just Transition. Our comments, which relate to specific provisions of the draft plan, are set forth below.

Disadvantaged Communities

- Section 6.1 (p. 32): The last sentence of the second paragraph of this subsection recognizes “that women, femmes, youth, and children are more vulnerable to the climate crisis and acknowledges the need to specifically provide support and opportunities to these populations who are disproportionately impacted by the climate crisis.” (Emphasis added). The CAC should recognize that there is evidence that the *elderly* are also more vulnerable to the climate crisis, with increased risks of death from heat exhaustion, among other issues. The Draft Scoping Plan should be revised to include the elderly in this list.
- Section 6.1 (p. 34): In the sub-subsection titled “Direct Benefits to Disadvantaged Communities,” the first sentence of the second paragraph indicates that “State agencies, in consultation with the CJWG and other relevant stakeholders, are developing a methodology for defining these benefits.” The Draft Scoping Plan should provide an estimated date for when such a methodology would be made available for public review and comment, as it will significantly impact how benefits to Disadvantaged Communities are administered and distributed under the CLCPA.
- Section 6.1 (p. 36): In the sub-subsection titled Community Air Monitoring in Disadvantaged Communities, the last sentence of the paragraph indicates “DEC will use the strategy to design community emissions reduction programs in Disadvantaged Communities.” The CAC should consider adding language in this section regarding an annual review process to evaluate the effectiveness of NYSDEC strategies to reduce emissions in Disadvantaged Communities, and there should be some accountability component to this Community Air Monitoring program. With the best of intentions, some state programs in the past have turned out to be ineffective, and part of the problem has been the failure to assess the effectiveness of programs in a systematic way. Additionally, will the State commit to a heightened enforcement program for stationary emissions sources in Disadvantaged Communities? What about mobile sources that contribute significant emissions to specific Disadvantaged Communities?
- Section 6.4 (p. 39): The third bullet point indicates that “[z]ero-emission and low-emission transportation options” are factors to be considered with respect to “barriers to and

opportunities for access to and/or community ownership of several services and commodities in Disadvantaged Communities.” The CAC should consider the development and implementation of an aggressive program for the installation of publicly available electric vehicle (EV) charging infrastructure in Disadvantaged Communities, since opportunities for the installation of residence-based charging stations may be more limited in those communities, as compared to other areas of the State where single-family homes predominate. The final scoping plan should also include programs that provide for significant investments in rebates and grants for EVs to individuals residing in Disadvantaged Communities, especially where transit options are limited.

Just Transition

- Section 7.2 (p. 43): In the sub-subsection titled Direct Displaced Worker Support, the third sentence of the first paragraph provides a list of different programs the State will advance to directly support displaced workers. This list includes “establishing continuing education, Registered Apprenticeships, certifications, [etc.]” In addition to these programs, the CAC should consider the fiscal and other implications of creating a fund that provides direct financial support to displaced workers and to communities that rely on fossil-fuel dependent industries across the State. Financial support can be in the form of wage replacement and pension/retirement support for impacted individuals, and direct funding to support lost tax base to local governments and school districts impacted by displaced workers.
- Section 7.2 (p. 43): In the sub-subsection titled Direct Displaced Worker Support, the third sentence of the second paragraph provides a list of measures to support displaced fossil fuel workers. This list includes “securing wage support and setting aside a fund for on-the-job training, providing resume writing support and career coaching, and hosting job fairs with relevant clean energy employers, while also leveraging opportunities at dual-commodity utilities.” The CAC should put some emphasis on providing grants, scholarships and zero-interest educational loans for to-be displaced workers who wish to obtain initial or additional degrees from higher education institutions or trade schools to better prepare themselves for the clean energy economy. The State could use this type of initiative to help uplift certain classes of individuals who have explored combining their technical/trade skills with other areas of expertise.
- Section 7.2 (p. 44): In the sub-subsection titled Evaluation of Labor Standards, the first sentence of the paragraph notes “[a]s New York continues to work toward the Climate Act

mandates and the overall energy landscape changes, labor standards should be further evaluated and enhanced to promote family sustaining wages and comprehensive benefits...” Instead of just aspiring to evaluate and enhance labor standards, the final scoping plan should actually establish specific policies requiring prevailing wage and benefits, project labor agreements, benchmarks for local hires, and encouraging Community Benefits Agreements for projects using state funds or taking place on state-owned property.

- Section 7.2 (p. 44): Sub-section titled “Targeted Financial Support for Businesses”. The CAC should consider adding language to this section that highlights accountability for businesses that obtain financial support from the State for the referenced programs, but do not actually use the funds as intended. Businesses should not be rewarded simply for having the intent to support the New York workforce.
- Section 7.2 (p. 45): Sub-section titled “Training Curriculum and Programs”. The final scoping plan should include programs that go beyond those now referenced in this sub-section, to provide individuals living in Disadvantaged Communities with the opportunity to pursue careers with advanced degrees (e.g., Masters, Juris Doctor) and certifications (e.g., Professional Geologist), and with assistance in finding jobs in the Clean Energy economy. The State should work with institutions of higher education, like CUNY and SUNY, to provide these opportunities for qualified candidates, since the Clean Energy sector will need environmental and energy professionals, and some individuals from Disadvantaged Communities may not have the financial resources to attend institutions for advanced degrees.

Chapter 11 Transportation

In general, the Draft Scoping Plan presents a well-considered approach to achieving GHG emission reductions from the transportation sector. It appropriately focuses much of its attention on facilitating the ongoing shift from vehicles powered by internal combustion engines to electric vehicles (“EVs”) and those powered by hydrogen fuel cells (“HFCVs”). As noted above, the draft plan envisions 3 million light duty EVs on the road in New York by 2030, and virtually all of the State’s 9 million-vehicle light duty fleet making the transition by 2050. It further anticipates that a “large majority” of medium and heavy duty-vehicles will be zero emission by 2050. DSP at 97. However, the Draft Scoping Plan offers virtually no detail as to the measures the State intends to implement to deploy the vast infrastructure needed to support this sea change in New York’s motor vehicle fleet. With virtually no elaboration, the Draft Scoping Plan aspires to “quickly” install the infrastructure needed to service light-duty EVs, DSP at 104, and indicates that the State will “support the transition for medium and heavy-duty vehicles by providing rebates and direct investment in EV charging stations and hydrogen filling stations, where market support is needed.” DSP at 106.

The Section is concerned that the Draft Scoping Plan does not reflect the urgency of the infrastructure problem facing the State, or the difficulties it will face in resolving it. The fact is that New York is nowhere close to providing the many thousands of EV charging stations needed to service the 3 million light duty EVs that the Draft Scoping Plan anticipates to be on the road in a *mere 7 years*. And the motoring public is well aware of this problem: “range anxiety” continues to be a major impediment to the widespread adoption of EVs. Because consumer preference is critical to achieving the draft plan’s light-duty vehicle goals, it is highly unlikely that the ambitious goals of the draft plan will be met unless the State steps up to resolve this problem promptly, and widely publicizes the progress it is making in doing so.

The final scoping plan should include a strategy whereby the New York State Energy Research and Development Authority (“NYSERDA”), the Department of Public Service (“DPS”) (under the auspices of the Public Service Commission (“PSC”)), the New York State Department of Transportation (“NYSDOT”), New York’s utilities, electric vehicle service providers and automobile manufacturers work collaboratively to develop an action plan that sets charger installation targets keyed to projections of EV market penetration over the next several years. This action plan should map out in detail the public and private sector activities to be taken to achieve those milestones, so that adequate charging infrastructure will be available both *when* it will be needed, and also *where* it will be needed: with ample Level 2 chargers at locations where cars will be parked for

extended periods (like private residences, multi-family buildings, commuter parking lots, and vehicle fleet storage areas); and publicly accessible DC Fast Chargers at convenient roadside locations along critical travel corridors.

Making EV chargers *available* is not the only issue the State must address in creating a viable EV charging network. EV drivers now face challenges in *operating* the DC Fast Chargers currently available along New York roadways. These facilities are provided by electric vehicle service providers operating under a variety of business models, which rely on proprietary software and subscriber service arrangements. As a result, charging services are offered under varying pricing structures and terms of service. The various networks operate independently and are not well integrated with each other, causing confusion among drivers seeking to power their vehicles. Such issues can be addressed by assuring that EV charging stations are “interoperable”, i.e., equipped to be readily accessible to the general public without membership or subscription requirements, and capable of accepting a variety of payment methods. At the very least, the State should require any EV charging station receiving public incentives to be “interoperable.”

Additional stakeholders, including transit providers, school districts, and the private companies that serve them should be involved in the development of an action plan for the electrification of New York’s buses. We anticipate that this plan would be aimed at accomplishing the EV transition on a fleet-by-fleet basis, with fleet owners/operators replacing existing buses with EVs as they reach the end of their useful life; and that the timing for installation of EV charging stations at fleet parking facilities would be coordinated with the overall transition plan for the affected fleet. We further expect that a similar process would be implemented for State and local agency fleets. (See the LPDD website at <https://lpdd.org/resources/lpdd-model-law-clean-fleet-legislation/> for a model law and <https://lpdd.org/resources/lpdd-model-executive-order-green-fleets/> for an executive order calling for the development and implementation of green fleet transition plans by government agencies at the state and local level.)

The infrastructure problem is even more challenging with respect to heavy-duty vehicles. Some of those vehicles are candidates for electrification and can be serviced by Level 2 chargers located at fleet parking facilities. Since other types of heavy-duty vehicles (like those deployed for long-haul operation) are not suitable for electrification, the Draft Scoping Plan indicates that “[t]he transition to ZEVs for this subsector will entail a mix of battery electric and hydrogen fuel cell vehicles.” DSP at 105. This is easier said than done, because the transition to HFCVs will require a *second*, entirely different, infrastructure network along New York’s roadways. The Draft Scoping

Plan omits any detail as to the work the State intends to accomplish in establishing and ensuring the safe operation of a hydrogen filling station network.

However, the Section understands that Governor Hochul has announced a collaboration with neighboring states and other stakeholders to create a regional hydrogen hub in the tri-state area, and we expect that many of the activities needed to plan for and begin implementation of a hydrogen filling station network in the region would be undertaken under that initiative. Although the Governor's announcement expresses the intention of seeking designation of the hydrogen hub as one of the four that are earmarked for significant federal funding under the Infrastructure Investment and Jobs Act ("IIJA"), the Section urges the State to go forward with this important initiative with or without federal support. We also understand that the Governor has announced that NYSERDA, DPS, and NYSDEC will launch a project to assess and develop the codes necessary for the safe storage and handling of hydrogen fuel in New York State. The Section commends these efforts and suggests that they be incorporated into the final scoping plan.

The Section was surprised to note that the Transportation Chapter of the Draft Scoping Plan makes no mention of the State seeking federal funding to support the transportation decarbonization effort in New York. That notable omission should be corrected in the final scoping plan because billions of dollars -- in addition to the monies provided for designated Hydrogen Hubs -- will be available to state and local governments for such efforts under the IIJA. However, the State will be able to tap into this significant source of funding only with proper planning. To give just a few examples:

- \$5 Billion over fiscal years 2022-2026 will be available under the National Electric Vehicle Infrastructure ("NEVI") Program, which is to be distributed among the States by USDOT pursuant to a specified formula. New York stands to receive \$175 million annually under the NEVI program. Those monies will not be available to the State unless and until it submits an EV charging infrastructure deployment plan meeting requirements established by the Secretary of Transportation. The funds can be withdrawn in the event the Secretary finds that the state is failing to implement the plan.
- \$2.5 Billion over the next five years will be available – on a *competitive* basis - under Section 11401 of the IIJA for the strategic deployment of publicly available EV charging and hydrogen filling stations. Applicants must demonstrate that they have developed their proposals in collaboration with "stakeholders (including automobile manufacturers, utilities, infrastructure providers, technology providers, electric charging [or] hydrogen ... providers, metropolitan planning organizations, States, Indian tribes,

and units of local governments, fleet owners, fleet managers, fuel station owners and operators, labor organizations, infrastructure construction and component parts suppliers, and multi-State and regional entities)” to foster public and private investment in charging or refueling infrastructure.

- \$2.5 Billion over the next five years will be available – again on a competitive basis – for rebates to be distributed by the U.S. Environmental Protection Agency (“EPA”) under the “Clean School Bus” program to school districts and their contractors for electric buses and related infrastructure.
- \$5.6 Billion in competitive funding is available from the Low or No Emission Bus Program for buses and bus facilities. To secure a zero-emission grant under this program, applicants must submit a “zero emission transportation plan that demonstrates a long-term management plan with a strategy” on how it will use current and future funding to achieve zero emissions across its fleet. The Federal Transportation Administration recently announced that \$1.1 Billion is available in fiscal year 2022 for this program.

The types of entities eligible for funding under the IIJA vary from program to program, but may include not only the State, but also public authorities, local governments, school districts, electric vehicle service providers, other private parties and partnerships among such entities. In order to maximize the opportunities provided by the statute, we anticipate that the NYSDOT will take (and perhaps already has taken) on a role leadership in the preparation of its own applications for funding under the IIJA. As an agency with expertise in securing federal transportation funding, NYSDOT should also provide guidance and assistance to other public entities – such as municipalities and school districts - in doing so. More generally, planning for the zero-emission vehicle transition in New York will be an extraordinarily complex endeavor requiring coordination among government agencies at the state, county and local levels, as well as a multiplicity of private parties. For this reason, the Section suggests that this effort be spearheaded by a high-ranking state official reporting directly to the Office of the Governor.

The Section endorses the strategy identified by the CAC with respect to “mobility-oriented development.” However, we note that the Draft Scoping Plan provides little detail about how the State might implement that strategy. Since local governments wield primary control over what may or may not be built within their borders through the exercise of their zoning powers, the State will not be the principal driver in moving this strategy forward. However, the State could play a major role in fostering the implementation of mobility-oriented development if NYSERDA and the Department of State were tasked to collaborate on creating a model “mobility-oriented

development” ordinance, along with related informational resources aimed at encouraging the adoption of such a local law by municipalities. That model ordinance could include provisions imposing minimum mixed use and density requirements for projects located close to transit hubs, creating incentives allowing additional floor area or building heights in such areas, or both mandates and incentives. Likewise, the State could create model ordinances and related resources to assist municipalities in amending their “single-use district” zoning laws, so that they allow a mix of uses – including residential, commercial, and industrial -- to coexist in certain districts, and thereby reduce vehicle-miles-traveled within their borders. Other provisions, like those allowing live/work units in residential districts also could be encouraged. Many local jurisdictions around the U.S. have adopted such ordinances, and these models could provide templates for the State to consider in developing its own guidance and resources. A helpful discussion, with citations to some of the local laws recently enacted by other jurisdictions, is set forth in *Remarkable Cities and the Fight Against Climate Change*, Jonathan Rosenbloom, Environmental Law Institute, 2020, available at <https://www.eli.org/eli-press-books/remarkable-cities-and-fight-against-climate-change>.

The Section also endorses the emphasis placed by the CAC on the expansion of public transportation alternatives but suggests that the final scoping plan provide more detail as to how that strategy could be implemented, given how expensive, potentially controversial, and legally complex projects aimed at extending mass transit can be.

More broadly, regulatory complexity and the prospect of legal challenges may impede implementation of several of the transportation-related strategies set forth in the Draft Scoping Plan. Thus, municipalities seeking to amend their zoning ordinances, transit agencies seeking to extend their service and alternative fuel providers seeking to site their facilities may confront a number of regulatory hurdles, local opposition and potential litigation. The State should examine closely the statutory and regulatory framework applicable to such activities and streamline the approval process to the extent it is appropriate do so. Among other things, NYSDEC should consider adding certain actions, like the siting of EV charging stations, as Type II actions under SEQRA, though that will not be a substitute for a comprehensive approach to this problem, which typically involves major facilities or projects that may themselves require environmental impact statements.

Finally, the Section refers the CAC to several model LPDD documents (in addition to the clean fleet documents noted above) that might assist in planning for the transportation transition. Those documents include model laws directing public utility commissions (i.e., the PSC in New York) to hold proceedings for the development of comprehensive transportation electrification plans by regulated utilities; addressing problematic utility rate structures; adopting EV ready building codes; providing incentives for alternative fuel vehicles including EVs, HFCVs and electric bicycles; and providing incentives for installation of charging stations and requiring facilities receiving such incentives to be interoperable. These documents may be found at the LPDD website.

Chapter 12 Buildings

The Section finds the Draft Scoping Plan’s proposals with respect to decarbonizing buildings to be robust, as demanded by the challenge of reducing greenhouse gas emissions from this critically important sector. Because of the importance and complexity of decarbonizing New York State’s buildings, our comments to this section are lengthy. However, the Section emphasizes that the legal issues identified herein should not be viewed as obstacles, but rather as guardrails for developing legally defensible building policies. Decarbonizing buildings is legally feasible in New York State, and policymakers should not shy away from enacting policy to do so. We provide these comments as a roadmap through some of the more significant legal considerations that inform the structuring of sound buildings policy.

A. New Building Decarbonization

The Draft Scoping Plan’s first identified building sector strategy is to “Adopt Advanced Codes for Highly Efficient, All-Electric, and Resilient New Construction.” The Section strongly agrees with the CAC that near-term decarbonization of all new buildings is vital to achieving the CLCPA objectives. In addition to the Scoping Plan’s proposals with respect to new building decarbonization, Governor Hochul has committed to phasing fossil fuels, namely natural gas, out of newly constructed buildings by 2027, and a bill before the State Legislature proposes doing the same by 2024.² Given the overlap between these proposals to limit gas use in new buildings and the Draft Scoping Plan’s approach to new building decarbonization, both are considered in these comments.

1. New York State Law: Harmonization of NYS Public Service Law

While nothing in New York State law restricts the state from enacting building fossil fuel restrictions, there is some confusion among stakeholders about the interplay of such restrictions with certain provisions of the New York State Public Service Law. In particular, N.Y. Pub. Serv. L. sec. 30 states: “It is hereby declared to be the policy of this state that the continued provision of all or any part of such **gas**, electric and steam service to all residential customers without unreasonable qualifications or delays is necessary for the preservation of the health and general welfare and is in the public interest” (emphasis added). In addition, N.Y. Pub. Serv. L. sec. 31 obligates gas utilities or municipalities to provide new gas transmission lines to buildings that do

² *Governor Hochul Announces Plan to Achieve 2 Million Climate-Friendly Homes by 2030*, N.Y. State Press Office (Jan. 5, 2022), <https://www.governor.ny.gov/news/governor-hochul-announces-plan-achieve-2-million-climate-friendly-homes-2030>

not already have gas service, up to 100 feet of such gas line. A PSC rule, Section 230.2 of Title 16 of New York Codes, Rules and Regulations, further allows new customers to aggregate their allotted 100 feet of gas line extension, effectively allowing utilities to provide, and charge ratepayers for, significant extensions of the gas system, the costs of which would otherwise be borne (if at all) by the private property owners seeking such an extension. Section 30 - sometimes on its own and sometimes alongside Section 31 and Section 230.2 of Title 16 - is referred to as the “obligation to serve” or the “duty to serve.” All together, these provisions effectively guarantee gas service to new customers who request it.

It is the Section’s view that sections 30 and 31 and Section 230.2 of Title 16 are not in conflict with restrictions on natural gas in newly constructed buildings, nor with all-electric construction requirements. However, their existence has caused a good deal of uncertainty among stakeholders as to how these public service laws and regulations might stand alongside laws prohibiting gas line extensions to new buildings (and, to a lesser extent, alongside all-electric building requirements, which do not regulate the same equipment as the Public Service Law and regulations). Stakeholders with an interest in the continued provision of natural gas may cite these provisions of existing law and regulation as in conflict with phase-outs of gas from buildings.

These provisions of the Public Service Law should therefore be amended to avoid actual or perceived conflicts with building electrification objectives. While the Section does not endorse any particular language for amending section 30, we note that existing proposals and precedents that could inform such an amendment. A bill introduced in the Washington State Legislature would amend its analogous obligation to serve provision, replacing “natural gas and electric” as the guaranteed services with “energy services,” as follows:

The legislature declares it is the policy of the state to:

- (1) ~~Preserve affordable natural gas and electric services to the residents of the state;~~
- (2) Maintain and advance the efficiency and availability of ~~natural gas and electric~~ energy services to the residents of the state of Washington;
- (3) (2) Ensure that customers pay only reasonable charges for ~~natural gas and electric~~ energy services;
- (4) (3) Permit flexible pricing of ~~natural gas and electric~~ energy services; and

(4) Limit and reduce the use of fossil fuels for space and water heating and advance the use of high-efficiency electric equipment.³

Wash. H.B. 1084 sec. 6 (2021; reintroduced 2022), which would amend
Wash. Rev. Code 80.28.074 and 1988 ch. 166 sec. 1.

Another formulation was put forth by Justin Gundlach and Elizabeth B. Stein in their 2020 paper *Harmonizing States' Energy Utility Regulation Frameworks and Climate Laws: A Case Study of New York*,⁴ which proposed to amend N.Y. Pub. Serv. L. sec. 30 as follows:

30. This article shall apply to the provision of all or any part of the gas, electric, ~~or steam~~ or other thermal energy service provided to any residential customer by any ~~gas, electric or steam and municipalities corporation or municipality~~ entity. It is hereby declared to be the policy of this state that ~~the continued provision of all or any part of such gas, electric and steam service to all residential customers'~~ continued access to energy and heat, without unreasonable qualifications or lengthy delays, is necessary for the preservation of the health and general welfare and is in the public interest.⁵

These possible amendments are just two potential approaches to aligning section 30 with the Draft Scoping Plan's building sector objectives. The Section does not advocate one over the other but suggests that New York State's "obligation to serve" be amended to guarantee *energy service*, and perhaps also heating and cooling, not *gas service*. Section 31 and Section 230.2 of Title 16 of New York Codes, Rules and Regulations should also be amended to do away with entitlements to subsidized gas line extensions.

There is almost certainly more harmonization needed to align the Public Service Law with the CLCPA, and the Section's comments here do not weigh in on the many legal issues associated with the energy transition in New York State. We highlight these particular legal issues since they have the potential to stand in the way of new-building electrification efforts because stakeholders have or perceive they have a vested obligation or right to sell or receive gas.

2. Pending Litigation Regarding Federal Preemption of Natural Gas Bans

In July 2021, the U.S. District Court for the Northern District of California dismissed claims from a restaurant industry group, the California Restaurant Association, which argued that Berkeley,

³ Proposed deletions shown in strikethrough font; additions shown in underline.

⁴ Justin Gundlach & Elizabeth B. Stein, *Harmonizing States' Energy Utility Regulation Frameworks and Climate Laws: A Case Study of New York*, 41 Energy L.J. 211 (2020), https://policyintegrity.org/files/publications/Harmonizing_States_Energy_UTILITY_Regulation_Frameworks_Gundlach_and_Stein.pdf

⁵ Proposed deletions shown in strikethrough font; additions shown in underline.

California’s natural gas ban should be held preempted by the U.S. Energy Policy & Conservation Act,⁶ or EPCA. (EPCA, which preempts state and local “regulation[s]... concerning the energy efficiency, energy use, or water use” in common building appliances like furnaces, water heaters, and HVAC systems, is discussed further in Part B.1 of these comments.) The California Restaurant Association asserted that EPCA preempted Berkeley’s natural gas restrictions because they effectively prohibit the use of natural gas appliances and therefore “concern[] the... energy use” of covered building appliances.

While the District Court dismissed these claims, the California Restaurant Association appealed the ruling to the U.S. Court of Appeals for the Ninth Circuit. If the Ninth Circuit were to reverse the District Court ruling and hold that state and local requirements relating to subjects other than appliance energy conservation (such as restrictions on gas extensions to new buildings) could be preempted by EPCA, policymakers would need to give careful thought to structuring any building electrification requirements in New York to avoid such preemption. For the time being, the District Court ruling stands, and the Ninth Circuit proceeding may be monitored at the docket for *California Restaurant Ass’n v. City of Berkeley*, No. 21-16278 (9th Cir. 2021).⁷

3. Timeframe

Two conflicting timelines have been put forth for policy efforts to decarbonize new buildings, particularly for the phase out of natural gas. The Draft Scoping Plan proposes a 2024 phase out for fossil fuel space heating, hot water, cooking, and appliances for newly constructed low-rise residential buildings by 2024 and for commercial and larger multifamily residential buildings by 2027, roughly consistent with Governor Hochul’s proposal. A bill before the State Legislature would move faster, eliminating gas for all of these building typologies by 2024.⁸

There is no reason, from a legal perspective, that the phase out of fossil fuels from new buildings cannot go faster than the proposed five-year time horizon. A 2027 deadline for new building electrification strips New York State of its leadership role in the decarbonization space, trailing more than forty communities in California, plus the city of Seattle, Washington, that have limitations on natural gas use in new buildings *already* in place. Even New York City’s Local Law 154 of 2021, which effectively requires that new buildings be built all-electric, phases in many

⁶ 42 U.S.C. §§ 8251-8279 (1975).

⁷ See Sabin Center Climate Change Litigation Database entry: <http://climatecasechart.com/climate-change-litigation/case/california-restaurant-association-v-city-of-berkeley/> and blog post summarizing District Court decision: <http://blogs.law.columbia.edu/climatechange/2021/07/07/california-restaurant-association-v-berkeley-and-local-natural-gas-restrictions/>

⁸ N.Y. State S.B. S6843A (2021).

building typologies faster; only new buildings of seven or more stories are subject to the latest 2027 phase-in date, as compared to the Draft Scoping Plan’s distinction between buildings under/equal to or over four stories. The Section encourages policymakers to keep in mind that building electrification requirements are already demonstrated feasible and that longer time horizons risk the State’s well-earned reputation as a climate leader given the scope and scale of the CLCPA.

4. Avoiding Increased Energy Burden

As New York transitions its buildings away from natural gas, complex questions regarding how much New Yorkers pay for their energy will emerge. Residents shifted to electricity service may see energy costs rise, and those left on the gas system will gradually find themselves sharing system-wide costs with fewer and fewer ratepayers. Care must be taken to ensure that members of Disadvantaged Communities, and in particular those with high energy burdens, are not saddled with crippling increases in their bills. The Section recommends that the PSC open a proceeding to better understand energy cost implications of the transition away from natural gas. Moreover, state law with respect to energy ratemaking will likely need amending to protect vulnerable residents from these increases in energy costs. It is beyond the scope of these comments to further elaborate on the complicated interplay of the energy transition and utility bills, but the Section recommends that appropriate changes be made to existing law as are needed to protect consumers.

5. Local Action on New Building Decarbonization

While the Draft Scoping Plan focuses on the State’s actions to decarbonize the building sector, many local governments have expressed interest in advancing their own building electrification or fossil-fuel-free construction policies. From a legal perspective, their challenges in doing so are two-fold. First, most local governments in New York are precluded from enacting local construction requirements due to preemption by the Statewide Building Code.⁹ While some policy levers that aim to restrict natural gas or fossil fuel use in new buildings do not go through the building code and therefore do not risk preemption, amending the building code at the local level is a well-trod way (in other states) to accomplish this policy goal. And second, even where municipalities do have authority to enact requirements with respect to new-building electrification, many local governments lack clarity and certainty about what and how they are permitted to

⁹ N.Y. Exec. L. § 379 (2020); N.Y. Energy L. § 11-109 (2011).

legislate and fear legal challenge. This risk of litigation - which can be enormously costly for a small community - effectively prevents many local governments from taking action to address climate change.

In developing policy to phase fossil fuels out of new construction, the Section encourages policymakers to ensure that local governments are not preempted from enacting their own building electrification or fossil-fuel-free requirements. New laws enacted should include language expressly allowing local governments to go further and faster if they choose. Alternatively, this may be accomplished by enacting a state law allowing local governments to avoid Statewide Building Code preemption of certain kinds of building requirements. Another option would be to enact an all-electric stretch code that local governments could adopt sooner than any similar statewide requirements.

B. Energy Efficiency and Emissions Standards for Appliances and Existing Buildings

The Draft Scoping Plan proposes to set energy efficiency and emissions standards with respect to building equipment as such equipment is replaced at its end of useful life. In so doing, policymakers should structure such standards carefully to avoid preemption by the U.S. Energy Policy & Conservation Act,¹⁰ or EPCA.

1. Standards Applicable to Appliances

EPCA directs the U.S. Department of Energy (“DOE”) to set energy conservation standards for a range of “covered appliances,” including many large building systems like furnaces, water heaters and HVAC systems, in addition to many other appliances. In so doing, the law also expressly preempts state and local “regulation[s]... concerning the energy efficiency, energy use, or water use” set for these same covered appliances. In short, the federal government sets energy efficiency standards for furnaces, hot water heaters and HVAC systems; therefore, state governments generally may not, with some exceptions.

By its terms, EPCA would preempt a New York state requirement that any “covered appliance” be replaced with electric equipment by virtue of its energy performance, whether couched in terms of energy efficiency or otherwise. However, there are several other ways New York could achieve the objectives the Draft Scoping Plan lays out with respect to building equipment and appliances.

¹⁰ 42 U.S.C. §§ 8251-8279 (1975).

i. Energy efficiency standards for non-EPCA appliances

State energy efficiency, energy use, and energy conservation standards for products not covered by EPCA-promulgated standards are not preempted by EPCA. The Draft Scoping Plan proposes state energy standards for computers, monitors, fluorescent and LED light bulbs and air purifiers, categories not covered by EPCA.

ii. Building code exception to EPCA preemption

While states are broadly preempted from enacting standards with respect to the energy efficiency or energy use of EPCA-covered products, state building codes *may* include such standards if they meet seven conditions: the code (1) “permits a builder to... select[] items whose combined energy efficiency” meet an overall building energy target;¹¹ (2) does not specifically require any EPCA-covered appliance to exceed federal standards;¹² (3) offers options for compliance, including an appliance that exceeds federal standards, on a “one-for-one equivalent energy use or equivalent cost basis”;¹³ (4) bases any baseline building design used by the code on a building with covered products that do not exceed federal standards;¹⁴ (5) offers at least one “optional combination[] of items” that does not exceed federal standards for any covered appliance;¹⁵ (6) the frames any energy target as a total for the building;¹⁶ and (7) uses EPCA-specified test procedures for determining energy consumption of covered products.¹⁷

In essence, this means that state building codes can set energy use or conservation standards with respect to appliances for which standards are set under EPCA, but they cannot effectively require use of appliances that exceed federal standards. To put it differently, building and building energy codes must offer options for builders to install appliances that pass muster under EPCA, and must base these options on a defensible “one-for-one” basis.¹⁸ Therefore, it is permissible for New York State to include all-electric appliance standards in the statewide building code so long as the seven conditions of the building code exception are met. (Building code standards that are not appliance energy conservation standards, such as air emissions standards -

¹¹ 42 U.S.C. § 6297(f)(3)(A).

¹² 42 U.S.C. § 6297(f)(3)(B).

¹³ 42 U.S.C. § 6297(f)(3)(C).

¹⁴ 42 U.S.C. § 6297(f)(3)(D).

¹⁵ 42 U.S.C. § 6297(f)(3)(E).

¹⁶ 42 U.S.C. § 6297(f)(3)(F).

¹⁷ 42 U.S.C. § 6297(f)(3)(G).

¹⁸ For cases parsing the contours of the building code exception to EPCA preemption, see *Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque*, 2008 WL 5586316 (U.S. Dist. Ct. D. N.M. 2008) and *Building Industry Ass'n of Wash. v. Wash. State Building Code Council*, 683 F.3d 1144 (9th Cir. 2011). The former is discussed in Part B.2., *infra*

discussed in subpart iv, infra - should not need to comply with this the building code exception to EPCA preemption, as they are not preempted by EPCA.)

iii. EPCA Preemption Waiver

The state may request a waiver to EPCA preemption from DOE, which would be granted if DOE finds the state has justified “by a preponderance of the evidence that such State regulation is needed to meet unusual and compelling State or local energy or water interests.”¹⁹ “Unusual and compelling State... interests are” further defined as “substantially different in nature or magnitude than those prevailing in the United States generally.”²⁰ Given the global nature of climate change and the nationwide imperative to reduce energy use this does not appear to be a likely avenue to avoid preemption of appliance energy conservation standards pursuant to the goals of the Draft Scoping Plan, but we include it here to illustrate that federal law does envision some ways that state regulations can avoid preemption.

iv. Air Emissions Standards

In addition to each of the above-described exceptions to EPCA of preemption *energy conservation* standards, the state is not preempted from enacting non-energy standards for EPCA-covered appliances, including *air emissions* standards. Gas- and other fossil-burning appliances emit both greenhouse gas pollution and local air pollution onsite. However, federal law does not, for the most part, regulate air emissions from these sources. In the absence of any such federal requirement in place to preempt state air pollution protections, New York State has significant authority to regulate the air pollution aspects of these appliances.

Any air pollution regulation or standard with respect to building appliances could be framed in terms of greenhouse gas emissions or emissions of local air pollutants. The latter approach has precedent in California, where the San Joaquin Valley Air Pollution Control District regulates nitrogen oxide (NO_x) pollution from natural gas-fired furnaces;²¹ in Texas, which has NO_x rules for natural gas-fired boilers and process heaters;²² and in Utah, which has a low-NO_x standard for water heaters.²³ California’s Air Resources Board is also considering proposing zero-GHG

¹⁹ 42 U.S.C. § 6297(d).

²⁰ § 6297(d)(1)(C).

²¹ SJVAPCD Rule 4905 (2020), <https://www.valleyair.org/rules/currentrules/Rule4905.pdf>

²² 30 Tex. Admin. Code §117.3205.

²³ *Air Quality: New Water Heater Rule Will Help Reduce Wintertime Air Pollution*, Utah Dep’t of Env’tl Qual. (2022), <https://deq.utah.gov/communication/news/air-quality-new-water-heater-rule-will-help-reduce-wintertime-air-pollution>

standards for appliances.²⁴ The Section encourages policymakers to develop air pollution standards for appliances where other exceptions to EPCA preemption are not available or where whole building standards are not appropriate.

2. Energy Standards Applicable to Whole Buildings

Energy standards applicable to whole buildings are less likely to be preempted by EPCA than are standards applicable to appliances. However, some are likely to face preemption scrutiny and may be preempted if not carefully constructed. For example, some building codes have faced preemption scrutiny (and, in at least one case, been held preempted) because they effectively require the use of appliances that exceed the federal standards promulgated under EPCA. A federal district court in New Mexico held preempted aspects of the city of Albuquerque's 2007 code, which offered performance and prescriptive options for compliance. The performance-based options effectively (through ambitious performance targets) required the installation of appliances that exceeded federal appliance standards. The prescriptive pathways offered alternative energy conservation options a builder could undertake if they chose to use appliances that met, but did not exceed, federal standards. The District Court noted that "[t]here is no question that the prescriptive alternatives, which explicitly require covered products in excess of federal standards, are requirements that 'concern' the energy efficiency of covered products."²⁵ The performance-based options were also deemed to be in excess of applicable EPCA standards. Even though the code gave builders options for compliance -- i.e., they could install appliances that exceeded EPCA standards, or they could follow the prescriptive pathway that allowed other energy conservation measures in exchange for using appliances that merely met EPCA standards - the Court held that the code effectively imposed "a penalty... for selecting products that meet, but do not exceed, federal energy standards," thus "effectively requir[ing] the installation of products that exceed" EPCA standards.²⁶ (This case relates to the building code exception to

²⁴ 2022 State Strategy for the State Implementation Plan: Draft Measures, Cal. Air Resources Bd. (Oct. 6, 2021) at 57, https://ww2.arb.ca.gov/sites/default/files/2021-10/2022_SSS_Draft_Measures.pdf

²⁵ *Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque*, 2008 WL 5586316 at *8 (U.S. Dist. Ct. D.N.M. 2008).

²⁶ *Id.* at *9. But see *Building Industry Ass'n of Washington v. Washington State Building Code Council*, 683 F.3d 1144 (9th Cir. 2011), which considered Washington's 2009 state-level building code. That code allowed for three compliance pathways in order to achieve a fifteen percent overall reduction in building energy use. Two of the pathways would not, by themselves, meet the target, and builders would therefore be required to earn one "credit" for other energy conservation measures. *Id.* at 1149. Credits could be earned, among other ways, by installing appliances that exceeded EPCA-standards. *Id.* Though the approach of offering multiple compliance pathways that allowed builders to choose whether to use better-than-EPCA appliances was in some ways similar to Albuquerque's code, the Court held Washington's code not preempted by EPCA. The Court differentiated the two cases by reasoning that, "Albuquerque's ordinance imposed costs, as a matter of law, on builders who installed certain covered products meeting federal standards, by requiring the builder to install additional products that would compensate for not using a higher efficiency product... The Albuquerque ordinance thus effectively required use of the higher efficiency products by imposing a penalty through the code itself." *Id.* at 1152. On the other hand, the Washington code did "not create any penalty or legal compulsion to use higher efficiency products." *Id.*

EPCA preemption, discussed supra, but illustrates the point that whole building standards can incur EPCA preemption scrutiny.)

Another case to monitor is *California Restaurant Ass'n v. City of Berkeley*, No. 21-16278 (9th Cir. 2021), described above. There, the plaintiffs argue that Berkeley's prohibition on gas connections to newly-constructed buildings (or "natural gas ban") is preempted by EPCA because it effectively precludes the use of gas-fueled appliances. The District Court ruled to uphold the Berkeley prohibition, and the plaintiffs appealed to the Ninth Circuit. The Ninth Circuit's decision may have additional implications for when a state or local requirement not directly applicable to appliance energy conservation nonetheless can be preempted by EPCA.

Despite these warnings, whole-building energy standards have largely shown to be legally unproblematic. For example, Washington, DC's building performance standard²⁷ regulates building energy use, but the flexibility with respect to compliance options and the fact that it does not force the use of appliances that exceed EPCA standards has meant it has not faced EPCA preemption claims. Whole-building standards that regulate greenhouse gas emissions, like New York City's Local Law 97, have also not invited EPCA preemption challenges.

C. Building Energy Benchmarking and Disclosure

The Draft Scoping Plan anticipates requiring building energy benchmarking for buildings over 10,000 square feet, in addition to a number of other building energy audit and disclosure requirements. The Section recognizes benchmarking and other forms of building energy or emissions disclosure as essential to lay the groundwork for more substantive building performance standards. To date, benchmarking requirements have focused on larger buildings, setting applicability thresholds for buildings at somewhere between 10,000 and 50,000 square feet. As policies are developed to capture smaller buildings, two legal considerations arise (in addition to practical considerations around capacity of smaller building owners to comply with benchmarking programs requiring some level of technical know-how). The Section emphasizes that these considerations are not obstacles to building energy disclosure policies but must be considered in their development.

The first of these legal considerations is privacy. When energy data is required from individual residences, or from buildings small enough that disclosure of building-wide information indicates

²⁷ Clean Energy DC Omnibus Amendment Act (2018).

the energy usage of individual residences, protected privacy interests may be implicated. From a federal constitutional perspective, a building energy disclosure requirement, even for a single-family home, is not likely to run afoul of the Fourth Amendment. The U.S. Court of Appeals for the Seventh Circuit considered claims relating to alleged privacy infringements by smart meters that collected home electricity use information every 15 minutes, holding that, while the data collected were "searches" for purposes of the Fourth Amendment of the U.S. Constitution, the city of Naperville, Illinois' "significant government interests" (i.e., "the modernization of the electrical grid") made the searches reasonable, and therefore not unconstitutional.²⁸ Policymakers should take care to articulate the state's "significant governmental interest" (i.e., decarbonizing the state's homes and buildings) to protect against claims of unconstitutionality. The Section also advises review of analogous state-level privacy laws to ensure any building energy or emissions disclosure requirement for small buildings is consistent with residents' protected privacy rights. Finally, any disclosure requirement for smaller residential buildings should include protections at the individual residence level for data under public information laws.²⁹

Second, as disclosure requirements are developed to apply to smaller buildings, questions arise about how to obtain the data. Single-family homeowners, for example, will not have the facility with Energy Star's Portfolio Manager platform that the managers of larger buildings have. One option would be to have energy utilities and other energy providers send data directly to the implementing agency. This would require a state law or rulemaking directing energy utilities and providers to comply with such requirements. The PSC should consider opening a proceeding to explore how such provision of energy data by utilities could work.

In addition, the Section notes that time-of-sale and time-of-lease energy disclosure requirements are helpful and a good first step for smaller residential buildings. However, many buildings will not be captured for some time. Policymakers should consider other triggers for energy disclosure requirements, such as a requirement for energy disclosure every year, or for a home energy audit once every five or ten years. As the previous two paragraphs indicate, legal considerations associated with mandatory disclosure of energy data from smaller buildings are addressable in carefully crafted policy.

²⁸ Naperville Smart Meter Awareness v. City of Naperville, 900 F.3d 521, 528-29 (7th Cir. 2018).

²⁹ These privacy questions should also be considered with respect to grid-interactive technologies, highlighted in the Scoping Plan as an innovative strategy on p {}.

D. Embodied Carbon

As the Draft Scoping Plan rightly notes, reducing the carbon embodied in building materials and other materials used to construct the built environment is critical to decarbonizing the building sector and is often overlooked because emissions associated with construction materials are one-time, not emitted on an ongoing basis such that they would be included year-over-year in a GHG inventory. Nevertheless, these emissions can be very substantial.

With an eye towards what value the Section can provide with respect to the legal aspects of embodied carbon, we note that there are many areas of law, regulation, and policy that relate to embodied emissions in some way. Most obviously, the CAC should consider including in the final scoping plan a recommendation that state building codes be reviewed and updated on a faster timeframe than the International Code Council (ICC) codes. Procurement requirements could also be reviewed to ensure that they allow for and prioritize the use of sustainable building materials. The State may also wish to revise the SEQRA regulations to account for embodied emissions alongside operational emissions. We would encourage policymakers to consider all aspects of the built environment in policy objectives relating to embodied carbon, including the use of technologies like carbon-sequestering road and sidewalk materials, which could require updates to a wider range of existing laws and rules. The Section suggests that a holistic review of all aspects of state and local laws and rules that could facilitate the use of low embodied carbon and carbon-sequestering materials be undertaken.³⁰

E. Public Financial Incentives and Private Financing

By including two sections on financing needed for building upgrades, the Draft Scoping Plan rightly emphasizes the scale of funding that will be needed to decarbonize the state's buildings. We encourage policymakers to think creatively and seriously about the range of financing proposals set out by the Climate Action Council. The Section is particularly pleased to see a focus on investment in low- and moderate-income households in Disadvantaged Communities, and strongly emphasizes that state investment and state-facilitated or -incentivized private investment should prioritize Disadvantaged Communities (at least as, and ideally to a greater extent than, is required by the CLCPA's 35 percent spending commitment). Financing, particularly private financing, should be paired with careful management of building improvements to avoid unjust

³⁰ For more on embodied carbon policy proposals, see *City Policy Framework for Dramatically Reducing Embodied Carbon*, Carbon Neutral Cities Alliance and One Click LCA (May 2020) at <https://www.embodiedcarbonpolicies.com>

and disequitable investment. Alignment among the CLCPA, building decarbonization policies and programs, and financing programs may be required. In addition, legal protections should be reviewed and may need to be enhanced for lower income residents and residents of affordable or rent-protected housing. Building decarbonization in existing neighborhoods can cause gentrification and displacement of longtime residents who cannot afford to stay. As rent-protected and affordable housing stock is retrofitted to be efficient and resilient, residents should be protected from these outcomes. Finally, while a street-by-street transition off of the gas system may be helpful in avoiding unjust energy rate increases, the interplay between gas and electricity rates as the energy system transitions is highly complex, and a PSC proceeding should be opened to study this.

F. Historic Buildings

The Section notes that the Draft Scoping Plan does not address historic building decarbonization. The State has thousands of synagogues, churches, and historic buildings, many of which perform poorly with respect to energy efficiency and conservation. Policymakers should consider mechanisms for decarbonizing this particular building stock. For example, a dedicated fund could be established to audit some of these buildings as a representative sample so that a widely applicable design for energy efficiency improvements could be prepared and implemented on a larger scale.

G. Conclusion

The Section supports the breadth of the Draft Scoping Plan's approach to decarbonizing the building sector. These comments are aimed at informing the CAC of the Section's views on how the policy elements outlined therein could be structured in a way that comports with applicable law. We also encourage policymakers to look for ways to decarbonize the sector as expeditiously as possible, and to do so in a way that carefully considers costs and implications for energy rates, a question mediated in significant part by state law. Decarbonization of New York's buildings is possible and will yield significant benefits for residents through improved housing stock, better air quality, fewer negative health effects and lower health costs, and a reduction in the state's contribution to global temperature rise. Legal issues associated with doing so should not be thought of as obstacles, but rather considered and addressed in carefully developed policy.

Chapter 13 Electricity

A. Retirement of Fossil-Fuel Fired Facilities:

This is the first strategy listed in the Draft Scoping Plan related to transforming power generation in the State (E1 at 154).

1. Overall Comments

The CAC should develop additional strategies to address barriers, incentives, and disincentives to fossil-fueled generating unit owners in repurposing existing facilities with clean energy resources. The working group on the reuse of existing facilities unnecessarily limited its scope:

Based on the word ‘Reuse’ in the Act, the Group focused its efforts under this task on reuse activities that could be explored on sites *after the plant in question was fully retired and deactivated*. The Group *did not consider future scenarios that would potentially see the plant maintaining its operations but also adding new uses/activities on the site*. (Draft Scoping Plan, Appendix D, n 3) (emphasis added).

This decision warrants reconsideration because the CLCPA does not require limiting the strategies to further the goal of reuse to post-retirement and deactivation. On the contrary, the Act directs the identification of “electric generating facilities *that may be closed* as a result of the *transition* to a clean energy sector and the issues and *opportunities presented by reuse* of those sites” (ECL 75-0103[8][c]) (emphasis added). As discussed more fully below, delaying reuse, or failing to address the barriers and disincentives to the reuse of existing facilities makes the transition more difficult, costly, and less likely to occur. After a facility has retired and has been deactivated, it will no longer possess some of the contractual rights, regulatory approvals, and legal rights that can aid in a transition.

2. Interconnection Reuse

The Draft Scoping Plan recognizes that existing interconnection is an asset for the reuse of a retired fossil-fuel fired generation facility. The DPS should include consideration of the interconnection rights of a transitioning existing facility before retirement and deactivation. The DPS should also consider a mechanism to preserve interconnection rights for reuse after retirement and deactivation. For example, interconnection agreements could be modified to provide for (i) the owners retaining the interconnection rights for a period after a facility’s retirement, and (ii) facilitating upgrades to the interconnection for reuse. Maintaining the existing

rights and expediting the evaluation of any upgrades required would make the reuse of a retired facility more likely, more cost-efficient, and timely from the standpoint of both repurposing with clean energy resources and reducing revenue losses to local communities associated with retirement. We encourage the State to provide a mechanism to preserve interconnection rights and support necessary upgrades for facility reuse.

3. Water Withdrawal Authorization

One adverse result of facility retirement is the loss of its authorization to withdraw water for non-process cooling water upon the cessation of the use. This is unfortunate because such facilities will have implemented and will have the infrastructure for achieving the best technology available for reducing fish impingement and entrainment. This result could be avoided if the “asset” of the existing water withdrawal authorization and its transferability could be maintained for a period of time after retirement to encourage and facilitate site reuse. NYSDEC should consider how it might work with retiring facilities on the preservation of this asset.

4. Local Government Planning

The Draft Scoping Plan has numerous references to fostering local planning for the reuse of existing sites, such as NYSEERDA’s Just Transition Site Reuse Planning Program. However, many of these planning considerations do not explicitly include the existing site owner. To be successful, planning proposals need to consider site-specific information and take into account the financial impact, incentives, and disincentives for property owners. We expect project success to be most likely when facility repurposing is driven by the property owner.

Studies to evaluate repurposing that take into account existing infrastructure are costly. A property owner has little incentive to incur the costs of engineering and interconnect studies when the local community is engaged in reconsideration of its comprehensive plans that could affect the zoning of the property. Consideration should be given to expanding the Just Transition Site Reuse Planning Program to provide funding to existing owners for the studies needed to evaluate repurposing with clean energy resources.

Retired or retiring fossil-fuel fired facilities are often located in industrial districts, with many having been constructed initially to serve as cogeneration facilities. An existing facility may be nonconforming under current zoning or become nonconforming because of rezoning. There appears to be a misconception in the Draft Scoping Plan that because existing facilities were

initially constructed decades ago, owners have recovered their investments. However, this is often not the case because many of these facilities have been acquired, often changing ownership more than once post-construction. The current owners have invested in acquiring the facilities, maintaining them, often investing substantial funds in upgrading pollution control systems and permitting, and in training and maintaining highly skilled staff. Addressing reuse after the retirement and deactivation of an existing facility may undermine reuse by ignoring the advantages of what some will argue is a constitutionally protected nonconforming use right in repurposing the facility.

Additionally, local action to rezone land to facilitate a community's development or to revise a local comprehensive plan takes time. Absent changes to local government zoning plans, attempting forced repurposing of a retired facility using existing local zoning powers may cause delay and result in zoning disputes over reverse spot zoning. For some communities, there may be no incentive to engage in rezoning simply because a fossil-fuel fired facility within its jurisdiction has retired or is retiring.

To address these concerns, the Draft Scoping Plan should recognize explicitly the benefits of adding clean energy resources to existing facilities prior to retirement, including battery storage, clean hydrogen conversion, advanced recycling facilities discussed in the Waste Chapter below, and collocation of solar and wind.

5. Site Remediation

It is typical for fossil-fuel fired facilities to be located in industrial zones. If the facility's zoning were amended to permit residential use, this action could result in delays in reuse because site preparation costs may be prohibitive if certain remedial actions were required beyond those required for continued industrial or commercial use. The State's Brownfield Cleanup Program ("BCP") may be available for some fossil-fuel fired facility sites where environmental impacts have occurred and where no unsatisfied enforcement consent orders related to the site have been imposed. Sites subject to active consent orders or sites where operations did not cause contamination above the applicable cleanup standards may not be deemed eligible to participate in the BCP. The Draft Scoping Plan should encourage State support of financial incentives to repurpose existing facilities with clean energy resources in the absence of BCP eligibility. The law creating the BCP was amended in April 2022 to provide an additional tax credit incentive for the

reuse of brownfield sites for renewable projects. NYSDEC should market the applicability of the BCP for such projects and the possible reuse of retired gas power plant sites for this purpose.

Retired coal-powered generation facilities may be subject to the Coal Combustion Residual Rule (“CCR”) (40 C.F.R. Part 257, Subpart D). Under the Water Infrastructure Improvements for the Nation Act, 33 U.S.C. § 2201, states are allowed to adopt their own CCR permitting program so long as it is at least as protective as the CCR. Consideration should be given to whether a New York State coal CCR permitting program could be adopted that would aid in transition by integrating it with New York’s Brownfield Cleanup Program.

B. Support Local Capacity

1. Successful Renewable Energy Siting

New York’s siting and permitting processes present a significant barrier to the renewable energy buildout contemplated in the CLCPA. Despite New York’s long history of climate and clean energy leadership, our rate of renewable energy installation has been far slower than in many states that lack ambitious climate goals but have different siting and permitting processes. According to the US Energy Information Administration, over the five years between 2016 and 2020, New York was in the bottom third of states for the rate of wind capacity additions and roughly at the national average rate of utility-scale solar additions³¹.

The CAC Integration Analysis estimates that, over the decade from 2020 to 2030, somewhere between 16 to 18 GW of new land-based wind and solar will need to be added to meet New York’s goals, plus an additional 25 to 27 GW over the following decade. Compared to 2.5 GW of solar³² installed over the last five years, and a mere 600 MW of wind over the past decade, what an astronomical ramp-up in the rate of installations is required! It is imperative that we address the factors that are slowing installation. Two of the most significant factors are siting hurdles and associated community opposition, and interconnection costs and delays.

Local communities are typically well placed to determine what gets built and how within their local contexts. However, given the unprecedented rate of new energy infrastructure needed, communities will need intensive support to make high quality, efficient decisions to site renewable projects. In addition – and considering the rising skepticism about renewable builds in many parts

³¹ Based on US Energy Information Administration, *Existing Nameplate and Net Summer Capacity by Energy Source, Producer Type and State (EIA-860)* available at <https://www.eia.gov/electricity/data/state/>.

³² From NYSERDA, <https://www.nyserda.ny.gov/All-Programs/NY-Sun/Solar-Data-Maps/Statewide-Projects>.

of the state – communities need a much clearer path to appreciating and realizing real benefits from the installations they host. With resistance to the CLCPA and misinformation about the Draft Scoping Plan already emerging at local governments around the state³³, the need to clearly communicate with, listen to, and support local governments is urgent.

The way in which renewable energy projects are sited today leads to communities feeling they are passive recipients of projects designed by developers who may be uninformed about community priorities, and who have goals which are not always consistent with those of the community. Proposed projects often throw the community into a divisive fight over the details of a single project, preventing rapid permitting and construction of facilities and adding to the feeling of disenfranchisement.

The CAC should consider a process that brings all stakeholders in the community together to review, in detail, the opportunities for solar, the critical natural and community resources they want to protect, and the areas where solar will be most economically viable and best serve existing and anticipated load centers. A statewide mapping tool that provides the detailed resource, land use, land cover, and utility interconnection information to support this process is essential, as is a well-designed and well-supported process to utilize it.

The recommendations appearing in both the Electricity (Strategy E4 at 162), and Land Use chapters (LU8 at 291) to develop a statewide renewable energy mapping tool are a good first step. However, a tool on its own, without technical support and extensive outreach and education, is unlikely to be widely used. NYSERDA should develop and roll out a full curriculum of support for users, including hands-on, regional peer group sessions where users are walked through how to use the tool, and are accompanied through conducting a process with local stakeholders to reach community agreements about priority sites. Critically, this process must be available to every community in New York State, not just a handful of early adopters.

It will be critical to build out regional capacity across the state to provide this support. NYSERDA should competitively fund local community organizations that are viewed as trusted resources for environmental resource planning within each local region. Alternatively, NYSERDA could utilize the Clean Energy Communities (CEC) coordinators network for this purpose. However, we would caution that, while the CEC coordinators have been an invaluable resource to municipalities, the

³³ See for example recent testimony before the Delaware County Board of Supervisors and the resolution adopted at its April 13, 2022 meeting: <https://www.delcony.us/wp-content/uploads/2022/04/2022-04-13-Board-Meeting-Minutes.pdf>.

current CEC resource base would be hard stretched to provide this kind of intensive support to cohorts of communities that would recognize each other as peers facing similar challenges.

If NYSERDA plans to rely on the CEC coordinators to provide this technical assistance, increased funding is needed across the state to bring on enough additional coordinators such that each one can focus on a two-to-three county subregion and work intensively with cohorts of peer communities. NYSERDA should also consider ways to offer incentives to communities that complete a site prioritization process using the tool.

In addition to a well-designed mapping tool and supportive training, communities need a toolkit of ways to use the maps they create of desirable project sites. Options could range from developing processes for accelerated approval of sites and project designs on a pre-approved list, to a framework RFP for communities to actively seek developers for community-prioritized sites. The farther along we can move communities from passive recipients of developer-proposed projects to active co-designers of desired projects, the better we will facilitate the rapid speed of development required.

Finally, even the best technical support and policy guidance will not be enough to achieve the scale of buildout required under the CLCPA unless communities clearly see direct benefits of renewable development (Strategy E4 at 162). While renewable energy has the potential to offer communities many benefits, including cleaner air, local ownership and control of energy, increased reliability, and stable energy prices, these benefits are far more diffuse, especially on a per-acre basis, than those historically provided by fossil fuel plants, which often offer communities very visible tax revenue and job benefits. And current renewable business models are frequently far from realizing all the potential benefits.

For example, the predominant business model for community solar developments at this time is a consumer discount, usually ten percent, from utility supply prices. This has the benefit of being simple to explain, and it avoids any upfront costs for participants. However, as the current run-up in energy prices has made clear, it lacks what can be one of the most crucial renewable selling points for both municipalities and local residents and businesses – insulation from volatile energy markets. Communities hosting wind and solar should have direct access to the stable, low-cost energy that these facilities provide. Models of community ownership and community control need to be further developed and aggressively supported, including facilitating renewable development by community choice aggregation programs. The State should work with developers and

communities to structure offerings that make the kitchen table economic benefits of hosting renewables clear and obviously appealing.

2. Resolve Interconnection Delays and Reduce Interconnection Costs

Delay in the interconnection process is also a significant hurdle to achieving rapid renewable energy buildout. There are examples of projects across the state that are fully permitted with broad community and local government support but that languish for years because of interconnection delays and unsupportable interconnection costs. Strategy E3 (DSP at 160) recognizes the need to speed up the interconnection process but does not address the cost issue.

While Strategy E3 recommends continued development of the Value of Distributed Energy Resources (“VDER”) rate design, sometimes the revenue uncertainties brought about by VDER pricing can inhibit investment in clean energy projects. A systematic review of the impacts of VDER rate designs on the market for projects of different sizes serving different customers and investors, with a focus on reducing uncertainties about future revenues where this is slowing market adoption, should be undertaken.

3. Government Agency Staffing and Coordination

The Draft Scoping Plan rightly acknowledges that there are numerous state agencies that will be involved in the review and authorization of proposed projects to accomplish the statutory mandate to decarbonize the electricity sector. The Section supports the “multi-pronged approach” described in DSP subsection E4 at 162 to achieve both clean energy siting and community acceptance. Implementation of the components of this strategy will require significant staffing at state agencies. However, state agency staffing levels decreased after the economic downturn of 2008 and staffing levels have not been fully restored. During this same period, many experienced staff retired. To achieve the ambitious goals of the CLCPA, the Draft Scoping Plan should recommend increased funding to hire needed staff. Adequate staffing is also a tool that can foster improved coordination among state and federal agencies whose approvals are key to the achieving climate goals.

C. Reliability and Cybersecurity Concerns

The Section concurs with the State’s plans described in subsection E9 at 174 to reduce the demand for electricity during peak hours through demand reduction and demand flexibility, which in turn will prevent infrastructure buildout. We believe, however, that the transition to renewable

energy can raise reliability concerns and we encourage the CAC to address the reliability of energy supply during future extreme weather events and standby capacity in its public information efforts to allay public concerns about a potential weakening of the energy supply.

In subsection E8 (DSP at 169) regarding improvements to reliability planning and markets, the DSP states: “[a] flexible grid also necessitates an interconnected digital system passing data back and forth which increased cybersecurity vulnerabilities and risks. These must be identified in mitigated against.” There is little discussion in the DSP of the types of vulnerabilities and risks presented by an interconnected digital system, and thus, the public cannot evaluate how serious these may be and whether the tools currently exist to prevent cyberattacks on this type of system. We encourage the CAC to address this issue in more detail in its final scoping plan and to provide public information on this topic to allay concerns to the extent consistent with security considerations, as well as to take the steps necessary to overcome these public concerns by demonstrating the system’s standby capability in the event of grid failures, cyberattacks, or extreme weather events.

Chapter 14 Industry

The Section notes that the Draft Scoping Plan avoids proposing regulatory initiatives that would mandate emission reductions from the industrial sector, and relies instead on financial incentives, technical assistance, and support for research and development (“R&D”) to induce companies to electrify their operations, reduce fuel consumption and increase energy efficiency. The CAC has elected to take this approach considering the relatively minor contribution – nine percent of state-wide emissions - made by the industrial sector to the carbon load in New York, and the concern that mandates would lead to “leakage” due to companies moving their operations to other jurisdictions. The only regulatory strategy that would be aimed at industry calls for NYSDEC to establish a state-level reporting regime for GHGs, with reporting requirements imposed on a wider range of companies than those that must report under federal law.

The Section supports the DSP’s strategy for the establishment of a state-level GHG reporting program. We suggest that NYSDEC use such a reporting program to monitor carefully trends in the level of GHG emissions from companies in the industrial sector, to determine whether the voluntary approach now included in the DSP is resulting in meaningful emission reductions. If not, the State should revisit the issue of regulatory mandates as needed to achieve the goals of the CLCPA.

The Section believes that the Industry Chapter of the draft plan would be improved by drawing on the considerable research and expertise contained in a document prepared by the Sabin Center titled “Compilation of Recommendations to Reduce Greenhouse Gas Emissions in New York State”, dated July 30, 2020 (the “Compilation”), which is available at <https://climate.law.columbia.edu/sites/default/files/content/CLCPA%20Proposal%20Recommendations%200.pdf>. The Compilation’s discussion of “Energy Intensive Industries” (at p. 128, *et seq.*) provides a valuable resource for the CAC to consider in crafting detailed strategies for the reduction of emissions from specific industrial categories and processes. For example:

- The section on “Cement” beginning at p. 28 discusses financial incentives and other initiatives to promote the use of low-embodied carbon cement (such as cement containing supplementary cementitious materials like fly ash and blast furnace slag) in place of portland limestone cement. The Compilation also recommends funding for research into processes that would increase the amount of carbon sequestration that could occur through carbon curing and suggests that the level of carbon emissions associated with

cement could be a factor in public procurement decisions. The Section notes that the Compilation cites the recently enacted New York State Low Embodied Carbon Concrete Leadership Act, and we recommend that the low-embodied carbon cement procurement program called for under this new statute be included in the final scoping plan and implemented as soon as possible.

- The section on “Industrial Process Incentives,” at p. 143 references the Department of Energy’s efforts to promote “smart manufacturing” through the Clean Energy Smart Manufacturing Innovation Institute, financial assistance under the Smart Manufacturing Leadership Act and several other programs. One voluntary program discussed would offer technical assistance and financial incentives for efficiency improvements to buildings, process optimization, minimization of waste, adoption of advanced process technologies, installation of combined heat and power (“CHP”) and waste heat capture and reuse, among other measures. This section of the Compilation provides links to various examples of subsidy support for Industrial Process Improvements and Material Efficiency. The “Other Recommendations” subsection points to savings opportunities via R&D advances, risk sharing and incentive programs. The “Discussion and Analysis” includes a discussion on policy options and government procurement procedures.
- The section on “Low Carbon Thermal Solutions/Industrial Heat Emissions” at p. 145 points out that process heating accounts for more than one-fourth of total manufacturing energy use in the state. The Compilation discusses several alternatives to carbon-based process heating but notes that such technologies are significantly more expensive and are, therefore, “hard to deploy even with substantial subsidies.” For that reason, the Compilation calls for “[r]esearchers, governments, industrial leaders, and investors” to ramp up “existing efforts to develop new and better solutions or to improve existing ones dramatically.”

Various other sections of the Compilation may be useful to the CAC in the event that, after considering public comment on the DSP, it decides to include targeted regulatory mandates for certain industrial sectors or activities in the final scoping plan. For example:

- At p. 134 of Compilation, see the suggestions and links regarding “Primary Metals (Steel and Aluminum)”. Under “Discussion and Analysis”, the focus initially is on blast furnace operations and blue hydrogen.

- At p. 135 of the Compilation, see the recommendations for “Refrigerants, HFCs”, with links to regulatory approaches for reducing fluorinated gases, and “Other Recommendations” on reducing HFCs. The “Discussion and Analysis” touches on Washington State Law on reducing HFCs.
- At p. 136 of the Compilation, see “Other Recommendations” for Bitcoin mining which states that banning or regulating Bitcoin mining in New York could be an “energy efficiency improvement.” Various taxation strategies also are discussed in the Compilation. These ideas are further addressed in “Discussion and Analysis”.
- At p. 140 of the Compilation, see “Natural Gas Production, Processing and Distribution”, with links to regulatory approaches for oil and gas sector methane emissions and pipeline leaks. The “Other Recommendations” section addresses methane reduction initiatives that could be pursued by NYSDEC for those natural gas production and transmission sources subject to regulation as air emission sources, with numerous suggestions for reducing emissions from pipelines, storage, abandoned wells and other infrastructure.
- At p. 149 of the Compilation, under Miscellaneous, Film Green is noted as a promotional vehicle, and Glass and Ceramics, Ammonia Production, and Menthol Production are addressed.

Chapter 15 Agriculture and Forestry

A. Introduction

Chapter 15 addresses two extremely important sectors of the New York State economy. Each is largely unregulated, and together are made up of hundreds of thousands of privately owned farms and private forest landowners. New York's almost 19 million acres of forest makes New York one of the most forested states in the nation. Both sectors are extremely important to achieving the goals of the CLCPA, and together they represent 85% of the State's land area. The enormous challenge for the implementation of the Act in these sectors is to find ways to influence that multitude of private actors to manage their farms and forests to help achieve the carbon goals of the Act.

As the DSP adopts the Agriculture and Forestry Working Group's (the "AFWG's") recommendations with only slight variations, the following comments by the Section apply to the AFWG's recommendations as well as to the DSP.

B. Forestry

Of the almost 18 million acres of forest in New York, only approximately four million acres are owned by the State. Of that, three million are in the Forest Preserve, constitutionally protected from logging, or even from management. Forestry is unlike other sectors of New York's economy, as it contributes greatly to the removal of carbon from the atmosphere and its storage in the trees and the soil. The Act's goal is to raise to 30 MMT CO₂e the amount of GHG equivalents captured by 2030. The challenge therefore is to find ways to preserve the carbon capture in forests and, in fact, to increase it.

The Section's specific comments on forestry are set forth below.

1. Stakeholders

NYSDEC, the Adirondack Park Agency, the Adirondack Council, the Adirondack Mountain Club and Protect the Adirondacks should be added to the list of key stakeholders for this sector.

2. Key Sector Strategies - DSP at 197

AF1 Identify Where Forest Management Would Provide the Greatest Benefit

The necessity of immediate and urgent research to identify the highest carbon value forests, and the best practices for carbon forest management (and preservation, in light of the impending impacts of climate change) cannot be emphasized enough. Given the critical nature of meeting the ambitious GHG goals of the CLCPA over the next 30 years, adequate research funding must be provided by the Legislature. The effort to achieve these goals has to be science driven, with ongoing research and outcome monitoring informing the project. To complicate the task, this research, monitoring, prediction and modeling must also take into account the very impacts climate change is causing in real time: less snowfall, warmer winters, droughts, floods, invasive species and diseases, disrupted and increasingly violent weather among them.

AF2 Prevent Forest Pests, Diseases, and Invasive Species and Restore Degraded Forests

As noted, NYSDEC needs broader legislation and regulations enabling faster and more agile actions to anticipate, prevent where possible, and combat invasive species and diseases. The Section is a resource for reviewing proposed legislation and regulations.

AF3 Maintain and Improve Sustainable Forest Management Practices and Mitigation Strategies

This strategy again focuses on the need for research, to establish best management practices and implement outreach and education programs to provide landowners with this information. A better understanding of managing forests to optimize carbon capture and sequestration must be given funding priority by the Legislature.

AF4 Assist Landowners in Implementation of Sustainable Forest Management and Mitigation Strategies

This strategy addresses the challenge of educating, encouraging and incentivizing private landowners to manage forests for an entirely new purpose, the preservation and enhancement of carbon capture and sequestration, all while adapting to the challenges of climate change itself. The existing program under Tax Law 480-a has not been broadly accepted with less than 10% of the privately owned forest land in the State benefiting from professional management plans under it. Tax Law 480-a was adopted in 1974 to incentivize private landowners owning 50 or more acres of forest to obtain and follow professional forest management plans. Despite the landowner benefit of lowered real property taxes, and compensatory payments to municipalities for the lowered tax revenue, 480-a plans have not been widely embraced.

The proposal to amend 480-a to include carbon and climate related goals in the management plans is clearly needed, as is the creation of the proposed new 480-b and 480-c by legislation. The Section will likely review and comment on proposed legislation.

Each of the programs described has a 15-acre minimum. It is not clear whether this threshold is consistent with the Act's goals, especially as afforestation efforts for farm owned forests may not meet those thresholds.

The barriers to landowner participation in the 480-a program need to be examined objectively and independently. AF4 recommends amending 480-a to add forest preservation and sustainability goals to the program, and given the long-term commitments made by landowners presently in the program, those changes would be incremental at best, with existing participants grandfathered.

The strategy also calls for legislation to create two new programs:

480-b would incorporate carbon sequestration as one of the goals of the 15-year management plan. 480-c would have the same 15-acre threshold, but carbon sequestration would be the key criteria in a management program drawn up by a "carbon certified forester."

Given the importance of carbon sequestration to the CLCPA's goals, it would seem that carbon sequestration should be a major element of all three programs, and that all professional foresters must quickly become familiar with the new carbon-based criteria required to meet the goals of the Act.

It is the Section's recommendation that all professionally managed forests in the State include plans for carbon sequestration. The criteria for the new programs should have low barriers for entry, and landowners willing to manage for carbon sequestration should be preferentially incentivized in order to reflect the eco-benefits created or preserved, and the harvesting income foregone.

AF6 Create a New York Based Carbon Bank

The creation of a Carbon Bank offers the potential to financially incentivize the management practices to capture and sequester carbon. Efforts need to be taken to avoid problems found in other carbon credit programs, and most importantly to require ongoing oversight of the program, to avoid creating market incentives that work against the goals of the CLCPA.

AF7 Monitor Progress and Advance Forestry Science and Technology

Like AF1, AF2, AF3, AF4, AF5, and AF8, AF7 calls for increased funding and accelerated research and implementation of carbon-oriented best management practices. The importance of immediate and ample funding for research to understand carbon sequestration in and under the forest and how to protect and increase those benefits, even while climate disruption threatens to alter those very systems, cannot be overstated.

AF8 Conduct Education and Outreach on Forest Management

The State is a major forest landowner, and best management practices aimed at increasing the capture and long-term sequestration of carbon should be implemented quickly and urgently by new agency policies across all state agencies and authorities. The State's opportunities as owner of forested lands or lands that could be reforested or afforested requires more discussion than the Chapter provides.

The State's opportunities to afforest highway rights of way, State Parks, nature centers, lands of the Thruway Authority, PASNY, SUNY, and the Department of Corrections are examples. Other state or regional actors include the Tug Hill Commission, the Adirondack Park Agency ("APA") and the New York City's Department of Environmental Protection ("DEP") responsibilities in the Catskill Watershed.

Of particular note in this regard is the APA. As a planning and regulatory agency for nearly three million acres of largely forested private land within the Adirondack Park, it could be a major catalyst for finding ways to measure, influence, educate and incentivize those owners to preserve and to increase carbon capture and sequestration. While neither a traditional state agency, nor a municipality, the APA has powers to review, plan, and to conduct outreach and education concerning the nearly three million acres of privately owned land within the Park. The role that the APA could play in advancing the goals articulated in this Chapter could be significant, as no other state-level agency has such a scope. It is a unique opportunity to explore ways to achieve these goals, and it is the only huge privately owned forested area in the State with this opportunity. The Section is in the early stage of undertaking a review of the APA at 50 years, and climate will be part of the review.

It should also be noted that New York City's DEP plays a very important planning and permitting role in the forested watersheds of the Catskills and could review both its regulations and its forest management activities to enhance forest health and carbon capture.

The Section recommends that a survey of the lands of all state agencies, commissions, and authorities be undertaken to identify opportunities for afforestation and carbon management. It believes that these lands could be the "laboratories" for carbon sequestration management, and if done in conjunction with the SUNY College of Environmental Science and Forestry's research efforts, could accelerate the development of best management practices, as well as provide forests on which to undertake demonstration projects.

AF10 Advance Precision Feed, Forage, and Herd Management

Agroforestry encourages the integration of managed forestry on otherwise agricultural lands, with mutual benefits. It appears research is needed to provide farmers with guidance and best practices. Cornell Cooperative Extension and Soil and Water Conservation Districts ("SWCD") are two important institutional actors each already active and respected in the farming community. SWCD, in particular, could expand its reach beyond agriculture to include forest owners, providing management advice and supplementing the NYSDEC's efforts.

AF12 and AF13 Adopt Soil Health Practice Systems and Increase Adoption of Agroforestry

The DSP discussion of carbon sequestration in soils and other environmental benefits focuses principally on agriculture practices. The soil in forests is extremely important to maintaining healthy forests, and forest soil also appears to be a significant carbon sink. More research needs to focus on forest carbon sequestration below the forest floor with a view to understanding better the role soil plays in forest carbon capture and sequestration.

AF14 Develop Agricultural Environmental Management Planning for Climate Mitigation and Adaptation

The Agricultural Environmental Management Planning Program could and should be implemented for forest management practices on a scale far larger and more ambitious than the planning currently under the 480-a Program. Goals should be set to increase the reach of carbon-based forest management practices to the majority of the nearly 15 million acres of private forests in the State, and the use of conservation easements to protect forests should be explored.

AF15 Monitor and Benchmark Agricultural GHG Emissions

Creating the means to monitor and benchmark agriculture GHG emissions applies completely, and for the same reasons, to forestry. In fact, AF15, 16 and 17 goals, and their components should all be applicable to forestry practices.

In each of the strategies above, the goal is to incorporate carbon capture and sequestration into the core of forestry management. This is a new goal and would provide enormous eco-benefits. How to incentivize a multitude of diverse private owners to undertake this shift in priorities is a common challenge for the CLCPA's implementation in both agriculture and forestry.

While the two are very different sectors of the State's economy, the similarities are clear, as are the broad strategies. Agriculture is an industry oriented to production of seasonal and annual crops. Forestry operates on a far different timeline but produces extremely valuable eco-benefits on a far longer timeline. The climate-focused Bio Economy Sections AF18-24 cover extremely important and very complex systems of valuing carbon benefits, and using wood grown in New York to offset fossil carbon sources for fuels, plastics and to produce durable wood products and greener building materials, potentially offsetting extremely carbon-intensive steel and cement.

The Section recommends that more emphasis be placed on the development of durable wood construction materials. Climate adaptation and mitigation will itself trigger increased construction, which creates even greater demands for greenhouse gas intensive cement for concrete and steel for construction.

Advances in structural engineered wood products holds great promise to substitute glued laminated lumber capable of building tall, durable, and fireproof buildings and bridges, simultaneously creating both demand for wood, and incorporating it into long-duration structures thus, sequestering the carbon.

Greater demand, coupled with measurable, enforceable management practices that ensure net capture and sequestration of carbon is maintained in the short run, and increased in the long run, are essential to optimizing the contribution of the state's forests toward the goals of the Act.

Changes to the state's Construction and Fire Codes, and procurement practices, and the rapid adoption of these measures by regional and municipal agencies is essential to realize this potential. The use of forest and agricultural products, and products to replace fossil fuels and chemicals for bioplastics requires a close and critical analysis.

Combustion and plastics are two environmental and climate problems, and creating a green economy based on them is fraught with risks.

AF24 Advance Deployment of Net Negative Carbon Dioxide Removal

This strategy introduces the very challenging and extremely important goals of establishing standards and systems for analyzing “negative emissions profiles” for bioeconomy products. Given the need to enhance markets for wood products, in order to allow and incentivize climate enhancing management of forests, there are few goals more important than creating products that “do no harm” to the larger climate project of the Act. However, care should be taken in promoting only those elements of the bioeconomy that actually achieve a net carbon benefit. See Section C, “Agriculture” Subsection 10, below. Finally, the State should consider funding for studies of new engineered products to provide developers with the confidence needed to rely on new engineered products and evaluate whether additional tax incentives might encourage the selection of these more expensive building materials.

3. Additional Comments Concerning Forestry

The Land Use Chapter of the DSP (Chapter 19) is critically important in achieving the goals of the Forestry and Agriculture Chapter. As noted above, the goal of preserving existing forests and agricultural property and of adding to forests throughout the State will need to be reflected in land use plans, comprehensive plans and zoning laws and rules through the State. The APA, with jurisdiction encompassing nearly 3 million acres of privately owned land, much of it forested, could play an important role in developing, piloting, and exploring ways of achieving the cooperation of the landowners and municipalities within the Park.

The CAC should also consider the role that SEQRA can play in the implementation of the Act through consideration of climate issues in general, and forest and agricultural land preservation, in particular, in the environmental impact review of public and private discretionary actions. SEQRA implementing regulations must better reflect the goals of the CLCPA, especially the Type I list (6 NYCRR 617.4), and the Criteria for Determining Significance (6 NYCRR 617.7). With appropriate amendments to the regulations, the preservation of forests could be prioritized commensurate with forests’ importance to achieving the goals of the CLCPA.

4. Summary of Forestry Comments

- Urgently increase research funding to target the most carbon effective management practices and the best sites to deploy them.
- Undertake aggressive reforestation and afforestation and serve as pilot projects and laboratories for doing so.
- Empower state agencies, through funding and legislation to act quickly and effectively in combating threats posed to forests from invasive species.
- Look at the APA as a vehicle to study and implement forest initiatives.
- Amend and add to the 480-a tax program requiring carbon management in all programs.
- Emphasize building and fire code changes allowing durable and structural wood products to replace concrete and steel, and to allow changes to state procurement standards.

C. Agriculture

1. General Comments

The Section commends the CAC's effort to tackle GHGs from this largely unregulated sector and appreciates the CAC's efforts to reconcile the competing interests with which it must contend. However, the Section believes that the DSP underestimates the sector's contribution to GHG emissions and does not set targets for reductions consistent with the CLCPA or other sectors of the economy. In addition, NYSDEC has authority, both under pre-existing New York law and the CLCPA, to regulate methane and other emissions from manure. The final scoping plan should call for the adoption of such regulations by NYSDEC in the event the voluntary measures now included in the draft plan are not effective in achieving the necessary reductions. The CAC should consider whether its endorsement of offsets for its proposed carbon bank and ecosystem services program may be inconsistent with the CLCPA's environmental justice provisions. The CAC should evaluate a fee on non-organic, chemical fertilizer use and suggest ways to discourage other potentially environmentally unsound farming practices. We find that the DSP's reliance on non-waste biomass and biofuels may contradict the GHG reduction goals of the CLCPA. Finally, we urge the CAC to reconsider incorporating the CJWG's recommendations into the draft plan. Each of these points is discussed in more detail below.

2. The DSP Minimizes Agriculture's Impact on Climate

The DSP states that agricultural emissions, consisting of methane, nitrous oxide and a small amount of CO₂, represented approximately 6% of statewide GHG emissions in 2019, including emissions from livestock (92%) and soil management practices (8%). See DSP Sec. 15.1, p. 194. Six percent is an underestimate compared with larger percentages assigned to food systems globally (one quarter to one third of anthropogenic GHG emissions). The DSP deemphasizes the importance of the sector's climate contribution by undercounting (e.g., out-of-state contributions, such as fertilizer production) or by apportioning the impact of in-state agricultural practices to other sectors, such as transportation (e.g., brief mention of farm vehicles) and waste (food and agricultural waste). The DSP should acknowledge this more inclusive contribution of agriculture to climate problems.

The CLCPA defines "[s]tatewide greenhouse gas emissions" as "the total annual emissions of greenhouse gases produced within the state from anthropogenic sources and greenhouse gases produced outside of the state that are associated with the generation of electricity imported into the state and the extraction and transmission of fossil fuels imported into the state." ECL § 75-0101(13). Thus, the definition includes embedded GHG emissions of energy and fuel produced out of state and imported into New York. However, it does not include GHG emissions from the production of products such as fertilizers, pesticides or livestock feed produced out-of-state but used in state. While such emissions do not fall under the CLCPA definition, their exclusion from the DSP results in the draft plan understating overall agricultural GHG emissions affecting the State. The CLCPA does not prohibit the CAC from including these emission figures in the draft plan. By doing so, or at least explaining that the 6 percent figure does not include significant out-of-state emissions indirectly contributing to the carbon load associated with agriculture, the draft plan could articulate more clearly that reducing fertilizer and pesticide use will contribute to further GHG reductions.

In addition, the CAC should cover and account for agricultural on-site energy use, such as farm vehicle and equipment use, more extensively in the DSP. Currently, the DSP makes only passing reference to these issues. See Section 8.3, p. 61 (Health) (electrification of heavy-duty farm equipment will protect the health of farm and construction workers and reduce emissions and noise); 11.1, p. 95 (Transportation) (electric non-farm equipment expected to increase).

3. The DSP Should Establish Targets For Reducing GHG Emissions From Agriculture that Align with the CLCPA Goals

The CLCPA's overall goal is to reduce statewide GHG emissions to 85% below 1990 levels by 2050 and to reach net zero by that date for all sectors of the economy. See ECL §§ 75-0104(11), 75-0107(1). Furthermore, the CLCPA requires the State to achieve 100 percent emission-free electricity by 2040. See CLCPA § 4, N.Y. Pub. Serv. L. § 66-p(b)(2). The Agriculture and Forestry Advisory Panel ("AFAP") recommends, and the CAC adopts, measures that would achieve a 30% reduction by 2050 of agriculture's current GHG contribution to climate change (i.e., a return to 1990 levels). This 30% goal for agriculture is not consistent with overall statutory goals.

For instance, the DSP suggests benchmarking and tracking GHG emissions from farms but proposes no targets for such emissions or for the adoption of sustainable agricultural practices such as agroforestry and healthy soil systems. See, e.g., AF15. The Section believes the CAC should explore and develop additional and more aggressive GHG abatement opportunities, and targets, even if informal, should be set for the agricultural sector. The Section does not believe the CLCPA's focus on power generation and combustion sources prohibits the CAC from doing so. We urge the CAC to consider looking to proposed federal legislation as a model for establishing targets. See the Agriculture Resilience Act, introduced by Rep. Pingree, H.R. 5861, 116th Cong. (2020) in 2020 and H.R. 2803, 117th Cong. (2021) (reduce agriculture's GHG footprint 50% below 2010 levels by 2030 and attain net zero emissions by 2040 and require healthy soils and livestock management practices). Targets are particularly important to the extent the draft plan continues to rely on voluntary measures to encourage sustainable farming systems in the state.

4. NYSDEC Has Authority to Regulate GHG Emissions From Manure

Section 10 of the CLCPA states: "Nothing in this act shall limit the existing authority of a state entity to adopt and implement greenhouse gas emissions reduction measures." NYSDEC has such existing authority, independent of the CLCPA to regulate emissions of methane and nitrous oxide emanating from manure. Methane is a significant source of New York's GHG emissions and is reportedly the only GHG source that has increased in the State since 1990 (by 44 percent). Methane is reportedly 85 percent stronger than carbon dioxide in global warming and nitrous oxide is 265 times stronger. Under NYSDEC's long-standing air pollution control authority under the New York Environmental Conservation Law ("ECL"), the agency is empowered to adopt regulations controlling the emission of these powerful GHGs.

The environmental policy of the State of New York is “to conserve, improve and protect [New York’s] natural resources and environment and to prevent, abate and control water, land and air pollution. . . .” ECL § 1-0101(1). “It shall be the responsibility of [DEC]...to carry out the environmental policy of the state. . . .” See ECL §3-0301(1). To do so, DEC shall have the power to provide for the “prevention and abatement of all water, land and air pollution.” Id. Furthermore, the policy of the State is to maintain a reasonable degree of purity of the air resources of the State and “to require the use of all available practical and reasonable methods to prevent and control air pollution in the state of New York.” ECL § 19-0103.

“Air pollution” under the ECL is broadly defined as “the presence in the outdoor atmosphere of one or more air contaminants in quantities, of characteristics and of a duration which are injurious to human, plant or animal life or to property or which unreasonably interfere with the comfortable enjoyment of life and property throughout the state or throughout such areas of the state as shall be affected thereby....” ECL § 19-0107(3). NYSDEC is “empowered to “[f]ormulate, adopt and promulgate, amend and repeal codes and rules and regulations for preventing, controlling or prohibiting air pollution in such areas of the state as shall or may be affected by air pollution,” including requiring permits or certificates. ECL § 19-0301(1)(a). NYSDEC is further authorized to “[i]nclude in any such codes and rules and regulations. . . the extent to which air contaminants may be emitted to the air by any air contamination source.” ECL § 19-0301(1)(b).

“Air contaminant” means a dust, fume, gas, mist, odor, smoke, vapor, pollen, noise or any combination thereof. ECL § 19-0107(2). “Air contamination source” is defined as “any source at, from or by reason of which there is emitted into the atmosphere any air contaminant.” ECL § 19-0107(5).

The plain words of the air pollution provisions of the ECL make clear that methane and nitrous oxide (as well as ammonia and hydrogen sulfide) are air contaminants, and that facilities (including among other things, pads, pits, lagoons and other structures) that store or treat manure, as well as feedlots and grazing pastures where manure is introduced into the environment are “air contaminant source[s].” Consequently, methane and nitrous oxide emissions from such sources may be regulated by NYSDEC under the ECL, and that authority has not been disturbed by the CLCPA.

5. The CLCPA's Exemption Relating to Emissions From Livestock Does Not Preclude NYSDEC From Exercising its Regulatory Authority to Reduce GHG Emissions From Manure

The CLCPA requires that NYSDEC promulgate “legally enforceable emissions limits, performance standards, or measures or other requirements to control emissions from greenhouse gas emission sources, with the exception of agricultural emissions from livestock.” CLCPA § 2; ECL § 75-0109 (2)(b).

The Section believes that the exception for emissions “from livestock” may reasonably be read not to apply to manure after it has been introduced into the environment, since emissions that emanate from manure – whether at air contaminant sources like storage structures, feedlots or grazing lands -- are not “from” the animals, but rather “from” the manure itself as a result of how such air contaminant sources are managed. At the same time, we recognize that the statutory exception could be read more expansively to relieve NYSDEC from an unambiguous statutory mandate to control emissions from manure under the CLCPA. However, that more expansive interpretation would not undermine NYSDEC of its pre-existing statutory authority under the air pollution provisions of the ECL.

That methane may be difficult to monitor does not excuse NYSDEC from seeking to exercise its pre-existing authority to control manure-related GHG emissions as necessary to protect public health and the environment. In fact, the DSP itself indicates that – one way or another – agricultural methane should be subject to some regulatory control if needed to achieve the necessary emission reductions. See DSP § 17.2, p. 261 (Economy-wide Strategies) (“[T]he difficulty of monitoring methane with certainty from farms ... may be a reason to exclude those source categories from the scope of the program, *provided that some other regulatory mechanism is available to ensure emission reductions from these sources.*”). (Emphasis added.)

6. In the Event the Voluntary Measures Set Forth In the DSP Do Not Achieve the Necessary Reductions In GHG Emissions From Manure, NYSDEC Should Adopt Regulations Designed To Do So

The Section recognizes that the AFAP has spent a good deal of time and effort focusing on the manure problem and has devised two strategies -- Initiative “3A: Alternative Manure Management” and Initiative 4A “Precision Feed, Forage and Herd Management” -- to address it. We appreciate the fact that those strategies have been incorporated into the DSP at AF9 and AF10. We also appreciate that the DSP recognizes that methane from agriculture presents a

challenging problem, noting that one of the remaining GHG emissions in 2050 across all scenarios is projected to be methane from animal feeding. § 9.3, p. 75.

The DSP notes that “innovation in methane mitigation,” is required, See DSP § 9.2, p. 71, and acknowledges that this “will require transformative solutions.” See DSP § 9.3, p. 74. Moreover, the Section is aware that the CJWG recommended that the DSP include regulatory options for reducing methane emissions upstream of manure storage and practices.

Because the programs embodied in Initiatives 3A and 4A are entirely voluntary, they may be inadequate to achieve the meaningful emission reductions associated with manure management needed to meet the goals of the CLCPA. Thus, the CAC should consider converting some of the voluntary measures the DSP advocates, such as livestock dietary changes, into options for binding standards. At the minimum, NYSDEC, working with the Department of Agriculture and Markets, should promulgate strongly worded guidance advocating for such measures. See AF10. Standards and/or guidance could address, for instance, research into dry manure management systems instead of wet ones; transitioning to pasture-based and lower density farming; better manure spreading practices; research into feed additives; decreased use of antibiotics and development of agricultural alternatives to milk-based products that might be adopted by the State’s agricultural producers. The Section suggests also that the draft plan further explore techniques it already endorses that are likely to significantly reduce methane, such as cover and flaring emissions and encourages the CAC to articulate options for prioritizing funding for smaller livestock producers while regulating larger ones. Finally, the Section recommends that NYSDEC carefully track the State’s progress in reducing methane emissions from agriculture. In the event that NYSDEC finds that the voluntary measures now included in the DSP are not achieving the necessary reductions, NYSDEC should go to the next step and exercise its authority under the ECL to enact the binding regulations required to do so.

7. Soil Health, Nutrient Management and Agroforestry (AF 11-AF17): The CAC Should Reconsider New York Carbon Bank and/or an Ecosystem Services Program

The Draft Scoping Plan should articulate regulatory options for establishing a “Forest Carbon Bank (AF6) and/or “Payment for Ecosystem Services Program” (AF16) and should reconsider recommendations contained at AF6 for offsets by parties emitting GHGs, where pollution from offsets may disproportionately affect low-income communities, thereby potentially violating the CLCPA. The CLCPA requires that offset projects “provide public health and environmental

benefits, and do not create burdens in disadvantaged communities.” ECL § 75-0101(1)(h). Measures must maximize reductions of GHGs and co-pollutants in such communities. ECL § 75-0103(14)(d); see also, e.g., ECL § 75-109(4)(B) (offsets should not result in disadvantaged communities bearing disproportionate burden of environmental impacts); ECL § 75-0109 (3)(d) (NYSDEC is to “[p]rioritize measures to maximize net reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities). The final scoping plan should consider the pollution impacts to environmental justice communities of such programs and articulate how impacts could be avoided.

8. The Draft Plan Should Consider Regulatory Options for Fertilizer Use and for Other Farming GHG-Emitting Practices

In addition to being a powerful GHG, nitrous oxide depletes the ozone layer and is emitted largely by agriculture. The DSP encourages managing agricultural nutrients to decrease nitrous oxide air emissions and nitrogen and phosphorous pollution of waterways from New York farms due to fertilizer use. See AF11. However, the Section recommends that the draft plan evaluate regulatory options with respect to the imposition of a fee on non-organic, chemical fertilizer use quantities and/or application methods, as suggested by the CJWG. Furthermore, the draft plan should evaluate options to discourage the unnecessary use of pesticides even though such use can in some instances further climate goals (for instance, when used to suppress weeds to reduce tillage needs).

9. The Draft Plan Should Measure Outcomes for Disadvantaged Communities

The CLCPA contains a requirement to afford disadvantaged communities with 35 percent of the benefits of many aspects of the State’s climate programs, and it sets a goal of 40 percent. See ECL §75-0117. The Agricultural provisions of the draft plan should considerably strengthen equity-focused goals. Disadvantaged communities control a very small share of New York agricultural lands. To achieve the CLCPA’s mandate, the draft plan should do more to ensure that the climate benefits of soil health and other sustainable agriculture programs, such as those promoting perennial crops and riparian buffers, reach disadvantaged communities. Land access, succession, and land leasing deserve more attention in the final scoping plan.

10. The DSP's Climate-Focused Bioeconomy and Forest Products Provisions (AF18 AF24) May Not Support the Goals of the CLCPA

The DSP's promotion of New York's bioeconomy, including support for biomass (AF19) and biofuels (AF20), does not appear to fully support the goals of the CLCPA to reduce state-wide GHG emissions while lending support to Disadvantaged Communities unless focused on waste materials. Harvesting and utilizing non-waste biomass can hinder carbon sequestration by otherwise existing forests and add to GHG emissions. For instance, the draft plan notes what it appears to view as a detrimental decline in the State's production of "firewood," (AF17) although it is widely understood that burning wood without scrubber technology adds to GHG emissions. Furthermore, the DSP promotes biofuels without noting that such fuels, whose use contribute to GHGs (and compete with food production unless waste products such as corn husks are used), arguably should, from a climate standpoint, be used transitionally while the State attempts to achieve an economy based entirely on renewable energy as called for in the legislation. See CLCPA § 4, N.Y. Pub. Serv. L. § 66-p(b)(2). Nor does the DSP articulate the extent to which Disadvantaged Communities may bear the brunt of pollution effects from the use of these products. The Plan should carry out the CLCPA's GHG mandates through prioritizing afforestation and forest preservation efforts, which provide the maximum climate benefit, over strategies designed to promote wood products and should make clear that bioenergy is not a carbon-neutral strategy unless waste biomass materials are used.

11. The DSP Does Not Adopt the CJWG Recommendations

The DSP does not offer sufficient guidance for NYSDEC to fulfill its mandate to "[p]rioritize measures to maximize net reductions of [GHG] emissions and co-pollutants in disadvantaged communities...." Section 71-0109 (3)(d). NYSDEC must "prioritize the safety and health of disadvantaged communities." CLCPA § 1.7. The CLCPA sets "a goal for disadvantaged communities to receive forty percent of overall benefits of spending on clean energy and energy efficiency programs, projects or investments in the areas of housing, workforce development, pollution education, low-income energy assistance, energy, transportation and economic development," with thirty-five percent set as a minimum. See ECL § 75-0117. Nevertheless, the DSP offers little explanation for not adopting the CJWG's recommendations, although the recommendations are consistent with the legislation. Some of the CJWG's conclusions and recommendations, which are echoed by the Section above, include:

- A 30% GHG reduction target is inadequate given that the CLCPA requires an 85% reduction of anthropogenic emissions, with a goal of net zero.

- Address barriers for small to mid-size farms and for socially disadvantaged farmers.
- Provide for more regulatory or mandatory actions and rely less on voluntary programs.
- Fund practices upstream of manure storage and those that smaller producers can adopt.
- Impose a fee on synthetic fertilizers, encourage organic farming and decrease pesticide use.
- Create a pathway for 100% zero emissions farm vehicles and equipment.

The Section recommends that the CAC reconsider all the agriculture and forestry recommendations made by the CJWG for possible inclusion in the final scoping plan.

Chapter 16 Waste

A. Introduction

The Section commends the CAC for convening a Waste Advisory Panel to address GHG emissions from the waste sector and for including strategies to reduce emissions from this sector in the Draft Scoping Plan, and in particular, the strategy aimed at reducing waste generation. The proposed strategies for the waste sector are a good start, but the concern is whether they lack specificity, and therefore, would be too weak to avoid the continued generation of high volumes of waste, methane gas, and other GHGs. The Section recommends the development and implementation of additional strategies consistent with the policy of solid waste management set forth in the Solid Waste Management Act of 1988 (Section 27-0106 of the ECL), known as the hierarchy of solid waste management, having as its first goal the reduction in the amount of solid waste generated. The solid waste hierarchy should serve as the guide for state action under the CLCPA.

The Section considers the following to be key imperatives for future waste management:

- **Waste reduction/diversion:** *The amount of waste generated needs to be reduced, and when generated, diverted from landfilling whenever possible. Legislation such as the Food Scraps Law, Extended Producer Responsibility Act, and the Bottle Bill, should be amended to strengthen waste reduction and diversion provisions.*
- **Fostering innovation with established guardrails:** *Advanced recycling should be considered, and if adoption proceeds, operators must be required to eliminate any potential negative environmental externalities.*
- **Equitable landfills:** *Host communities, especially those in Disadvantaged Communities, must be protected from disproportionate burdens associated with operations at the State's solid waste management facilities.*

B. Strategy W1 Organic Waste Reduction and Recycling

The Section concurs with the strategy for organic waste reduction. DSP at 241. We support legislative action to eliminate the exemptions in the Food Donation and Food Scraps Recycling Law (the "Food Scraps Law") and to support new construction of organic waste recycling facilities. As of January 1, 2022, the Food Scraps Law required businesses and institutions that generate an annual average of two tons or more of wasted food per week to donate all excess edible food and recycle the remaining food scraps if they are within 25 miles of an organic waste recycler (composting facility, anaerobic digester, etc.). The Food Scraps Law applies to restaurants,

grocery stores, hotels, colleges and universities, malls, event centers, and other large food generators. It exempts generators in New York City (the “City”) because the City has a law addressing organic waste.³⁴ Also, the Food Scraps Law exempts hospitals, nursing homes, adult care facilities, K-12 schools, and farms.³⁵ The Section fully supports the strategy components in the DSP to amend and expand the Food Scraps Law and to simplify regulations for this sector by the creation of registrations rather than requiring permits for certain organic recycling facilities.

C. Strategy W2 Waste Reduction, Reuse and Recycling

As the Draft Scoping Plan acknowledges, climate change necessitates drastic reductions in statewide GHG emissions, including from the waste sector. Current practices have failed to make recycling and reuse more economically viable than landfilling. The Draft Scoping Plan acknowledges that landfilling is too cheap, which has led to a disinvestment in waste reuse either as a fuel or as a feedstock for new products: “[t]he relatively low cost of landfilling (particularly in Western New York) makes recycling less attractive to both private and municipal sectors.”³⁶ The solid waste hierarchy favors waste reuse over landfilling, but reuse continues to be an aspiration for materials handling due to a lack of investment in advanced recycling technology. Until a portion of our waste is processed for reuse, and markets for these materials grow, waste will continue to be collected and shipped to landfills, much of it to Western New York. Unless the cost of landfilling increases, the use of innovative and effective recycling technologies will stall. The final scoping plan should provide support for the development and implementation of these technologies within a reasonable time frame.

In April 2022, Kentucky became the 18th state to enact legislation that recognizes the important benefits of advanced recycling. Michigan has embraced waste sorting technology at advanced recycling facilities that combines robotic arms, magnets, and staff to increase recycling rates. Emmet County in Michigan operates a high-tech recycling program that has grown into a million-dollar revenue source for the community of ~33,000 residents, selling thousands of tons of recyclables to companies across Michigan and the Great Lakes region to make into new products. The program even recycles plastic shopping bags. Inside the County’s Harbor Springs facility, a robotic arm quickly sorts materials by sweeping across a moving conveyer belt and plucking high-grade plastics, glass, and aluminum. The mixed waste stream circulates until the robot pulls out

³⁴ See §16-306.1 of the NYC Administrative Code “*Organic Waste*”

³⁵ See N.Y. Envtl. Conserv. Law § 27-2201-2219

³⁶ See page 241.

all the recyclable items, at a rate of 90 picks per minute and there is another line of materials where workers pluck papers, boxes, and bags by hand.³⁷

This three-decades-old program prioritizes recycling and assists with developing inroads into the growing circular economy for recyclables and compostable organics. It has “demonstrated that public investment in this type of infrastructure pays off – pays off in valued public services, as well as 90-some percent of the material that they collect through their recycling programs is actually sold to Michigan companies,” according to Kerrin O’Brien, executive director of the nonprofit organization Michigan Recycling Coalition.

The CAC should encourage investment in the construction and operation of advanced recycling facilities in New York by recommending that a state agency prepare an inventory of potentially appropriate sites and provide experienced staff to facilitate the permit application review process.

However, while waste reduction and reuse techniques are developing, the waste sector will continue to be a source of significant methane emissions. The Draft Scoping Plan acknowledges the significant methane emissions³⁸ emitted from the twenty-six (26) active landfills in the State as well as the intermittent nuisance emissions that affect host communities. These large regional landfills accept waste from outside the community and often from out of state, resulting in inequities for the host communities arising from associated environmental impacts. We support the components of the strategy in the DSP to reduce waste generation and shift the waste sector away from landfilling by promoting recycling and reuse and the development of markets resulting in increased protections for human health and the environment and equity.

To address methane emissions from landfills while waste reduction initiatives are being implemented, the State should seek to increase coordination with EPA’s Landfill Methane Outreach Program (“LMOP”), particularly with respect to emissions from closed municipal landfills. The NYSDEC Division of Materials Management’s Bureau of Solid Waste Management is a LMOP partner, and as such could work with EPA to expedite the designation of “candidate” landfills to implement methane reduction initiatives. Currently four (4) LMOP candidate landfills exist in the State, with seven (7) landfills having “unknown” status. The State should work with EPA to classify those unknown landfills and strategize on how federal and state resources can complement each other to foster methane reductions. The State has approximately 1,901 inactive

³⁷ <https://wasteadvantagemag.com/one-michigan-county-makes-millions-by-recycling-it-could-become-a-state-model/>

³⁸ See page 235.

landfills and only twenty-two (22) of these participate in projects through the LMOP.³⁹ The State should prioritize increasing the number of LMOP projects in operation on New York's landfills.

The Waste Advisory Panel's recommendations dated April 5, 2021, set forth in Appendix A of the DSP at A-165 to 192, advocate for the incorporation of improved monitoring technologies for fugitive emissions into landfill operations (A-173 to 174). The Advisory Panel acknowledges that data on fugitive emissions are lacking. Consideration should be given to reliable data collection through the use of drone technology to continuously monitor a landfill surface. The Section supports the Advisory Panel's mitigation strategy for a NYSDEC regulatory change to require the installation of landfill gas collection systems sooner after waste placement and the expansion of monitoring requirements for fugitive emissions beyond existing criteria. The CAC should include this strategy in the final scoping plan.

D. Strategy W3 Extended Producer Responsibility ("EPR")/Product Stewardship

On January 8, 2022, Senate bill S.1185C, entitled the Extended Producer Responsibility Act, was proposed. The bill focuses on the regulation of containers, packaging, and end-of-life products to reduce waste generation and thereby avoid GHG emissions. A new ECL §27-3303 in the bill would create a producer responsibility advisory board. The board would receive and review the required Producer Responsibility Plans and make recommendations regarding plan approvals. Those who would be regulated under the bill include producers of packaging materials. These producers would be given four years to obtain NYSDEC's approval of a Producer Responsibility Plan that would allow them to continue to sell covered materials/products (packaging). This promotion of EPR as a means of achieving a more sustainable supply chain and consumer economy is gaining support among other States. For example, Maine, Oregon, Hawaii, Maryland, and Massachusetts all have a form of EPR in the legislative pipeline. The scale of waste generated from packing materials is clear given that Amazon alone delivers more than 1.5 million packages a day to New York City. The CAC should establish a strategy for the waste sector that encourages the use of EPR to reduce waste from packaging materials.

E. Productive Landfills

Closed landfills have proven to be appropriate sites for solar energy arrays and hold a lot of promise for reaching the State's renewable energy goals. The State has approximately 1,901

³⁹ https://www.dec.ny.gov/docs/materials_minerals_pdf/inactivelandfills2021.pdf

closed landfills. The State needs to research the feasibility of their reuse for solar energy generation and make this information available to renewable project developers.

The New York State Bar Association was instrumental in convincing state legislators to provide increased financial incentives to promote the siting of renewable energy projects on landfills in the fourth extension of the Brownfield Cleanup Program. The 5% increase in tax credits available for these projects may not be sufficient to incentivize developers if the costs of construction on these sites are prohibitive and other potential liabilities are present. Nonetheless, we expect some closed landfills to present opportunities for development.

To encourage the construction of solar energy arrays, the State amended the SEQRA environmental impact review regulations to exempt these installations as Type II actions where they involve 25 or fewer acres of physical alteration on closed landfills. The Section requests the CAC to recommend increased NYSDEC staffing to review permit applications for the construction and operation solar energy arrays as an end use for closed landfills pursuant to the regulations set forth at 6 NYCRR 363-9.7. Permit applications will need to be reviewed expeditiously if New York is going to foster renewable energy projects on closed landfills, particularly downstate where the demand for renewable power will be highest.

The NY Sun Program offers financial incentives for, among other projects, the installation of solar energy systems on closed landfills and brownfield sites measuring at least 64 acres. NY Sun also provides incentives, financing, and tax credits for both residential and commercial solar energy system development on non-landfill and greenfield sites, particularly upstate on farmland. It may be the case that more financial support will be needed to encourage project development on downstate closed landfills and brownfield sites. The incentives per watt of power generated are attractive to renewable project developers, but they may not overcome the disincentives of additional costs and potential liabilities associated with redeveloping these sites. The final scoping plan should include a recommendation for NYSERDA to assess whether existing incentives are sufficient to attract private and public investment in solar project development on repurposed sites under the NY Sun program, and whether the 64-acre requirement should be reduced because the average closed landfill is typically in the 25-acre range.

F. Strategy W8 Recycling Markets

The Section supports the components of the market development strategy described in this section of the DSP. When China stopped taking recyclable plastic waste from the United States

in 2018, existing recyclable waste management approaches collapsed, and plastic waste began to pile up at solid waste management facilities. The lack of a viable regional plastics market in the State makes it nearly impossible to catalyze change in plastics management. Until recycled plastic can be economically competitive with virgin feedstock, and until there are non-petroleum-based packaging alternatives, manufacturing companies will continue to allow their costs of production drive sustainability decisions. Discouragingly, even new “sustainable” packaging, such as Chipotle’s paper plates, end up in a landfill or a combustion facility.

The Section agrees with the statement in the DSP that the State should support markets for recovered resources and incentivize public-private partnerships for recycling facility development. On January 18, 2022, Senator Mannion introduced “S.7891” to amend ECL §27-0303 and §27-0707 to support advanced recycling and the development of advanced recycling facilities. Advanced recycling is a heat-based, non-incinerating, recycling process for plastic. This bill aims at incentivizing more plastic recycling, reducing the amount of plastic landfilled, reducing GHG emissions, converting used plastics into future plastic feedstocks, and generating a diverse range of products.⁴⁰ The goal is for recycled plastic material to displace the virgin plastic material currently used in manufacturing.

If this bill passes, advanced recycling of plastic would be allowed through the processes of depolymerization, gasification, pyrolysis, and solvolysis. Post-use polymers and recovered feedstocks will be excluded from the definition of “solid waste” and advanced recycling facilities would be exempt from the definition of “solid waste management facility,” and therefore, exempt from Part 360 and 361 requirements. This bill contains a potential partial solution to the current recycling crisis in New York. The final scoping plan should encourage state support for advanced recycling technology to solve the plastic waste challenge in a manner that is protective of human health and the environment.⁴¹

⁴⁰ <https://www.nysenate.gov/legislation/bills/2021/s7891>

⁴¹ *Id.*

The Section acknowledges that the temperature and pressure conditions necessary to operate advanced recycling facilities require significant amounts of energy, but if that energy can be generated from renewable sources rather than fossil fuels, this concern would be mitigated. The emergence of catalytic pyrolysis and enzyme-driven PET hydrolases could play a key role in decreasing thermal energy requirements and processing time, and in increasing process efficiency.

1960-2018 Data on Plastics in MSW by Weight (in thousands of U.S. tons)

Management Pathway	1960	1970	1980	1990	2000	2005	2010	2015	2017	2018
Generation	390	2,900	6,830	17,130	25,550	29,380	31,400	34,480	35,410	35,680
Recycled	-	-	20	370	1,480	1,780	2,500	3,120	3,000	3,090
Composted	-	-	-	-	-	-	-	-	-	-
Combustion with Energy Recovery	-	-	140	2,980	4,120	4,330	4,530	5,330	5,590	5,620
Landfilled	390	2,900	6,670	13,780	19,950	23,270	24,370	26,030	26,820	26,970

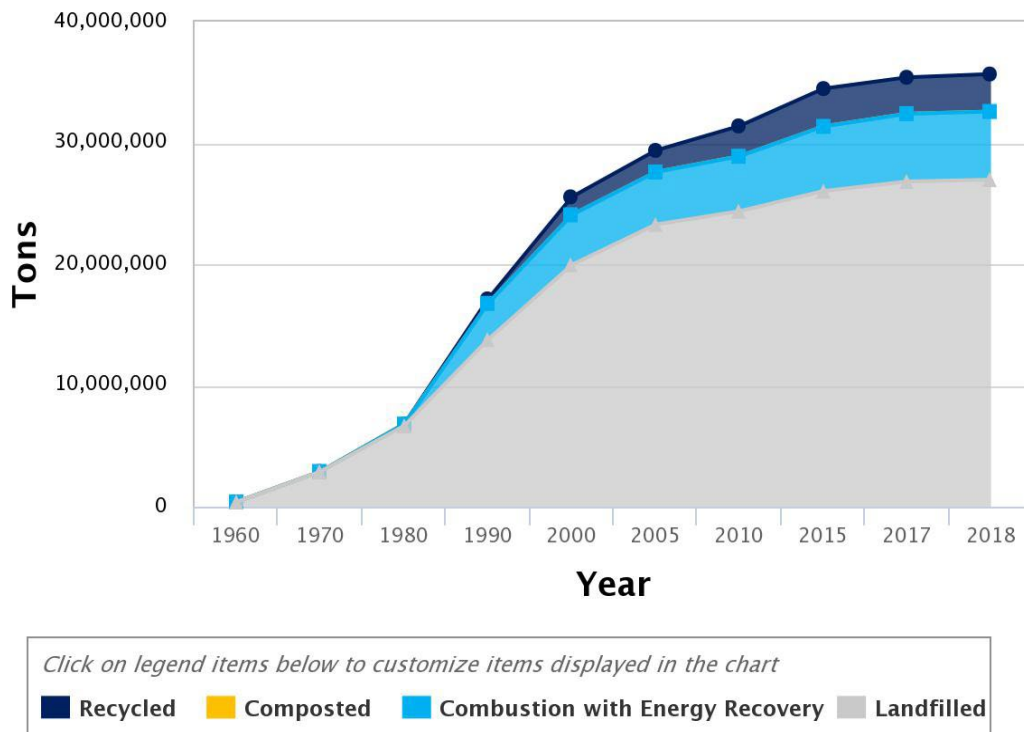
Sources: Plastics information is from the American Chemistry Council, the National Association for PET Container Resources and The Association of Plastic Recyclers.

The Section requests the CAC and the Waste Advisory Panel to review the recommendations in the July 2020 New York City Bar Association’s Plastics Report (the “Plastics Report”).⁴² The Plastics Report focuses on legislative action that would clean up riparian areas, work towards the elimination of single-use plastics, and focus extended producer responsibilities on products that contain microfibers and plastic microbeads. In working towards the elimination of single-use plastics such as water bottles, cutlery, plates, and straws, a proposed Senate bill S.6815 is focused on actions that state universities would take to eliminate single-use plastic items. This proposed legislation, while only affecting a small percentage of the total single-use plastic used

⁴² <https://s3.amazonaws.com/documents.nycbar.org/files/2020743-PlasticsReport.pdf>

in the State, if successful, would be a model for expanded legislative action. We recommend support for this legislation that could lead to the elimination of single-use plastics.

Plastics Waste Management: 1960–2018



Aluminum Recycling

There is no mention in the Draft Scoping Plan of support for increased recycling of aluminum. This recyclable metal has established uses and its recycling causes minimal negative externalities. In 2018, EPA used industry data from the Aluminum Association to calculate that the national recycling rate for aluminum containers and packaging was 34.9%.⁴³ That same year approximately 2.7 million tons of aluminum ended up in landfills.⁴⁴ To achieve a more sustainable future and combat climate change, the State should incorporate in the DSP a strategy to increase the rate of recycling of aluminum products.

The New York State Returnable Container Act (the “Bottle Bill”) currently provides a refund value for beverage containers of not less than five cents.⁴⁵ Since its enactment, NYSDEC estimates redemption rates at ~70-80%, which they claim has reduced container litter by approximately

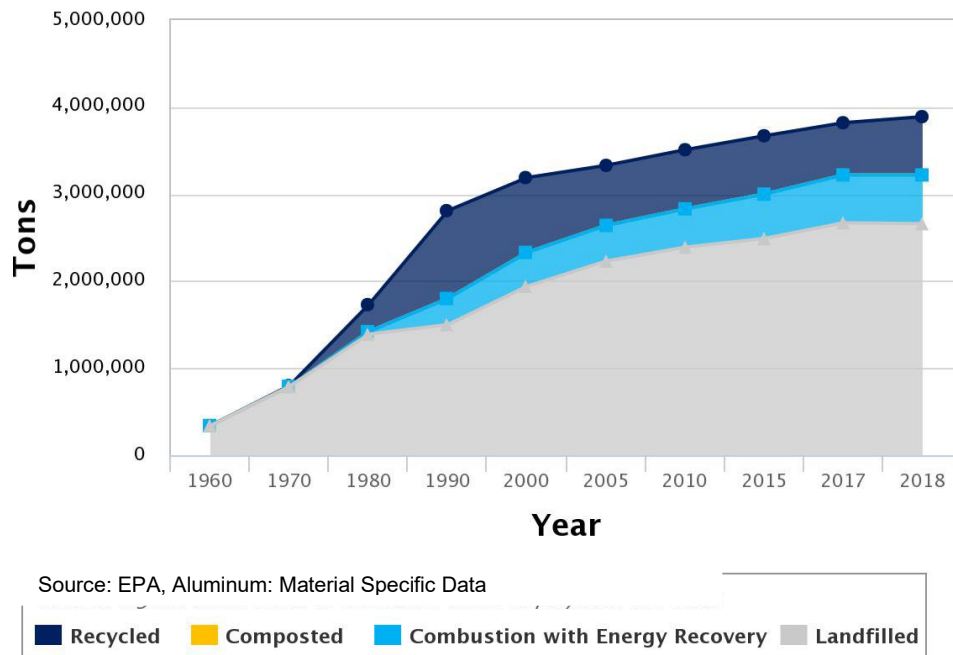
⁴³ <https://www.epa.gov/facts-and-figures-about-materials-waste-and-recycling/aluminum-material-specific-data>

⁴⁴ *Id.*

⁴⁵ New York State Returnable Container Act, §27-1005. Refund value.

75%.⁴⁶ While these numbers are impressive, the Bottle Bill applies only to glass, metal, and plastic containers that hold less than one gallon or 3.78 liters. To facilitate an increase in aluminum recycling, the Bottle Bill should be expanded to apply to more beverage containers and their refund values increased. Lastly, educational materials and public information campaigns should be undertaken to inform the public of the benefits of properly sorting recyclable materials.

Aluminum Metals Waste Management: 1960–2018



In sum, the Section requests the CAC to consider our recommendations to strengthen and supplement the strategies set forth in the DSP for the waste sector in order to reach the significant GHG reductions needed to achieve a sustainable, equitable, and climate-safe future.

⁴⁶ <https://www.dec.ny.gov/chemical/8833.html>

Chapter 17 Economy-Wide Strategies

This section addresses the recommendations of Chapter 17, Economy-Wide Strategies, in the Draft Scoping Plan. That Chapter identifies three options for public discussion: (1) carbon pricing by means of a tax or fee on the carbon content of goods; (2) a cap-and-trade program (called “cap-and-investment”) through an auction of permits for covered activities; and (3) a clean fuel supply standard that would require oil or gas providers to gradually reduce the carbon intensity of their products. Chapter 17 also identifies 11 criteria for evaluating these policy options and notes that an economy-wide program should be coordinated with agency actions in related areas and may depend on the availability of funds from Congress or other federal GHG-reduction initiatives.

The Chapter’s introductory description of these three policy options is a concise and useful primer in framing, in general terms, the advantages and disadvantages of each option. What the Chapter does not do, however, is indicate how the three options it discusses would operate in the context of New York’s economy, whether these separate options could be combined to form an integrated economy-wide program, how that program would relate to other existing or proposed regulatory programs or the scale of subsidies required to prevent the burdens of any of these programs from falling on low- and middle-income consumers. While the draft plan cannot be expected to provide a precise estimate of those subsidies, it is important to indicate their order of magnitude, which incremental costs they would be expected to cover, and for which classes of consumers. The draft plan should also indicate how it might be staged if the necessary subsidies are not yet available, what its preferred alternative would be if those subsidies were simply not feasible and how those conditions would affect compliance with the CLCPA’s GHG goals.

In addition to this general shortcoming, the Chapter is unclear as to what portions of New York’s economy its analysis is intended to apply. After an extended discussion of the pros and cons of a “cap and invest” emissions trading program, a carbon tax and a declining fuel supply standard, the Chapter notes that electricity will likely be regulated separately and thus need not be the focus of the economy-wide measures. The Chapter also notes that certain methane-generating activities such as landfilling, farming and refrigeration are difficult to monitor, presumably for each of the program options, and that the fuel supply standard in particular would only cover transportation, buildings and industry. Yet, if electricity is covered by separate regulation, transportation, buildings, and industrial emissions are the principal GHG sources to be covered in an economy-wide program.

The Chapter touches only briefly on another factor relevant to the choice of preferred GHG-reduction strategies – the feasibility of regulation by NYSDEC, the PSC or any new agency assigned to monitor and enforce compliance with the “cap and invest” option, particularly if that option is cast widely to include industry and portions of building construction or operation. The sheer number of covered sources would present both management and budgetary challenges to agencies that are chronically short of staff, and the additional administrative burdens on businesses would surely be cited in complaints about the State’s competitive standing.

Although it does not say so, the Chapter implies that, with electricity generation regulated separately, a carbon tax or fuel supply standard is likely the preferred option for both generating revenue and achieving GHG-reduction goals in industrial, transportation, and buildings emissions. Either of these options would seek to achieve those goals by imposing adding cost to the consumption of fossil fuels for industrial activities, the operation of vehicles (whether private cars or public transit), oil or gas-heated homes and gas stoves, and home construction itself. Yet these costs are likely to be very substantial for many homeowners and, indirectly, for most renters in the state. Many homeowners will not be able to afford (or simply will not wish) to replace their cars, their furnaces, their stoves or their home’s windows and insulation. Renters will have less choice in these matters but often be less able to bear the costs of these conversions. Unless the State of New York, or the federal government, is prepared to assume not only the increased operating costs for low and even middle-income homeowners and renters, but also the significant costs of converting their homes to electricity (as they are attempting to do for electric cars and solar roofs), it seems doubtful that either the carbon tax or fuel supply standard option can be counted on to achieve the statute’s GHG-reduction goals.

Moreover, the DSP does not consider whether the proceeds of a carbon tax would be adequate to provide the subsidies, financial incentives, technical assistance and other support recommended throughout the draft plan, while also addressing existing inequities in disadvantaged communities and protecting both their residents and other low-income New Yorkers from increased utility and other costs. The Chapter’s economy-wide discussion does not address this issue, an omission that threatens to render much of its discussion of the State’s policy choices academic.

Finally, the Chapter’s utility as a planning document is further limited by its discussion of the “Process Going Forward.” That process makes clear that virtually all of the key questions about the draft plan are still to be evaluated and decided by the CAC, including the type of policy to be

recommended, its level of ambition, which industries or activities it should cover, how, as required by the Act, proceeds are to be directed to “disadvantaged communities,” what “design elements” would be proposed to encourage innovation in the State’s economy, how the draft plan would relate to regional and federal programs and other critical questions that the Chapter mentions but does not discuss. Because the Draft Scoping Plan includes virtually no specific proposals on these questions, or even any indication how the CAC intends to answer them, meaningful public comments on the proposed plan must await revision of the Draft Scoping Plan or issuance of the final scoping plan for public comment.

Chapter 19 Land Use

A. General Comments

Chapter 19, “Land Use”, begins with the correct observation that “[t]he way we use land, whether for development, conservation, or a mix of uses, directly affects the State’s carbon emissions, sequestration, and storage.” The chapter identifies urban sprawl as a critical problem because it both encourages automobile traffic and tends to be destructive of land that would serve as a carbon sink. Although the existence of relatively cheap land outside of the built-up metropolitan areas may be a major cause of sprawl, there is no recommendation of how it may be discouraged aside from the State’s guidance to localities and general recommendations such as “[t]he State should increase local capacity to conserve agricultural, forested, and other natural lands through statewide authorization of the Community Preservation Act for the purposes of land conservation for carbon sequestration, and to support land use patterns that reduce GHG emissions such as transit-oriented development.” [p.282]

The Chapter recognizes that land use traditionally rests with local governmental agencies, and all of the strategies in this Chapter are well-grounded in historical state environmental efforts and conventional land-use planning doctrine. However, notably absent are fact-based estimates for the level of effort and corresponding cost, revenue associated with the strategies, or a meaningful outline for practical and specific efforts to achieve the recommendations of this Chapter in time to make a difference in achieving carbon reduction within the statutory time limits.

Also notably absent is any specific recommendation for reconciling the inevitable clash between the siting of clean energy facilities and local land use control. Thus, the Chapter’s discussion of generally recognized principles of land use planning assisted by extensive State “advice” omits any discussion of the new Office of Renewable Energy Siting (“ORES”) and its implementation of the Accelerated Renewable Energy Growth and Community Benefit Act, codified in Section 94c in New York’s Executive Law.

These comments consist of a short description and commentary on certain portions of the Chapter and conclude with a number of recommendations, including one proposing that the Governor’s Office coordinate state efforts to assist localities in the reconciliation of clean energy siting with traditional land use control.

B. Discussion of “Key Strategy Themes” In the Chapter

The Chapter’s recommendations are organized around three “Key Strategy Themes” (DSP at 274). These foundational themes are:

1. Protection, restoration and monitoring of natural and working lands;
2. Forests and farmlands in municipal land use; and
3. Smart Growth

Set forth immediately below is a short discussion of certain of the strategies (and “components” of those strategies) that are proposed to implement each of the Key Strategy Themes.

Key Theme No. 1: Protection, Restoration, and Monitoring of Natural and Working Lands

The Chapter’s discussion of the first “Key Strategy Theme” sets forth various common sense and well-recognized approaches to land use management by local authorities. The Chapter does a good job of identifying the development pressures on maintaining forest land, but it fails to provide specifics for the implementation of forceful counter measures to such pressures.

Among the strategies (and strategy “components”) for achieving the protection, restoration and monitoring of natural and working lands are the following:

- “Enact ‘Keep Forests as Forests’ Law”. (DSP at 277)

This proposal recommends State legislation requiring developers to “purchase and set aside forested land when forest land is lost during development following the principles of avoid, minimize, and mitigate.”

This approach to conserving natural resources by requiring replacement of trees lost through forest development is well established in State and Federal wetland policy and legislation, and is also reflected to some extent in municipal land use “tree ordinances.” The Section supports this proposal, assuming that the program would be modelled loosely after the State’s wetlands regulations, because it appears to be a low-cost and effective approach to forest preservation that could be cost-neutral to the State. However, we do so with some hesitancy because a substantial scientific and land-use planning effort will be needed to identify “forests” that are “worthy” of preservation due to their size and ecological value. NYSDEC will recall that it took years of intensive work to get the regulatory regimes for the protection of wetlands up and running

effectively. Moreover, it would take several years for saplings planted under such a program to mature to the point that they are able to sequester substantial amounts of carbon. The Section also expects that it would be a heavy lift to garner the political support and cooperation from the development community in the establishment and implementation of such a program. Finally, the Section suggests that any statutory forest protection regime be crafted to avoid causing undue delay (or deterring altogether) renewable energy projects that are essential to meeting the CLCPA goals.

The Section further suggests that the CAC consider another approach to forest preservation that may achieve some of the objectives of a “Keep Forests as Forests” law and do so in the short-term. Under this approach the Scoping Plan could harness State and local agencies’ existing authority under SEQRA (and with respect to energy facilities, the Accelerated Renewable Energy Growth and Community Benefit Act and Article 10 of the Public Service Law) by requiring careful consideration of forest preservation in the environmental review of a project and mitigation of forestland impacts to the extent practicable.

1. “Establish programs to support local land acquisitions.” (DSP at 277)

This proposal calls for creation of a grant program to encourage local government statewide to preserve forestland, similar to the more limited Community Preservation Act. The Section supports this strategy in concept. However, the DSP provides no estimation of cost, nor the source of revenue for this grant program. The Section notes that one straightforward way to implement this proposal would be to modify the Community Preservation Act to expand its geographic scope beyond the three counties it now benefits, and to expand the revenue sources that might be tapped to achieve its promise.

2. “Maintain and Increase State Land acquisitions.” (DSP at 277)

This proposal follows the now-historic path through which the State has preserved millions of acres of forestlands over the years. However, the proposal does not identify, or even quantify the lands available for acquisition, nor the amount of funding needed to make a significant difference. For this strategy to be meaningful, there should be some quantification of (a) available lands for acquisition, (b) some idea of a practical goal of acquisition and forestation, and (c) establishment of an order or priority of acquisition.

3. “Require participation in carbon markets.” (DSP at 277)

This proposal provides that “[t]he State should enact legislation to establish and or require participation in a forest carbon market for GHG emission sources in the State.” The creation of a “forest carbon market” is likely to be a controversial and complex endeavor, and unfortunately there is no discussion of the basics of the program envisioned by the proposal, nor how the program could be implemented or funded. Moreover, the Section is aware of reports regarding the impact of wildfires on California’s forest carbon market. There is nothing in the DSP suggesting that the CAC has considered such impacts on the effectiveness of a New York forest carbon market. Thus, this strategy appears to have been included in the draft plan without the considered attention its viability would require.

- “Increase grant program funding.” (DSP at 279).

This proposal recommends that the “State should increase funding for the Urban and Community Forestry Grants to assist local municipalities in the management of urban forest...” (DSP at 279) This section also contains a recommendation for grants to individuals “to establish and maintain privately owned trees.” (id.) Again, this apparently good idea is devoid of quantification of the effort, cost or revenue source. Equally important, there is no attempt to integrate local and private endeavors and expenditures in the overall State activity that will be needed in the short run (before additional forests mature into an effective carbon sink) and long-term objectives.

Key Theme No. 2: Forests and Farmland in Municipal Land Use Policies; and Key Theme No. 3: Smart Growth

The most notable proposals aimed at protecting forests and farmland in municipal land use and at promoting “smart growth” are that:

- the State should “provide guidance and support on clean energy siting to localities,” (DSP at 291); and
- “the State should provide direct planning and zoning assistance to local communities and promote municipal implementation of mitigation strategies through enhanced support of local adoption of zoning and land use regulations consistent with smart growth principles and local policies that support sustainable, equitable development and the accelerated expansion of local clean energy while also ensuring and enhancing public outreach,

education and engagement of particularly in land use decisions and process.” (DSP at 295).

- “DEC should develop a statewide conservation framework...and provide [a] basis for prioritizing State funding, tax relief, land acquisition, and technical assistance programs to conserve priority natural areas and promote smart growth.” (DSP at 288).
- “DOS, DEC, and the legislature should assist county and local governments to create land-use policies, land conservation programs and smart growth strategies, land conservation programs and smart-growth strategies that prioritize and protect wetlands, forests, grasslands, stream buffers and other natural areas (such as statewide authorization of the Community Preservation Act, training and support on use of CRRRA model local laws, comprehensive planning language, zoning and other conservation planning approaches; and funding....”) (Id.)

These invocations for cooperation and assistance seem to ignore the competing goals inherent in the regulation of land. More particularly, they overlook the fact that the Accelerated Renewable Energy Growth and Community Benefit Act and implementing regulations adopted by ORES appearing at 19 NYCRR Part 900, (as well as Article 10 of the Public Service Law) present a potential clash between local control of land use through municipal zoning and the need for expediting the siting of renewable energy facilities. These State laws and regulations -- reflecting the importance of the task of siting enough major solar and wind facilities to meet the CLCPA goals - may prioritize clean energy facility siting over the preservation of prime agriculture and forest lands and the promotion of “smart growth”. Among the statutory provisions designed to accelerate siting are a one-year time-limit for each siting proceeding, pre-emption of environmental review under SEQRA and preemption of local laws, mainly municipal zoning codes, deemed to be “unreasonably burdensome” for siting a project.

Preemption is probably the most important of the provisions in Section 94-c. The statute provides: “the office may elect not to apply, in whole or in part, any local law or ordinance which would otherwise be applicable if it makes a finding that, as applied to the proposed major renewable energy facility, it is unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility.” Section 94-c(g). When preemption is invoked, it denies towns and villages the land use authority granted them under the State enabling statutes. Although the siting authorities (under Section 94-c and the similar

statutory siting program appearing in Article 10 of the Public Service Law) are obligated to consider local zoning on *how* to site a facility, neither have the authority to consider zoning code provisions on *where* to site it. Moreover, the siting laws require the developer only to mitigate environmental harms to the extent possible on whatever land it proposes to build the facility. Both Article 10 and Section 94-c state that the “unreasonably burdensome” test for preempting local law relates only to the facility as proposed and not to the local zoning law itself.

The regulations under Section 94-c also contain a set of default “uniform standards and conditions” for mitigating environmental harm so that the developer and the community need not spend time negotiating them, as they would under Article 10. But perhaps the most important factor in accelerating the process is the evident political expectation that ORES will use its discretion to move toward positive siting decisions expeditiously, notwithstanding the provisions of local laws. The bottom line is that siting of renewable energy facilities under State law presents a challenge to local governments as well as to the preservation of agricultural lands, forests, and wetlands.

The Chapter recommends that NYSERDA assist local communities in developing procedures to accommodate these possibly conflicting goals, and focus on how State agencies might assist “regional and local agencies in general planning, direct technical assistance, and the establishment of criteria such as incentives [that] should be based on proximity of generation to current load centers.” (DSP at 293). However, the DSP chapter on Land Use fails to discuss the land preservation and smart growth initiatives in the context of Section 94-c. Another omission is the failure to recognize the potential confusion and possible conflict inherent in several separate agencies rendering assistance to localities.

C. Other Recommendations on Land Use

State Efforts To Assist And Advise Local Governments On The Siting Of Clean Energy Facilities Should Be Coordinated

Local control of land use through municipal zoning has a potential to conflict with the imperative to site renewable energy facilities. This potential or actual conflict is all the more reason for adoption of the Chapter’s many proposals for providing state assistance to local governments on siting issues. The Section recommends that the Chapter’s many proposals for providing State “assistance” to regional and local land use agencies (presumably by DOS, NYSDEC and NYSERDA) be coordinated by the Office of the Governor.

ORES Should Amend Its Regulations To (i) Protect Prime Agricultural Lands; and (ii) Provide For Incentives To Host Localities for Renewable Energy Projects of Less than 25 Megawatts

The CAC might include in the final scoping plan a recommendation to amend the ORES regulations to create a rebuttable presumption against the siting of a renewable energy facility on “prime agricultural land,” with a carefully crafted definition encompassing only those lands that merit such protection. In addition, NYSERDA and PSC are required under current law and regulations to devise incentives and assistance to localities to ease the siting of Renewable Energy facilities generating 25 Megawatts or more, in recognition of the impact that fast-tracking of such facilities will have. However, no such comparable effort or responsibility is provided for facilities of less than 25 Megawatts, and that should be corrected.

The State Should Set A Goal For The Forested Area Needed To Provide An Adequate Carbon Sink In New York.

The Chapter’s discussion of the need to preserve and enhance the forest and other important natural assets reflects concerns that long predate the effort to address the climate crisis, and many of the actions it proposes also have been long discussed by planners. The final scoping plan should provide some focus to the DSP’s proposals for forest and natural resource preservation by quantifying the amount of forestland and other natural resources needed to create and maintain a carbon sink consistent with the general purposes of the CLCPA. Although absolute numbers may well be elusive, relative goals will be helpful in implementing funding initiatives and planning. Once such goals are established, the State should identify the amount of funding needed to achieve and protect the target forest, as well the revenue source for such funding. The final plan also should provide specific, quantifiable mechanisms for the creation, preservation, and enhancement of such lands through tax revenue, tax credits and regulation.

Chapter 20 Local Government

The Draft Scoping Plan correctly notes that “[l]ocal governments have an important role to play in meeting Climate Act mandates,” and the Section is encouraged to see inclusion of a chapter focused on helping municipalities achieve state and local climate commitments. Section comments on this chapter include: (1) eliminating preemption barriers to local climate action; (2) ensuring maximum utility of the CAC’s proposed clean energy community dashboard; (3) allowing local governments to adopt more stringent building energy codes, and making it easier for them to do so; (4) considering equity implications of residential PACE financing; (5) offering renewable energy project siting support to local governments; (6) ensuring that the state does its part to meet the renewable energy objectives (i.e., to power the electric grid with clean and renewable sources) of the CLCPA while helping local governments access renewable energy programs; and (7) allowing local governments to act as “laboratories” for climate policy.

A. Eliminating and/or Relaxing Preemption Barriers to Local Climate Action

Given our focus on legal considerations relating to the Draft Scoping Plan, the Section’s main comment is that a key missing component in the local government chapter is the removal of legal barriers to local climate action, namely the specter of preemption. Two particularly burdensome instances of preemption in New York State law are (1) state preemption of local construction code requirements, and (2) certain elements of the state public service law, such as the obligation to serve. State lawmakers should work to lessen their bite; building code and building energy code preemption could be done away with entirely, while changes to the Public Service Law would require more nuance.

Getting rid of these areas of preemption, or lessening their impact, would be a good start, but state laws expressly authorizing local governments to undertake certain kinds of climate action would be even more effective. Local governments fear not only preemption, but litigation. The Draft Scoping Plan notes that “[m]any local governments, especially small, resource-constrained communities, struggle with tight budgets and limited staff capacity, which limits their ability to take local climate actions,” and the same is true with respect to legal capacity. Local governments are reluctant to enact policies that could attract preemption scrutiny, particularly from well resourced fossil fuel interests. Eliminating or relaxing areas of existing preemption and offering clear authorization for various climate laws - like building decarbonization requirements - would go a long way in facilitating local action.

B. Clean Energy Community Dashboard

The CAC's proposal for a clean energy community dashboard is a promising one that would help local governments better understand community energy use and greenhouse gas emissions. The Section has two comments. First is to leverage the *Global Protocol for Community-Scale Greenhouse Gas Inventories* developed by ICLEI-USA, C40 and the World Resources Institute,⁴⁷ and to ensure consistency with this already widely-used accounting system. Second is to include building-level data if possible. Understanding building-level data will allow local governments to take building greenhouse gas emissions, a key sector over which local governments have significant authority and ability to reduce emissions.

C. Local Energy Policies

The Draft Scoping Plan's second local government strategy involves encouraging municipalities to adopt more advanced energy conservation standards. The Section has two comments. First, while we support further deployment of the NYStretch Energy Code, at present it is a limited tool that, by NYSERDA's own words, is only "about one cycle ahead of" base code.⁴⁸ Of course, any stretch code option is better than none. But we encourage NYSERDA and other state agencies to really push the envelope on the stretch code, both in terms of energy conservation and other measures like electrification, electric vehicles, and renewable energy. Massachusetts, for example, is in the process of developing a net zero stretch code. Even better would be to eliminate legal barriers to local code adoption via preemption by the statewide building code.

Second, we caution policymakers in expanding the reach of, or otherwise promoting, Property Assessed Clean Energy (PACE) financing. While PACE for commercial buildings (C-PACE) is relatively uncontroversial, PACE for smaller residential buildings has come under scrutiny for its potentially inequitable outcomes.⁴⁹ Some residential PACE providers push unneeded or overly expensive building improvements on single-family homeowners, and because PACE liens are super-priority, homeowners can end up under water and/or in danger of losing their homes.⁵⁰

⁴⁷ Available at <https://ghgprotocol.org/greenhouse-gas-protocol-accounting-reporting-standard-cities> (last accessed Apr. 25, 2022).

⁴⁸ See *NYStretch Energy Code: 2020 Outreach, Training and Resources*, NYSERDA (last accessed Apr. 25, 2022), available at <https://www.nyserd.ny.gov/All-Programs/Energy-Code-Training/NYStretch-Energy-Code-2020>.

⁴⁹ See, e.g., Andrew Khouri, *L.A. County Ends Controversial PACE Home Improvement Loan Program*, L.A. TIMES (May 21, 2020), <https://www.latimes.com/homeless-housing/story/2020-05-21/la-fi-pace-home-improvement-loans-la-county>

⁵⁰ See, e.g., Jeremy Kohler and Haru Coyne, *State-supported 'clean energy' loans are putting borrowers at risk of losing their homes*, Energy News US (Apr. 26, 2021), <https://energynews.us/2021/04/26/state-supported-clean-energy-loans-are-putting-borrowers-at-risk-of-losing-their-homes/>

While we don't mean to suggest that PACE financing is without value, policymakers should take extra caution to ensure legal and policy protections for homeowners.

D. Siting Support

The Section strongly supports the Climate Action Council's recommendations to create a statewide uniform solar permit and to develop model laws that encourage local siting of renewable energy resources. These legal resources would be extremely helpful in alleviating limits on municipal staff capacity and in providing continuity in the market so that large renewable energy developers and single-building rooftop solar customers alike have clarity and predictability around development/installation requirements.

E. Community Clean Energy Initiatives

The Section is similarly supportive of the CAC's recommendations to encourage local access to community choice aggregation (CCA), microgrids, and other community-scale energy measures. However, these programs aimed at helping local governments should not be viewed as substitutes for state action to completely green the grid. Municipalities and the state of New York have complementary but distinct strengths and areas of authority, and local governments simply cannot catalyze renewable development, to say nothing of a 100 percent clean electricity grid, in the way that the state can. State law is only one of several barriers to local muscle in this sphere. State policy should aim to connect local governments to clean energy and clean energy programs, but the state is responsible for fulfilling its CLCPA obligations to ensure clean and renewable power.

F. Conclusion

On the whole, we encourage New York State policymakers to think carefully about the ways in which local governments are best suited to advancing the goals of the CLCPA, and to reduce barriers to local government action on climate. The State is in the best position to develop strong clean and renewable energy programs and to fulfill its obligation to power the electric grid with 100 percent clean power, and to ease regulatory barriers to local access to these programs and to renewable siting. State funding is key, and the state can also support information sharing to benefit communities. In short, the more the state does to achieve the CLCPA objectives, the more able local governments will be able to do their parts.

The Section also encourages New York State to allow local governments significant flexibility to develop climate policy that goes further and/or faster than state laws. As states do at the national level, local governments play an important role as “laboratories” for climate policy. They develop policies that can be replicated, or at least learned from, in neighboring communities and beyond. This is good for New York State - as local governments work to reduce the greenhouse gas emissions in their localities, greenhouse gas emissions come down for the state, too.

General Conclusion

The Section appreciates the opportunity to provide these comments on the Draft Scoping Plan to the CAC. We would welcome the opportunity to discuss them with state agency officials, in particular with NYSDEC staff. We request you to contact our Section's liaison at the New York State Bar Association, Cheyenne Burke, at (518) 487-5652, cburke@nysba.org, and she will make arrangements for our discussion.