Via Email

February 6, 2022

Maureen Leddy
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-1050
climate.regs@dec.ny.gov

Re: ***Comments on Draft CP-49: Climate Change and DEC Action***

Dear Ms. Leddy:

New York Lawyers for the Public Interest, Sierra Club, Earthjustice, Environmental Advocates, UPROSE, Long Island Progressive Coalition, Seneca Lake Guardian, Scenic Hudson, the Hudson Center for Community and Environment, Hudson River Sloop Clearwater, Clean Energy Group, Alliance for a Green Economy, Food & Water Watch, Fossil Free Thompkins, Clean Air Coalition of WNY, Green Education and Legal Fund, New Paltz Climate Action Coalition, New York Energy and Climate Advocates, New Yorkers for Clean Power, and the Committee to Preserve the Finger Lakes respectfully submit the following comments on the Department of Environmental Conservation's ("DEC" or the "Department") proposed guidance ("CP-49") on incorporating climate change considerations into DEC's activities and programs.

As DEC identifies, "[h]uman-induced climate change is the most pressing issue of our time."[1] The sources that contribute to destabilizing our climate also contribute to the excessive pollution burdens borne by many communities. CP-49 must address the urgency and severity of the climate crisis while also ensuring that pollution disparities affecting disadvantaged communities are addressed at the same time. CP-49 establishes policies for the Department to comply with the Climate Leadership and Community Protection Act ("CLCPA"). As such, DEC may only deviate from their policies in a manner that continues to comply with statutory requirements.[2] Moreover, in finalizing CP-49 and DAR-21, DEC must harmonize inconsistencies between the two policies so that DEC's approach to new Title V and air permits, modifications, and renewals is clear.

I. Integrating Climate Change into Departmental Activities Must Include Ratcheting Down to Zero Emissions, Including Upstream Greenhouse Gas Emissions Associated with All Fuel Sources

Commenters support the proposal that programs should review practices and policies to ensure that they are compatible with DEC policy of integrating climate change into departmental activities and relevant statutory requirements. However, the procedure set forth in Draft CP-49 should be amended in the following ways:

First, Draft CP-49 provides that programs should determine if policies "[m]inimize GHG emissions across the economy in line with Emissions Limits, particularly through reduced use of fossil fuels."[3] This language should be revised to clarify that the CLCPA requires that greenhouse gases ("GHGs") be precipitously *reduced*—not merely minimized—and sets a goal of achieving economy-wide net zero emissions by 2050. *See* E.C.L. §§ 75-0103(11), 75-0107.

Second, Draft CP-49 indicates that achieving the emissions limits will require transitioning to zero- and low-carbon fuels.[4] Without a robust and nuanced understanding of such fuels' full lifecycle emissions implications, Commenters are concerned about endorsing the use of non-renewable alternative sources such as hydrogen, biodiesel, or methane, which can have significant upstream greenhouse gas emissions and other harmful environmental and public health impacts.[5] The final version of CP-49 should clarify that the state must rapidly scale up renewable energy capacity and minimize reliance on low-carbon fuels and hydrogen.

Third, Draft CP-49 provides that the policy applies to "[a]ll major permit applications" made pursuant to specific sections of the Environmental Conservation Law, and "does not apply to

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[1] DEC, *Draft Commissioner Policy-49* 1 (Dec. 1, 2021), https://www.dec.ny.gov/docs/administration_pdf/cp49revised.pdf ("Draft CP-49").
[2] Draft CP-49 at 3 states: "[t]he Department reserves the right to deviate from this Policy when, in its judgment, doing so would result in a net benefit to the people of New York State."
[3] Draft CP-49 at 4.
[4] *Id*.
[5] Sasan Saadat & Sara Gersen, Earthjustice, *Reclaiming Hydrogen for a Renewable Future: Distinguishing Oil & Gas Industry Spin from Zero-Emission Solutions* 10–11 (Aug. 2021), attached as Exhibit B.

general permits beyond the . . . initial issuance of a general permit."[6] However, there is no basis in the CLCPA for distinguishing between major and minor permit applications or between general permit issuances and renewals. DEC's proposed categorical exclusions of minor permit applications and general permit renewals is unsupported and must be omitted from CP-49 when the guidance is finalized.

II. Apart From Actions Categorically Proscribed by the Climate Action Council Scoping Plan, DEC Must Analyze All Actions for Consistency with the CLCPA Emission Limits, and Compliance with Sections 7(2) and 7(3)

Draft CP-49 provides that an action may be considered consistent with the CLCPA Emission Limits, and in compliance with CLCPA Section 7(2), if the action complies with the Scoping Plan and implementing regulations. DEC further states that if a decision "is not covered by regulation, a full analysis of consistency with the Emission Limits is necessary."[7] Commenters disagree that actions complying with the forthcoming Climate Action Council Scoping Plan ("Scoping Plan") and implementing regulations should automatically be considered consistent with the CLCPA Emission Limits and compliant with the CLCPA. Instead, DEC must conduct a full analysis of consistency with the Emission Limits and compliance with Section 7(2) and 7(3) for any action that is not categorically proscribed by the Scoping Plan and implementing regulations.

Draft CP-49's provision equating compliance with the Scoping Plan and implementing regulations to consistency with the CLCPA Emission Limits creates an unnecessary risk of DEC approving actions which may not be expressly noncompliant with the Scoping Plan and regulations but would nevertheless be inconsistent with the CLCPA Emission Limits. Only actions that are specifically analyzed to be consistent with the CLCPA Emission Limits should be considered consistent with the CLCPA Emission Limits. Any other method runs the danger of creating gaps and undermining the directives of the CLCPA. DEC requiring such analyses only for decisions "not covered by regulation" would create the possibility for DEC to forego the required analyses in decisions that may be covered by the Scoping Plan and implementing regulations but still require analysis of consistency with the CLCPA Emission Limits and compliance with Section 7(2) and 7(3). Therefore, any action that is not expressly prohibited in the Scoping Plan and implementing regulations must undergo the analyses required in the CLCPA.

Though the Scoping Plan is meant to guide and assist DEC with mechanisms to comply with the CLCPA Emission Limits, the failure of the Scoping Plan to categorically proscribe an action does not suggest that action is consistent with the CLCPA or obviate the need for the requisite analyses under Section 7(2) and 7(3).

III. DEC Must Amend Its Approach to Considering Consistency with the Emission Limits

[6] Draft CP-49 at 5.
[7] *Id.*

Commenters are concerned with the assertion contained in Draft CP-49 that, "routine permit renewals that would not lead to an increase in actual or potential GHG emissions would ordinarily be considered consistent with CLCPA…"[8] From a climate perspective, there is no difference between GHG emissions from new and existing sources; both are equally inconsistent with the CLCPA's climate mandates. Therefore, DEC should not assume any permit renewals to be "routine" or consistent with the CLCPA, and the language of the policy should be amended to clarify that a full emissions analysis and consistency determination is required even for permit renewals that would not result in a reasonably expected increase in actual GHG emissions.

As a matter of statutory interpretation, deeming unmodified existing sources consistent with the CLCPA without undergoing a full emissions analysis violates the statute's plain language. Section 7(2) requires in relevant part that in "considering and issuing" all permits, licenses and other administrative approvals, agencies "*shall consider* whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in article 75 of the environmental conservation law." (Emphasis added.) This broad language does not authorize what ultimately amounts to a categorical exemption. As stipulated in *Overton v. Town of Southampton*, 857 N.Y.S.2d 214, 215 (App. Div. 2008), "[w]here statutory language is clear and unambiguous, the court should give effect to its plain meaning." Therefore, DEC must give effect to the CLCPA's plain and mandatory language and require full consideration of greenhouse gas impacts in the context of air permit renewals.

IV. DEC Should Make Changes to CP-49's Proposed Justifications Analysis

Commenters agree with Draft CP-49 that "[i]f a justification is not available, then the Department need not reach the next stage of the CLCPA Section 7(2) analysis regarding alternatives or GHG mitigation."[9] As detailed further in Commenters' letter regarding draft DAR-21 (attached as Exhibit A), DEC should harmonize these and other relevant guidance documents to clarify this principle.

DEC should also remove "[a]lternatives considered" and "[m]itigation options" from CP-49's list of elements a proposed justification should include. As drafted, this list improperly conflates the justification, alternatives, and mitigation analyses which, as Draft CP-49 recognizes, must occur at different steps.

Additionally, the examples of acceptable justifications provided in Draft CP-49 are overly broad and would undermine New York's efforts to reduce greenhouse gas emissions consistent with the CLCPA. As an overarching matter, Draft CP-49 fails to articulate any requirements that a proposed justification must meet, instead offering "examples" of acceptable justifications. CP-49 should provide a clear standard that DEC can apply to determine whether a justification is acceptable. Doing so would give effect to Section 7(2)'s justification requirement, ensuring that it acts as a true backstop to prevent projects that will unjustifiably interfere with the

[8] *Id*. at 6.
[9] *Id*. at 7.

state's ability to meet its greenhouse gas mandates. Moreover, a clear standard would facilitate the permitting process for all parties involved—and insulate DEC from claims of arbitrary and capricious decision-making—by providing clear guidance to project developers in preparing justifications and to DEC in making permitting decisions.

Moreover, the specific proposed "examples" of acceptable justifications will undermine New York's efforts to meet its greenhouse gas reduction requirement.

First, Draft CP-49 would allow a project to be justified through a "[d]emonstration that the lack of the project within the State would result in emissions leakage (e.g., the [applicant] would transfer operations to a neighboring state)."[10] The threat that an applicant will take a project to another state should not be a basis for New York to allow a project that is inconsistent with its statutory mandates. Rather, this proposed potential justification gives applicants far too much power to hold the state hostage. New York should instead focus on what we can and must do to achieve the CLCPA requirements and not be swayed by the possibility of a proposed project being sited elsewhere.

Second, Draft CP-49 provides that a project may be justified where the "[a]bsence of the project will result in economic, social, or environmental harm to the public and no feasible alternatives exist."[11] Again, CP-49 must be revised to avoid collapsing the justification and alternatives analyses. Furthermore, DEC must define the baseline against which "harm to the public" will be measured and clarify that foregone economic opportunity does not constitute harm to the public. The economic benefits of development alone cannot justify a project that is inconsistent with or will interfere with the emissions limits; otherwise, any project, no matter how incompatible with the CLCPA, would be justified, given that most major investments will create some degree of economic development.

More fundamentally, the aim of this proposed justification is uncertain. To the extent that DEC retains this justification, DEC should provide clear examples of when it would be appropriate to invoke in addition to clarifying that economic benefit alone cannot serve as a justification under Section 7(2).

V. CP-49 Must Expressly Assign Agencies Responsibility to Provide Oversight to Ensure Implementation of CLCPA Section 7(3) Beginning Immediately

Commenters contend that DEC must expressly assign the responsibility to provide oversight to ensure implementation of CLCPA Section 7(3) to the Executive Deputy Commissioner and the Deputy Commissioner for Climate, Air, and Energy, with the assistance of the Office of Environmental Justice. The Executive Deputy Commissioner and the Deputy Commissioner for Climate, Air, and Energy were properly assigned responsibility for oversight and implementation

[10] *Id*.
[11] *Id*.

of CLCPA Section 7(2), and the same offices should be responsible for oversight of Section 7(3) as both sections must be considered together to determine compliance with CLCPA.

Section 7(3) states that agencies must prioritize the reduction of greenhouse gas emissions and co-pollutants in disadvantaged communities ("DAC"). This prioritization must be included in the analyses regarding justification and mitigation required by Section 7(2). Further, even when an action is compliant with Section 7(2), DEC must deny permit applications when a proposed project would result in disproportionate burdens to DACs pursuant to Section 7(3). *See* CLCPA § 1(4), S.B. 6599, 242d Sess. (N.Y. 2019) ("In considering and issuing permits, licenses, and other administrative approvals and decisions . . . all state agencies . . . shall not disproportionately burden disadvantaged communities."). As such, CLCPA Section 7(3) must be considered concurrently with Section 7(2) when determining whether agency actions are compliant with the CLCPA, especially in permitting or renewing greenhouse gas emitting sources.

VI. DEC Must Issue Detailed Guidance on Implementation of CLCPA 7(3) and Develop Guidelines to Determine if a Proposed Action Would Result in a Disproportionate Burden to DACs

Section 7(3) prohibits the issuance of permits, licenses, and other administrative approvals and decisions that would disproportionately burden a DAC. Draft CP-49 states that detailed guidance on implementation of Section 7(3) will be provided through a forthcoming revision to CP-29. However, DEC has not made a formal announcement as to when these revisions will be completed and subsequently reviewed by the public. Until revisions to CP-29 are finalized, there is no uniform method to determine if a proposed action would result in a disproportionate burden to an identified DAC. This could potentially result in arbitrary, subjective analyses of proposed actions that do not align with a major component of the climate law—protecting DACs from increased harm.

DEC must coordinate with the Climate Justice Working Group and issue detailed guidance on implementation of Section 7(3) as soon as possible, as it is a crucial component of compliance with the CLCPA. Issuing detailed guidance for 7(2) without the same treatment for 7(3) sends a message of deprioritizing the impact on disadvantaged communities, and risks undermining a core principle and the overall intent of the CLCPA.

In the meantime, before detailed guidance on Section 7(3) is issued, CO-49 must make clear that DEC holds the authority to deny permit applications when a proposed project would disproportionately burden a DAC, and should clarify that even where a decision complies with all prongs of 7(2), DEC must deny a permit if the action proposed would disproportionately burden a DAC.

VII. DEC Must Make Changes to Draft CP-49's Discussion of Mitigation and Alternatives

Commenters urge DEC to review and consider the comments they submitted regarding alternatives and mitigation in Draft DAR-21, which are provided as an attachment to these comments. It is critical that the expectations regarding alternatives and mitigation are consistent between the two policy documents. In addition, several specific aspects of Draft CP-49's discussion of alternatives and mitigation warrant additional comment here.

With regard to alternatives, CP-49 identifies only two examples of potential alternatives for consideration: use of lower emissions technologies and "no action."[12] This is insufficient. At a minimum, CP-49 should specify that the full range of non-emitting alternatives must be fully and fairly evaluated before any project whose emissions impacts are inconsistent with the CLCPA is considered. Indeed, as DEC itself notes in the draft, "the Department's first preference is to avoid impacts and thus, avoid GHG emissions. In other words, before proceeding to consider potential mitigation options, as set forth in the CLCPA, the Department should first seek to ensure an action and potential alternatives are consistent with the Emission Limits."[13] Commenters agree. However, this Departmental preference for CLCPA-consistent projects should be incorporated into CP-49's discussion of alternatives. Commenters note that this approach of limiting consideration of non-CLCPA compliant projects only to situations where there is a compelling need that cannot be met through any combination of CLCPA-compliant projects is already recommended for the power sector in the Climate Action Council's Draft Scoping Plan.[14]

With regard to mitigation, Commenters have several concerns. First, the suggested mitigation options identified in Draft CP-49 differ from those identified in Draft DAR-21. It is critical that DEC harmonize the two guidance documents consistent with Commenters' submittals so that the agency and potential permit applicants are clear on what mitigation is acceptable.

Second, Commenters support DEC's statement that "[m]itigation options must result in at least a reduction in GHG emissions equivalent to the GHG emission increases from the project, or must ensure that the project is reducing GHG emissions over time consistent with the requirements of the CLCPA."[15] The mere fact of mitigation is insufficient; the magnitude of required mitigation must be commensurate with the CLCPA's emission reduction mandates.

Third, the final CP-49 policy should specify that financial mitigation is not an acceptable form of mitigation. As discussed in the attached DAR-21 comments, mitigation must be achieved on site. Indeed, as Section 7(2) of the CLCPA provides, in the event that a project is inconsistent with or will interfere with the CLCPA GHG limits, there is a need for "greenhouse

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[12] *Id*.
[13] *Id*. at 8.
[14] *See* N.Y. State Climate Action Council, *Draft Scoping Plan* 155 (Dec. 30, 2021), https://climate.ny.gov/-/media/Project/Climate/Files/Draft-Scoping-Plan.ashx. ("If a reliability need or risk is identified, emissions-free solutions should be fully explored, such as storage, transmission upgrades or construction, energy efficiency, demand response, or another zero-emissions resource. Only after these alternatives are fully analyzed and determined to not be able to reasonably solve the identified grid reliability need shall new or repowered fossil fuel-fired generation facilities be considered.")
[15] Draft CP-49 at 7.

gas mitigation measures . . . where such project is located." Financing separate projects that are designed to achieve GHG reductions does not comport with the plain language of the CLCPA and also raises significant concerns about the reality, additionality, permanence, transparency, verification, and ownership of the claimed emission reductions. Moreover, financial mitigation is, functionally, simply an emissions offset and is therefore expressly prohibited in the electric generation sector under E.C.L. § 75-0109(4)(f).

Finally, as discussed in the attached DAR-21 comments, for electric sector projects, in addition to affirming that offsets are not permitted, DEC should specify that a commitment to reduce or eliminate emissions beginning in 2040 absent a plan to address electric system reliability is inadequate.

VIII. CONCLUSION

In order to ensure that the CLCPA is fully implemented and that the state complies with its CLCPA mandates, the final version of CP-49 must reflect the state's commitment to rapidly ratcheting down all greenhouse gas emissions; clarify the state's analyses of consistency, justifications, mitigation, and alternatives; and recognize the urgent need to comply with Section 7(3) to prevent additional pollution impacts in already overburdened communities. Any failure to make these changes before finalizing CP-49 would undermine New York's efforts to achieve its greenhouse gas reduction mandates and to be a national leader on climate change policy. The state must also act swiftly to propose revisions to CP-29 to provide guidance on implementation of Section 7(3) in order to fulfill the CLCPA's promise of achieving equitable climate policy.

Respectfully submitted,

Josh Berman, Senior Attorney
SIERRA CLUB

Anthony Karefa Rogers-Wright, Director of Environmental Justice
Sonya Chung, Staff Attorney
NEW YORK LAWYERS FOR THE PUBLIC INTEREST

Hillary Aidun, Associate Attorney
EARTHJUSTICE

Conor Bambrick, Director of Climate Policy
ENVIRONMENTAL ADVOCATES OF NEW YORK

Lisa Tyson, Director
LONG ISLAND PROGRESSIVE COALITION

Elizabeth Yeampierre, Executive Director
UPROSE

Hayley Carlock, Director of Environmental Advocacy and Legal Affairs
SCENIC HUDSON, INC.

Kevin Wickersham, Executive Director
HUDSON CENTER FOR COMMUNITY AND ENVIRONMENT

Manna Jo Greene, Environmental Director
HUDSON RIVER SLOOP CLEARWATER, INC.

Seth Mullendore, Executive Director
CLEAN ENERGY GROUP

Andra Leimanis, Communication and Outreach Director
ALLIANCE FOR A GREEN ECONOMY

Jess Mullen, Chairperson
NEW PALTZ CLIMATE ACTION COALITION

Peter Gamba, Board Member
COMMITTEE TO PRESERVE THE FINGER LAKES

Chris Murawski, Executive Director
CLEAN AIR COALITION OF WNY

Mark Dunlea, Chair
GREEN EDUCATION AND LEGAL FUND

Eric Weltman, Senior Organizer
FOOD & WATER WATCH

Irene Weiser, Coordinator
FOSSIL FREE THOMPKINS

Sandra Kissam, Chair
ORANGE RESIDENTS AGAINST PILGRIM PIPELINES

Wes Gillingham, Associate Director
CATSKILL MOUNTAINKEEPER

Yvonne Taylor, Vice President
SENECA LAKE GUARDIAN

Leonard S. Rodberg, Coordinator
NEW YORK ENERGY & CLIMATE ADVOCATES

Jennifer Metzger, Senior Policy Advisory
NEW YORKERS FOR CLEAN POWER