

CP-49 / Climate Change and DEC Action

**New York State Department of Environmental Conservation
DEC Policy**

Issuing Authority: Commissioner Basil Seggos

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I. Summary: This document establishes the Department of Environmental Conservation’s (“Department”) policy to incorporate climate change considerations into aspects of its activities and comply with the specific requirements of the Climate Leadership and Community Protection Act of 2019 (“CLCPA”) and the Community Risk and Resilience Act of 2014 (“CRRRA”) as amended by the CLCPA (“Policy”). This Policy provides general direction to all Divisions, Offices, and Regions within the Department (“Programs”) regarding responsibilities related to incorporating climate change considerations and outlines procedures for compliance with specific provisions of the CLCPA and CRRRA. Additional direction may be provided within Programs or through other related policies, including statutory requirements regarding disadvantaged communities to be considered in CP-29.

II. Policy:

The Department recognizes that New York State’s air and water quality, forests, fish and wildlife habitats, and people and communities are at risk from climate change. To perform its core mission, the Department must incorporate climate change considerations into activities the Department undertakes. Additionally, the Department must meet certain requirements set forth in the CLCPA and CRRRA. Some, but not all, of these statutory requirements have been added to the Environmental Conservation Law (“ECL”). Finally, the Department should act as a statewide and national role model in responding to climate change encouraging jurisdictions to take the action needed to reduce greenhouse gas (“GHG”) emissions and to protect the environment, human health, and safety.

All Programs are expected to:

- assess their policies on a regular basis in light of climate change considerations and the requirements of the CLCPA and CRRRA;
- comply with Departmental direction regarding the CLCPA and CRRRA;
- participate in the assessment, planning, and implementation of new or revised State policies; and
- seek opportunities to further reduce GHG emissions and enhance the State’s resilience to climate change through collaborations with other Programs, state entities, and stakeholders.

Specific responsibilities are described in Part IV Responsibility and, where applicable, specific requirements are also detailed in Part V Procedure.

III. Purpose and Background:

Human-induced climate change is the most pressing issue of our time. Climate change threatens our natural resources and built environments, with profound effects on the State’s environment, communities, and economy. The most up-to-date and authoritative assessments of the impacts from climate change are listed in Part VI and include the New York State integrated assessment report for state-level impacts, the National Climate Assessment for national-level impacts, and the Intergovernmental Panel on Climate Change Impacts Assessment Report for global impacts. Department

staff should refer to the most recent version of these reports and to similar authoritative reports when determining the likely effects of proposed actions on GHG emissions, resilience to climate hazards, and the State's adaptive capacity.

The public has demonstrated overwhelming support for State action on climate change, both in terms of GHG reductions and in ensuring the State's resilience to climate change impacts. As a result, the CLCPA and CRRA established a set of highly ambitious goals and statutory requirements for State entities. The statutory requirements for the Department include, but are not limited to, the list below. Any relevant legal requirements that may be introduced in the future should be considered with this Policy.

- Promulgate statewide GHG Emission Limits ("Emission Limits") equal to a 40% reduction by 2030 and 85% reduction by 2050, from 1990 levels. (ECL § 75-0107)
- Co-chair a Climate Action Council that must publish a Scoping Plan for achieving the Emission Limits and net zero emissions, to be updated at least once every five years. (ECL § 75-0103)
- Establish a value of carbon for use by State entities. (ECL § 75-0113)
- Publish a statewide GHG emissions report on an annual basis. (ECL § 75-0105)
- Promulgate regulations to ensure compliance with the Emission Limits and work with other State agencies in promulgating their regulations. (ECL § 75-0109 and CLCPA § 8)
- Publish an implementation report no less than every four years. (ECL § 75-0119)
- Assess and implement strategies to reduce operational GHG emissions. (CLCPA § 7(1))
- Consider attainment of the Emission Limits when issuing permits, licenses, and other administrative approvals and decisions, including but not limited to, the execution of grants, loans, and contracts. (CLCPA § 7(2))
- In considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts shall not disproportionately burden disadvantaged communities. Additionally, the Department shall prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities. (CLCPA § 7(3))
- Ensure that no less than 35%, with a goal of at least 40%, of the overall benefits of spending on clean energy and energy efficiency programs, projects or investments are directed to disadvantaged communities. (ECL § 75-0117)
- Promote adaptation and resilience by assisting state agencies and other agencies to identify and assess climate change risks to proposed projects and recommend measures to mitigate such risks. (CRRA § 17-a)
- Provide for applicants to demonstrate their consideration of future physical climate risk in major permits for all permit programs regulated by the Uniform Procedures Act ("UPA") and its implementing regulations. (CRRA § 17-b)
- In review of applications for major permits regulated by the UPA, consider requiring an applicant to mitigate risks to public infrastructure and services, private property not owned by the applicant, disadvantaged communities, and natural resources. (CRRA § 17-b)
- Ensure, to the extent practicable, that any project it intends to approve, undertake, support or finance, will mitigate future physical risk due to sea-level rise, storm surge or flooding. (ECL § 6-0107)
- Ensure that criteria, standards and regulations issued for siting of industrial hazardous waste treatment, storage and disposal facilities; hazardous substances bulk storage facilities; and petroleum bulk storage facilities account for future physical risk due to sea-level rise, storm surge and flooding. (ECL § 27-1103; ECL § 40-0113; ECL § 17-1015)
- Consider future physical risk due to sea-level rise, storm surge and flooding in its land-

acquisition decisions. (ECL § 49-0203)

- Require that closure investigation reports for non-hazardous municipal landfill closure and municipal landfill gas management projects include consideration of future physical risk due to sea-level rise, storm surge and flooding. (ECL § 54-0503)
- Ensure that state assistance payments to municipalities for coastal rehabilitation projects include consideration of future physical risk due to sea-level rise, storm surge and flooding. (ECL § 54-1105)
- Consider future physical risk due to sea-level rise, storm surge and flooding in issuance of oil and gas well permits. (ECL § 23-0305)
- Promulgate and update regulations to establish science-based state sea-level rise projections. (ECL § 3-0319)
- Prepare guidance on implementation of the CRRA. (CRRA § 16)

This Policy is intended solely for the use of Department personnel. This Policy is not intended to create any substantive or procedural rights, enforceable by any party in administrative or judicial litigation. The Department reserves the right to deviate from this Policy when, in its judgment, doing so would result in a net benefit to the people of New York State.

IV. Responsibility:

The Executive Deputy Commissioner and the Deputy Commissioner for Climate, Air and Energy shall provide oversight to ensure implementation and ongoing compliance with this Policy and related planning, such as the Scoping Plan required by the CLCPA.

The Office of General Counsel shall provide support to ensure compliance with the CLCPA and CRRA, including this Policy.

The Office of Climate Change and Division of Air Resources, with the support of all Department Programs, shall develop rules, guidance, and reports to fulfill general requirements, including the establishment of the Emission Limits.

All Department Programs, with the assistance of the Office of Climate Change, shall integrate this Policy and related rules, guidance, and reports into all relevant activities and actions under their purview, as set forth in Parts V(1) and (4), and shall implement rulemakings as necessary to ensure compliance with the CLCPA and the CRRA.

The Executive Deputy Commissioner and the Deputy Commissioner for Climate, Air and Energy, with the assistance of the Division of Environmental Permits, shall provide guidance on the implementation of CLCPA Section 7(2) as set forth in Part V(2) and on the implementation of CLCPA Section 9 as set forth in Part V(4).

The Deputy Commissioner of Administration shall provide oversight to ensure implementation of requirements regarding agency operations, such as those specified in CLCPA Section 7(1).

All Department Programs, with the assistance of the Office of Environmental Justice, shall integrate this Policy and related rules, guidance, and reports into all relevant activities and actions under their purview, as set forth in Part V(3).

V. Procedure:

1. Integration of Climate Change into Departmental Activities

Programs shall be prepared to fulfill the responsibilities described herein and report on Departmental needs and progress toward implementing this Policy. Such responsibilities may include reporting on the activities below, for example, during Departmental planning exercises.

Participation in State and Department climate change planning.

The Office of Climate Change shall periodically request information from Programs in order to complete the responsibilities assigned herein. Such requests will be directed to the appropriate directors or designees. Department staff may seek assistance from the Office of Climate Change whenever needed.

Review of current policies, and the efficient and effective consideration of climate change.

Programs shall review current practices and policies to ensure they are compatible with this Policy and relevant statutory requirements. In conducting such review, Programs should determine if policies accomplish the following:

- Minimize GHG emissions across the economy in line with the Emission Limits, particularly through reduced use of fossil fuels, including emissions that are “upstream” or outside of New York State. Further direction is provided in Part V(2) below.
- Consider authoritative and up-to-date information on the projected future climatic conditions for New York State, not just historical reference conditions. Further direction is provided in Part V(4) below.
- Recognize that uncertainty and/or a lack of complete information is not a sufficient reason to delay action on climate change. Programs should determine where missing data or resources are needed to implement this Policy and share such information with the Office of Climate Change.

Review of day-to-day operational procedures.

Achieving the Emission Limits will require significant changes throughout New York State, such as the following potential policies: a transition to zero- or low-carbon fuels, a large-scale electrification of buildings and vehicles, and the diversion of organic material from landfills. Programs shall align decisions regarding procurement and day-to-day activities with the CLCPA and CRRRA requirements and shall regularly review procedures, including those related to equipment and vehicle use, travel, and waste. Additionally, Programs shall work with the Division of Operations, the Department’s Director of Sustainability and other relevant state entities to identify opportunities for GHG emission reductions.

2. Consideration of CLCPA Emission Limits in Agency Administrative Decisions

CLCPA Section 7(2) requires the Department to consider whether agency administrative decisions, including but not limited to, issuing permits, licenses and the execution of grants, loans, and contracts, are inconsistent with or will interfere with the attainment of the Emission Limits. As set forth in the CLCPA, the Emission Limits include all emissions of GHGs from sources within the State, as well as upstream GHGs produced outside of the State associated with either (1) the generation of electricity imported into the State, or (2) the extraction and transmission of fossil fuels imported into the State. ECL § 75-0101(13). The Emissions Limits are established in ECL Section 75-0107(1) on a percentage reduction basis and are further defined on a tonnage basis by Departmental regulation, Part 496

Statewide GHG Emission Limits.

Applicability

This Policy shall apply to the following:

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

- Article 15, Title 15, and Article 17 for facilities withdrawing and using over 20 MGD of water for cooling purposes.
- Article 19, Air Pollution Control
- Article 23, Title 17, Liquefied Natural Gas and Petroleum Gas
- Article 27, Title 7, Solid Waste Management
- Article 27, Title 9, Industrial Hazardous Waste Management

b. In addition to the permit applications listed above under (a), this Policy shall apply to

- projects involving construction of energy production, generation, transmission, or storage facilities; and
- applications for permits applicable to sources and activities that result in GHG emissions, directly or indirectly.

c. This Policy shall apply to funding decisions made by the Department, including but not limited to grants, contracts, and incentive payments.

d. The Policy shall apply to procurement actions where the Department has authority or discretion to enforce the Policy.

This Policy does not apply to general permits beyond the Department's initial issuance of a general permit. Although the Policy may not always apply to rulemaking actions, the Department will seek to ensure that future rulemakings are consistent with the CLCPA.

Scoping Plan

The CLCPA requires that, by January 1, 2023, the Climate Action Council develop a final Scoping Plan, which will provide recommendations for achieving the Emission Limits, including regulatory measures to be implemented by the Department. The Department is required to promulgate regulations to ensure compliance with the Statewide Emission Limits by 2024. Thus, an action that complies with regulations implementing the CLCPA and Scoping Plan may be considered consistent with the Emission Limits, and therefore in compliance with CLCPA Section 7(2). If the decision, however, is not covered by regulation, a full analysis of consistency with the Emission Limits is necessary.

For the interim period, between the date of adoption of this Policy and the adoption of regulations implementing the CLCPA and Scoping Plan, the Department shall employ a phased-in approach when applying CLCPA Section 7(2) and review agency decisions in the context of the current phase of CLCPA implementation. The phases of CLCPA implementation will be as follows:

- January 1, 2020 until Scoping Plan completion (required to be complete by January 1, 2023) - Guided by consistency with Part 496 Statewide GHG Emission Limit and the CLCPA Annual GHG Emissions Inventory

- After Scoping Plan but before regulations are effective (required to be promulgated by January 1, 2024) - Guided by consistency with Part 496 Statewide GHG Emission Limit, CLCPA Annual GHG Emissions Inventory and the policies and programs included in the Scoping Plan
- After Department regulations implementing CLCPA are adopted - Guided by consistency with Part 496 Statewide GHG Emission Limit, CLCPA Annual GHG Emissions Inventory, the policies and programs included in the Scoping Plan and their implementing regulations

Considering Consistency with the Emission Limits

Pursuant to the CLCPA, the Department must evaluate whether each decision is inconsistent with or will interfere with meeting the Emission Limits based on the factual circumstances of the decision. Although it is a fact-specific inquiry, in evaluating whether an administrative decision may be inconsistent or interfere with the Statewide Emissions Limits, the Department should consider if the decision enables a new source of GHG emissions; increases a source's permitted or potential GHG emissions; or allows a reasonably expected increase in actual GHG emissions above levels that existed prior to a permit application or decision at issue. In those circumstances, the Department may determine that GHG emissions from the action are below a level that - based on the relevant Program, specific facts, and the type of activity - will not interfere with the attainment of the Emission Limits. Routine permit renewals that would not lead to an increase in actual or potential GHG emissions would ordinarily be considered consistent with the CLCPA pending finalization of the Scoping Plan and future regulations unless project specific facts support a finding of inconsistency.

In addition, the Department may determine that an action is inconsistent with the emissions limits if it finds that the action:

- does not conform with the Scoping Plan or Department regulations designed to achieve compliance with the Emission Limits;
- would be directly responsible for an increase in demand for the use of a known source of GHG emissions, such as at an existing facility or project;
- directly reduces the market demand or market access for GHG emissions-reducing technologies or strategies; and/or
- prevents or makes it more difficult or more expensive for the State to reduce GHG emissions.

CLCPA Section 7(2) applies to direct GHG emissions from an activity authorized through the agency's administrative decisions as well as upstream emissions from imported fossil fuels as defined by the CLCPA. The evaluation should also consider reasonably foreseeable downstream and indirect emissions from an activity authorized through an agency administrative decision. An example of indirect emissions could be an increase in motor vehicle emissions reasonably expected to result from the action.

Special considerations for funding or procurement actions

Requests for proposals, or other similar instruments that result in contracting actions with the Department, shall, in addition to following the considerations below, include reservation language that reserves the Department's right to not fund projects or activities that are determined to be inconsistent with the CLCPA or implementing regulations.

Statement of Justification

If a Department administrative decision is determined to be inconsistent or would interfere with achievement of the Emission Limits, a statement of justification must be created to proceed with a decision. If a justification is not available, then the Department need not reach the next stage of the CLCPA Section 7(2) analysis regarding alternatives or GHG mitigation.

For Department actions that create direct or upstream GHG emissions that are inconsistent with or otherwise interfere with attainment of the Emission Limits, the justification should explain to what extent the decision is consistent with the CLCPA and its implementing regulations and, to the extent it is inconsistent, explain why the action is justified by other considerations.

The proposed justification must include, at a minimum, the following:

- Current level of GHG emissions from the action, inclusive of the full scope of GHG emissions defined in the statute, including all the applicable GHGs and the upstream GHG emissions from imported fuels as well as reasonably foreseeable downstream and indirect emissions;
- Projected future GHG emissions in 2030, 2040 (electricity sector), and 2050 from the action with description of the applicant's anticipated GHG emission reduction strategies;
- Alternatives considered that do not create GHG emissions or result in less GHG emissions;
- Description of the harm associated with the absence of the project (environmental, economic, social); and
- Mitigation options.

Examples of acceptable justifications may include the following:

- Demonstration that the lack of the project within the State would result in emissions leakage (e.g., the facility would transfer operations to a neighboring state).
- Absence of the project will result in economic, social, or environmental harm to the public and no feasible alternatives exist.

Identification of Alternatives and GHG Mitigation

If the justification statement indicates that the decision would result in GHG emissions inconsistent with the Emission Limits, but otherwise provides a detailed justification as to why the decision is necessary notwithstanding the inconsistency, then the applicant must include an identification of alternatives and GHG mitigation measures at the project location. When considering decisions that are deemed inconsistent an assessment of alternatives must be conducted. Alternatives could include:

- use of lower emissions technologies; and/or
- no action.

If an action is deemed inconsistent with or would interfere with the attainment of the Emission Limits, and if an adequate justification is available, GHG mitigation must be considered pursuant to Section 7(2). Any mitigation option must result in measurable GHG emission reduction or sequestration that is additional to actions already required by law or that the State is already undertaking. Finally, to be acceptable mitigation, an action must be real, additional, quantifiable, permanent, verifiable, and enforceable.

Mitigation 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. Some GHG mitigation examples include the following:

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

In situations where a decision would be inconsistent or interfere with the Emission Limits and a justification is available, the Department must request that the applicant provide alternatives and GHG mitigation measures. These proposed GHG mitigation measures can be included in the evaluation of the full suite of mitigation measures appropriate to the action.

In all cases, just as with other types of environmental impacts, 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.

3. Consideration of Impacts to Disadvantaged Communities in Agency Administrative Decisions

CLCPA Section 7(3) requires the Department to consider impacts to disadvantaged communities in agency administrative decisions, including but not limited to, issuing permits, licenses and the execution of grants, loans, and contracts. CLCPA Section 7(3) requires that Department administrative decisions:

- Shall not disproportionately burden disadvantaged communities;
- Shall prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities;

In advance of the completion of the proposed criteria identifying disadvantaged communities by the Climate Justice Working Group, as required by the CLCPA, the Department will identify disadvantaged communities using an interim approach. This interim approach identifies disadvantaged communities by meeting one of the two criteria listed below:

1. Census blocks that are in the top quartile of U.S. Department of Housing and Urban Development census tracts meeting the annual income threshold of at or below 50% of U.S. area median income and that are also located within a potential environmental justice area (which accounts for race/ethnicity and low income), as determined by the NYS Department of Environmental Conservation¹; or
2. Establishment as an opportunity zone pursuant to the federal Tax Cuts and Jobs Act of 2017².

Detailed guidance on implementation of Section 7(3) will be provided through a forthcoming revision to CP-29, DEC Policy on Environmental Justice and Permitting or other Department actions.

4. Consideration of Future Climate Risks

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

¹ NYS Department of Environmental Conservation. Potential Environmental Justice Areas. Available here:

<https://www.dec.ny.gov/public/911.html>

² NYS Empire State Development. Opportunity Zone Program. Available here: <https://esd.ny.gov/opportunity-zones>

Climate Change Projections

The Office of Climate Change is responsible for ensuring that the best available and authoritative scientific information is available. The Office of Climate Change shall maintain and update, as necessary, reference document(s) describing projections of change in climate parameters and indicating approved sources of information (e.g., sea-level rise viewers). This Policy shall serve as the standard reference for climate-change projections in Departmental decision making and shall be made available both internally and to the public. The Office of Climate Change shall regularly consult with Department staff and other stakeholders to identify information necessary to support effective decision making. Such information shall include, but is not limited to, relevant trends in and threshold values of climate parameters, secondary and tertiary climate-change effects, and cascading and interacting effects of climate change. The Office of Climate Change shall collaborate with appropriate entities, including academic researchers and other state entities, including the New York State Energy Research and Development Authority, to secure such information and incorporate it into the projection reference document.

Identification of Climate Hazards and Vulnerabilities

Programs shall review all regulatory and funding programs, particularly those in which consideration of climate risks is required by the CLCPA, to identify those programs and decision points in which climate or weather is a relevant factor. Programs, in consultation with the Office of Climate Change and Office of General Counsel, shall amend regulations, procedures, policies, guidance, etc., to ensure climate risks are adequately considered. The Office of Climate Change and Division of Environmental Permits shall convene an intra-departmental work group to coordinate and facilitate this review.

Pursuant to a Governor's directive in 2018, the Department shall regularly assess the climate vulnerability of its resources, personnel, and ability to achieve its mission and strategic goals. The Office of Climate Change shall coordinate this assessment, and all Programs shall participate as requested.

To facilitate interagency cooperation in climate change adaptation and resilience, the Office of Climate Change shall convene an interagency climate adaptation and resilience work group. This work group shall serve as a forum to exchange information among participating state entities, to explore opportunities for cooperation, and to minimize duplication and conflicting activities. This work group shall also, to the extent resources permit and as directed, work to further statewide climate adaptation and resilience planning.

Compliance with the CRRA

The CRRA requires that applicants for major permits subject to the UPA regulations demonstrate consideration of future physical risk due to climate change, including but not limited to, sea-level rise, storm surge and flooding. To the extent feasible, Programs shall base program-specific requirements and procedures on requirements or recommendations provided in Department-approved technical guidance documents, e.g., the State Flood Risk Management Guidance. The Division of Environmental Permits shall, in consultation with the Office of Climate Change, Office of General Counsel and Program divisions, establish permit application review procedures to ensure compliance with the CRRA. Until such time that additional procedures are established, the Division of Environmental Permits shall refer applications for major projects for which sea-level rise, storm surge or flooding pose substantial future risks, to the Office of Climate Change, applying screening criteria agreed upon between the Division of Environmental Permits and the Office of Climate Change. The Office of Climate Change will consult with the Division of Environmental Permits and Program units to identify appropriate risk mitigation measures.

The Department's smart growth committee shall ensure that mitigation of future physical risk due to sea-level rise, storm surge and flooding is included in its required smart growth reviews pursuant to Article 6 of the ECL.

VI. Related References:

Authoritative reports or information sources:

- Responding to Climate Change in New York State (ClimAID) (<https://www.nyserda.ny.gov/climaid>)
- U.S. Global Change Research Program (<https://www.globalchange.gov>)
- National Climate Assessment (<https://nca2018.globalchange.gov>)
- Intergovernmental Panel on Climate Change (<https://www.ipcc.ch>)
- Inventory of U.S. GHG Emissions (<https://www.epa.gov/ghgemissions>)
- New York Climate Change Science Clearinghouse (<https://www.nyclimatescience.org>)
- Observed and Projected Climate Change in New York State: An Overview (https://www.dec.ny.gov/docs/administration_pdf/ccnys2021.pdf)

Key policies and laws:

- CLCPA; and 6 NYCRR Part 496, Statewide Emission Limits
- CRRRA; 6 NYCRR Part 490, Projected Sea-level Rise, and implementing guidance
- Climate Smart Communities; and 6 NYCRR Part 492, Climate Smart Community Projects
- New York State Energy Plan
- Zero Emission Vehicle Memorandum of Understanding
- Methane Reduction Plan
- Executive Order No. 166, Redoubling New York's Fight Against the Economic And Environmental Threats Posed By Climate Change and Affirming the Goals of the Paris Climate Agreement, issued June 5, 2017
- Executive Order N. 88, Directing State Agencies and Authorities to Improve the Energy Efficiency of State Buildings, issued December 28, 2012
- Executive Order No. 4, Establishing a State Green Procurement and Agency Sustainability Program, issued April 25, 2008