COLUMBIA CLIMATE SCHOOL Earth Networks Interdisciplinary Network on Cumulative Impact Technical Engagement

New York State Department of Environmental Conservation Division of Environmental Permits 625 Broadway Albany, NY 12233-1750

Submitted via email (SEQRA617@dec.ny.gov)

May 7, 2025

Re: New York Environmental Justice Siting Law Comments on Proposed Part 617

To Whom It May Concern:

The Interdisciplinary Network on Cumulative Impact Technical Engagement at Columbia University (INCITE Network) is a research network which seeks to advance methods of assessing cumulative health, environmental, and pollution burdens in disadvantaged communities through an interdisciplinary approach. The INCITE Network submits these comments in response to the Notice of Proposed Rulemaking for the New York Department of Environmental Conservation (NYDEC) to amend the State Environmental Quality Review Act (SEQRA) regulations that are codified at 6 NYCRR Part 617 (SEQRA Amendments), with the primary purpose of implementing SEQRA-related provisions of the Environmental Justice Siting Law (EJ Siting Law) (Chapter 840 of the Laws of 2022, as amended by Chapter 49 of the Laws of 2023).

The INCITE Network unequivocally supports NYDEC's efforts to implement the various aspects of the EJ Siting Law and recognizes the critical importance of successfully incorporating its SEQRA-related requirements to ensure that the State's historic law meets its mandate to ensure that communities "equitably share responsibilities, burdens, and benefits" of addressing environmental conditions after "an inequitable pattern in the siting of environmental facilities in minority and economically distressed communities, which have borne a disproportionate and inequitable share of such facilities." The SEQRA Amendments are an important first step in providing greater protections to communities that "bear a greater environmental health burden due to the cumulative pollution exposure from multiple facilities."

Given the importance of these issues, the INCITE Network, drawing upon its years of expertise climate, environmental justice and administrative law, writes to provide comments it hopes will be beneficial to NYDEC's implementation of both the SEQRA Amendments as well as the remaining provisions of the EJ Siting Law.

1. The SEQRA Amendments Should Center Meaningful Community Engagement

At the core of any successful environmental justice policy is providing a meaningful opportunity for and being responsive to community input. Traditional processes, even ones as robust as those set forth in the SEQRA, rarely require the direct, targeted and deliberate actions necessary to ensure community voices are identified and ultimately centered the decision-making processes. Accordingly, NYDEC is urged to specifically incorporate meaningful public engagement principles as provisions of the SEQRA Amendments for actions within or likely to impact a disadvantaged community (DAC). This approach could build upon the principles set forth in NYDEC Commissioner Policy 29² while drawing from New Jersey's environmental justice rulemaking. More specifically, NYDEC should consider:

- a. Providing opportunities for public participation, including hearings and comment periods, at critical decision points throughout the SEQRA process. Specific focus should be placed on ensuring community engagement during the scoping process. NYDEC could consider a community-focused standard that mandates a hearing where: (i) requested by five (5) or more members of the affected DAC; (ii) requested by a community-based organization representing members of the affected DAC; or (iii) where the lead agency otherwise determines that public interest warrants a public hearing. This latter provision would be intended to address situations where the subject action is of clear public interest, but the members of the DAC may lack the resources or organizational representation to request a hearing;
- b. Establishing best practices to ensure that all public hearings are conducted in a manner most likely to maximize community participation including, but not limited to, requiring the hearing to be held at a location within the DAC convenient for those most likely to be impacted, at a suitable time (preferably evening hours), providing both in-person and virtual attendance options and ensuring accessibility and participation opportunities for community members with physical challenges (sight, hearing, mobility) and those with limited English proficiency. In addition to accepting oral comment at the hearing, written public comment should be accepted for a period of no less than 30 days after any hearing;

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¹ Disadvantaged Communities Criteria, NY, https://climate.ny.gov/resources/disadvantaged-communities-criteria/ (last visited May 5, 2025).

² Commissioner Policy 29, Environmental Justice and Permitting, NY DEP'T OF ENV'T CONSERVATION (Mar. 19, 2003), https://dec.ny.gov/regulatory/guidance-and-policy-documents/commissioner-policy-29-environmental-justice-and-permitting.

³ N.J.A.C. 7:1C, et seq.

- c. Requiring that all relevant comments received during public hearings or comment period be responded to in writing and included as part of the Environmental Impact Statement (EIS) or, as applicable, a Finding of No Significant Impact (FONSI);
- d. Ensuring that adequate notice of any action and the associated engagement opportunities is provided to community members by: (i) requiring a minimum of sixty (60) days' notice; (ii) specifying that all notices and other key documents are provided in language(s) representative of the residents of the DAC; (iii) requiring any newspaper notice be additionally published in at least one non-English language newspaper in circulation in the DAC; and (iv) posting appropriate signage at the proposed project site with delivery of notice to all property owners within 200 feet of the site; and
- e. Recognizing that each community receives information in unique ways, requiring the consideration of additional community-specific methods of notice and engagement to ensure direct and adequate notice to individuals in the DAC. These methods could include providing information directly to active community groups or organizations, automated phone, voice, or electronic notice, flyers, and/or utilization of other publications used within the DAC.

In addition to these specific regulatory requirements, NYDEC should consider the creation of a single online repository of information, organized by municipality, county, region or other grouping, that allows community members and other interested parties to easily view the status of and relevant information (i.e. public notice, EIS, agency determination) for actions in DACs that are subject to the requirements of the EJ Siting Law. This could also include methods that allow interested parties to receive email notifications for DACs actions within their area(s) of interest. We note that New Jersey has developed a similar approach in implementing its environmental justice regulations.⁴

2. The SEQRA Amendments Should Identify a More Objective and Reliable Basis for Assessing and Addressing DAC Impacts

NYDEC indicates that the SEQRA Amendments require the lead agency to determine whether a subject action will "cause or increase a disproportionate pollution on a disadvantaged community that is directly or significantly affected by such action." Making this determination requires two related assessments: (1) the current environmental and public health conditions of the subject DAC; and (2) the contribution of any action to those baseline conditions.

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⁴ Environmental Justice, NJ DEP'T OF ENV'T PROTECTION, https://dep.nj.gov/ej/meetings/#njdep-ej-publicmeeting (last visited May 5, 2025).

While the INCITE Network appreciates the challenges inherent in making these assessments and the need for appropriate flexibility in regulatory implementation, we fear that the standards set forth in the current proposal are too subjective to ensure reliable, predictable and ultimately protective outcomes in communities subject to disproportionate environmental and public health burdens. Absent a more objective decision-making basis, both NYDEC's regulatory structure and any actions taken thereunder will also face an enhanced risk of challenge.

NYDEC's use of the Climate Justice Working Group's (CJWG) environmental, climate, sociographic and health data to assess baseline conditions and identify disproportionately burdened DAC's (comparatively higher v. comparatively lower) through the <u>Disadvantaged Community Assessment Tool (DACAT)</u>⁵ is critical to establishing the current DAC environmental and public health conditions as a basis for analysis. We do not intend to comment specifically on the methodology utilized by NYDEC to draw these comparative distinctions but support the comments of other community-based advocacy organizations that may urge a more protective approach. We do note, however, that NYDEC should commit to an appropriate schedule of routine updates to the DACAT to ensure it continues to accurately reflect environmental burdens in DACs.

However, to assess the contribution of a subject action more objectively, we urge NYDEC to consider the following recommendations:

a. Utilize Presumptions Based on Comparative DAC Burdens: NYDEC's efforts to differentiate between comparatively higher and comparatively lower DACs is a useful construction that could provide more predictable outcomes and enhance community protection using appropriate presumptions.

First, the SEQRA Amendments should set the presumption that any action within a DAC that exceeds any applicable NYDEC permitting threshold will result in a "moderate to large impact" and require the completion of an EIS. NYDEC could, as appropriate, make the presumption rebuttable for actions in comparatively lower DACs. For those areas (comparatively lower DACs), NYDEC might require enhanced consideration where applicable permitting thresholds are exceeded. When those thresholds are exceeded, by the nature of NYDEC's permitting authority, environmental impacts should be considered and addressed due to their proposed placement in a DAC.

Furthermore, for actions that do not exceed applicable NYDEC permitting thresholds, the SEQRA Amendments should: (i) set a presumption that any action in a comparatively higher DAC will result in a moderate to large impact requiring an EIS unless demonstrated otherwise due to intra-tract differences; and (ii) allow the lead

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⁵ Disadvantaged Community Assessment Tool, NY DEP'T OF ENV'T CONSERVATION, https://storymaps.arcgis.com/stories/7f0ffdde675e4e3788632c1b4cce6c0a (last visited May 5, 2025).

agency to exercise its discretion in considering the magnitude of actions in comparatively lower DACs. This is appropriate as the SEQRA Amendments specifically acknowledge that comparatively higher DACs already have an increased likelihood of facing significant adverse impacts. Notwithstanding, actions in comparatively lower DACs must still be thoroughly assessed despite not being subject to this proposed presumption.

Finally, the INCITE Network is cognizant that creating additional procedural demands can increase the cost and lessen the viability of critical projects that serve the public interest and would support an effort by NYDEC to expressly define a narrow subset of projects where an EIS is not required. This category of critical public interest projects could be limited to include only those whose primary purpose is affordable housing, educational institutions, houses of worship, health care facilities, social service facilities (i.e. temporary or emergency housing), emergency response facilities, clean energy projects, climate adaptation and resilience measures and other projects that directly serve an essential environmental, health, or safety need of the DAC. NYDEC should take appropriate steps (i.e. guidance and subsequent rulemaking) to clearly define the projects or actions that would be considered to further a critical public interest. To ensure these projects are constructed in a manner that does not result in significant pollution increases, they should still be subject to the mitigation hierarchy discussed below.

b. Create a Hierarchy of Mitigation Measures: By utilizing the above-referenced presumptions, NYDEC could then focus more squarely on implementing appropriate "mitigation measures" rather than having to specifically quantify or assess the scale of contribution of any given action. Here, New Jersey may again serve as a useful reference point.⁶

An appropriate mitigation hierarchy would require, in the following order: (i) consideration of all feasible measures to avoid contributions to pollution in the DAC; (ii) where avoidance is not feasible, consideration of all feasible measures to minimize pollution contributions; and (iii) under appropriate circumstances, provide an additional environmental benefit within the DAC. Such appropriate circumstances could include the introduction of a new or expansion of an existing source of pollution in the DAC.

Critical to the success of any hierarchy is avoiding the allowance of "offsets" if there are feasible avoidance and minimization measures. For example, under this hierarchy it would be appropriate for a facility to propose replacement of a less efficient boiler

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⁶ N.J.A.C. 7:1C-5.4(b), -6.3(b) & -8.6(b).

at the same facility to reduce its emissions of PM2.5 as part of any overall project that might otherwise increase PM2.5 emissions from another source(s), provided it resulted in an overall facility-wide reduction in PM2.5 emissions. Conversely, we would not support an approach that allowed for the PM2.5 reductions from the boiler upgrade to act as a justification (offset) for not requiring feasible avoidance or minimization measures for other pollutant contributions. If NYDEC is to meet its statutory duty to reduce pollution burdens within DACs, it must ensure that feasible reduction measures are pursued for each relevant pollutant.

3. The SEQRA Amendments Should Require Consideration of a Broad Range of Factors Relevant in Assessing DAC Impacts:

NYDEC should consider as broad a range of relevant factors in assessing impacts of an action in a DAC as possible. While NYDEC's guidance identifies many relevant impacts that could potentially impact the pollution burden in a DAC (air/mobile emissions, wastewater discharges, noise/odor/light pollution, solid waste facilities), there are several additional areas of potential impacts identified in the environmental assessment forms (EAFs) that should be taken into consideration when assessing DAC impacts. Most notably, critical climate-related impacts that tend to disproportionately affect DACs such as flooding and heat impacts resulting from loss of vegetation and/or increases in impervious surfaces. These areas are more specifically identified in our technical comments below. For all areas identified as relevant, an action would be required to assess feasible mitigation measures in accordance with the suggested hierarchy.

4. NYDEC Should Consider Certain Specific Technical Modifications to the SEQRA Amendments:

In addition to the higher-level suggestions set forth above, the INCITE Network offers the following specific suggestions for modifications to the SEQRA Amendments and their supporting documents.

SEQRA Rules, 6 NYCRR Part 617

- a. 617.1 (Authority, intent and purpose): NYDEC should expressly include a recitation of the legislative findings of the EJ Siting Law to guide interpretation and implementation of the proposed amendments. Specifically, NYDEC should reference the pattern of inequitable facility siting in DACs, the disproportionate environmental health burdens borne by DACs (as supported by DACAT data) and the State's responsibility to "actively reduce" such burdens.
- b. 617.2 (Definitions): NYDEC should consider the necessity of defining several of the key terms included in the SEQRA Amendments and its related guidance (e.g. 617.7(c)(1), FAQ 6) including: (i) cause or increase; and (ii) disproportionate pollution burden. We recognize that defining these terms can be challenging. However, as discussed more fully in Comment 2 above, NYDEC can utilize

specific presumptions and an emphasis on a mitigation hierarchy in defining these terms. While NYDEC has indicated it does not intend for the DACAT to be dispositive, it could define "disproportionate pollution burden" as being equivalent to those DACs that are subject to "comparatively higher existing burdens or vulnerabilities" and utilize the DACAT designations to create a presumption that the DAC meets this standard unless otherwise demonstrated due to intra-tract differences.

Additionally, NYDEC should define "cause or contribute" to include any increase to relevant environmental burdens in the DAC as a result of the subject action. Where such a contribution occurs, NYDEC could then focus on the implementation of feasible mitigation measures. This focus would not require NYDEC to determine significance while allowing the agency or applicant responsible for the action to address only those considerations within its direct control, while more clearly meeting its mandate to decrease environmental burdens borne by DACs.

- c. 617.6(a)(3): NYDEC should exclude the use of the short EAF for Unlisted actions occurring in comparatively higher DACs unless the action is within the category of critical projects that serve the public interest (as discussed in Comment 2) or would otherwise qualify as "de minimis."
- d. 617.7(c)(3): NYDEC should require consideration of the relative environmental burden of the DAC by adding the following: "vii. whether, as applicable, the disadvantaged community is identified as being subject to comparatively higher environmental burdens on the Disadvantaged Community Assessment Tool."
 - 617.8: For any Type I or Unlisted Actions contemplated within a DAC, NYDEC should require that a public comment period as well as a dedicated public hearing (with appropriate community notice) be held in the DAC in a manner consistent with the meaningful community engagement principles identified above.
- e. 617.9(b)(5): NYDEC should require the inclusion of the DACAT information in the EIS for any action proposed within a DAC. NYDEC should further require specific discussion and justification should the agency contend that the action will occur in an area of the DAC tract that is not subject to disproportionate environmental burdens.
- f. 617(b)(5)(iii)(j): NYDEC should consider amendments to this section consistent with the comments above related to setting appropriate presumptions.

- g. 617(b)(5)(iv): As outlined above, NYDEC should consider incorporation of an avoid/minimize/additional environmental benefit hierarchy of feasible mitigation measures.
- h. 617(b)(5)(v): NYDEC should, as applicable, include a requirement for the consideration of alternative siting both outside of a DAC and in an area of the DAC that is less likely to impact areas that are predominantly residential and recreational.
- i. 617.11: NYDEC should incorporate appropriate meaningful community engagement principles for review of the final EIS for actions in a DAC.
- j. 617.11(d): NYDEC should expressly require that the lead agency make specific findings regarding the impacts of the proposed action on the DAC including whether it will "cause or increase a disproportionate pollution burden."
- k. 617.12: NYDEC should incorporate applicable meaningful public engagement principles including, specifically, requirements of language access and enhanced notice periods.

Long Environmental Assessment Form

- a. Part 1, Section E.4: As discussed above, while NYDEC identifies many of the most relevant impacts that could potentially impact the environmental burden in a DAC (air/mobile emissions, wastewater discharges, noise/odor/light pollution, solid waste facilities) it should be more expansive in consideration of relevant impacts to a DAC including, but not limited to:
 - i. Section C (Planning and zoning):
 - 1. Actions seeking amendments to zoning, particularly those that would site non-conforming pollution-generating activities in residential areas or increase allowable density of industrial land uses.
 - 2. Actions that reduce available open space or preservation areas within the DAC that may already have disproportionately less access and suffer from related climate impacts (i.e. flooding/heat impacts).

ii. Section D (Project Details)

- 1. D.2(b): Increased wetland encroachments can deprive a DAC of an already limited natural resource and result in increased climate impacts (i.e. flooding).
- 2. D.2(e): Creation of additional impervious surfaces can exacerbate localized flooding and other climate impacts (heat island).

iii. Section E (Site and Setting of Proposed Action)

- 1. E.1(b): Impacts to listed natural resources (forested areas, grassland, surface water features, wetlands) may adversely impact or otherwise exacerbate existing impacts in DACs where their presence might otherwise be limited, including adverse climate impacts.
- 2. E.1(c): Loss of public recreation space may adversely impact or otherwise exacerbate existing impacts in DACs where such resources may otherwise be limited.
- 3. E.2/E.3: Loss of natural and public resources may adversely impact or otherwise exacerbate existing impacts in DACs where such resources may otherwise be limited.
- 4. E.5: Climate impacts are particularly relevant in DACs where they may act as a threat multiplier of other existing environmental health burdens. Additionally, NYDEC would be wise to consider including standards requiring multi-residential developments to be designed to account for heat impacts to future residents.

iv. Part 2, Section 19 (Impact on Disadvantaged Communities)

- 1. Similarly, the identification of relevant questions to be reviewed by the lead agency should be expanded to include those listed herein and any other relevant sections to ensure a complete and thorough review of potential adverse impacts on DACs.
- 2. Regarding traffic impacts, NYDEC should focus on heavy duty/diesel traffic which is known to have a greater adverse impact on communities than other vehicles. NYDEC should also indicate that any increase in heavy duty/diesel traffic in and around residential areas of relatively higher DACs constitutes a "moderate to large" impact. Diesel traffic, and specifically associated PM 2.5 emissions, is a major driver of localized air quality, associated health complications, safety and quality of life concerns.

Short Environmental Assessment Form:

- a. NYDEC should incorporate the additional DAC-specific questions from the Long Environmental Assessment Form (Part 1, E.4, Part 2, 19) into the Short Environmental Assessment Form.
- b. The above comments related to the long EAF are restated here and should be considered by NYDEC for incorporation.

We appreciate this opportunity to comment on the proposed SEQRA Amendments. We hope that these comments will enhance NYDEC's ability to meet the mandate of the EJ Siting Law and would welcome any further discussion or engagement beneficial to NYDEC in its efforts.

Respectfully submitted,

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