CUDDY +FEDER LLP

445 Hamilton Avenue, 14th Floor
White Plains, New York 10601
T 914 761 1300
F 914 761 5372
cuddyfeder.com

Lucia Chiocchio
lchiocchio@cuddyfeder.com

May 7, 2025

Submitted Electronically: SEQRA617@dec.ny.gov

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

Re: Proposed Amendments to 6 NYCRR Part 617: State Environmental Quality Review (SEQR) Regulations and Environmental Assessment Forms
Comments on Proposed Part 617

Dear Acting Commissioner Lefton and Members of NYSDEC Division of Environmental Permits:

Cuddy & Feder LLP offers the following comments on the proposed revisions to the State Environmental Quality Review Act ("SEQR") regulations contained in 6 NYCRR Part 617 and the associated revisions to the model Short Environmental Assessment Form ("SEAF") and Full Environmental Assessment Form ("FEAF") designed to assist agencies in determining environmental significance under SEQR, which were published by the NYSDEC in the State Register on January 29, 2025.

As indicated in the Regulatory Impact Statement (SAPA 202-a) (the "RIS") issued by the NYSDEC associated with this proposed rulemaking, the NYSDEC's proposed amendments are separated into four main categories/objectives, namely:

(i) amendments which incorporate into the SEQR regulations the SEQR-related provisions of the Environmental Justice Siting Law ("EJSL"), SEAF, and FEAF;
(ii) amendments which update provisions of the SEAF and FEAF related to climate change;
(iii) amendments which amend the Type II list of actions (that do not require further review under SEQR) to include certain types of multi-family housing; and
(iv) housekeeping amendments.

The comments below address the first three categories of proposed amendments and provide a suggested addition to the Type II list of actions.

I. Comments on Amendments to the Type II List of Actions

The proposed rulemaking purports to amend the Type II list of actions that do not require further review under SEQR, as outlined in 6 NYCRR 617.5(c), to include:

> *(11) residential construction projects involving:*
>
> *i. ...*
>
> *1. construction of a building with four or more dwelling units including provision of necessary utility connections as provided in paragraph (13) of this subdivision and conveyances of land in connection therewith, under the following conditions:*
>
> *a. the gross floor area of the building does not exceed 10,000 square feet;*
>
> *b. the building is constructed on an approved lot;*
>
> *c. the building will be connected (at the commencement of habitation) to existing public water and sewerage systems; and*
>
> *d. the use is a permitted use under the applicable zoning law or ordinance, including permitted by special use permit, and subject to site plan review.*
>
> *2. construction or rehabilitation of appurtenant structures in connection with subparagraph (ii) of this paragraph, including sidewalks, parking areas, playgrounds, and landscaping;*

As noted in the Needs and Benefits statement included in the RIS (SAPA 202-a.3.b), this amendment is intended "to remove a potential regulatory hurdle for the construction or expansion of multi-family housing in previously developed areas that contain the requisite infrastructure to support such development without creating a potentially significant effect on the environment." However, the 10,000 square foot size limitation suggested by the NYSDEC for such multi-family residential projects makes it unlikely that proposed amendment will achieve its stated goal.

Practically, in designing a small multi-family residential building, it is likely that approximately 20% of the gross floor area (GFA) will be occupied by common areas, including areas utilized by residents such as halls, stairways, and amenity spaces, as well as areas which are not accessible to residents and controlled by building management such as utility rooms and closets. To be classified as a Type II action under the proposed amendment, a multi-family building would be left with only 8,000 square feet of GFA to be divided among the dwelling units within the

building. As recognized in the RIS, this would allow for only 6 to 8 relatively small dwelling units, which would likely comprise one-bedroom and at most two-bedroom units.

Such a small number of dwelling units would not meaningfully contribute to solving the problem of the "missing middle," described in the RIS as "a range of multi-unit house-scale buildings that are compatible in scale and form with detached single-family homes." Further, it is questionable whether building small multi-family dwellings of this type is affordable or feasible, particularly without the addition of a mixed-use or commercial component. In short, while the policy and intention behind the proposed amendment is commendable, the selected threshold is inadequate, as it is too small.

As the NYSDEC is aware, the New York State Governor and Legislature have recognized a state-wide housing crisis, which is a material cause of loss of population to other states, resulting in lack of needed workers and investors. The State's housing goals include advancing major housing projects, and increasing the number and diversity of new housing units in the State, particularly in urban areas with existing utility infrastructure to serve the projects. The proposed regulations do not go far enough toward removal of regulatory hurdles to residential development and are not likely to contribute to the achievement of these goals.

We request that the NYSDEC consider that following alternatives to the proposed amendment:

1. The 10,000 square foot GFA restriction could be removed from the proposed amendment in its entirety, such that a multi-family residential development of any size which is permitted under the applicable zoning law, and is proposed to be constructed on an approved lot, connected to public water and sewer infrastructure at the commencement of habitation, and which also is subject to site plan review would be considered a Type II action without regard to the size of the development. As noted in the RIS, projects which are permitted under local zoning are deemed compatible with the neighborhood, and the site plan review process affords a reviewing municipality to address and control typical construction and siting aspects of such projects.

2. In the alternative, the NYSDEC could define the types of multi-family residential developments that would be considered Type II actions by the number of proposed units, and could break down the types of development which qualify as Type II actions by the population size of the community in which the proposed development is to be sited, so that larger buildings in urban or other densely populated areas may be considered Type II and the size would be smaller in less dense areas. This approach would be consistent with the NYSDEC's treatment of residential construction projects that are considered Type I actions more likely to have an environmental impact, as

outlined in 6 NYCRR 617.4(b)(5). The NYSDEC could establish a formula for Type II actions based on unit number and community population which classifies all residential developments which do not rise to the level of Type I actions as Type II actions.

3. The NYSDEC could also consider a "carve-out" from a GFA threshold for any common areas, areas housing mechanical or other equipment for the building, parking areas, and similar amenity spaces not occupied by dwelling units. This would provide developers with the flexibility to provide additional units and would incentivize the provision of more developed amenity spaces within multi-family buildings. However, this alternative would only increase the number of dwelling units in a Type II building to approximately 10 units, rather than 6 to 8 units, which increase is not meaningful in addressing the identified housing demand.

4. Similarly, the NYSDEC could consider including an "area bonus" on top of the proposed 10,000 square foot GFA threshold for mixed-use buildings, to allow commercial spaces of less than 4,000 square feet of GFA or educational spaces of less than 10,000 square feet of GFA, as outlined in 6 NYCRR 617.5(c)(9) and (10), to be located within the same structure as a proposed multi-family residential development, and to classify such mixed-use buildings as Type II actions. The NYSDEC could also consider excluding any non-residential space from the 10,000 square foot GFA threshold. This would provide developers with an additional opportunity to derive income from a multi-family building and alleviate some of the cost burden associated with construction of housing projects.

We respectfully request that the NYSDEC consider the above-outlined alternatives in lieu of the proposed 10,000 square foot GFA limitation on Type II actions. Expanding the area and/or number of units that would constitute a Type II action would provide regulatory certainty and streamline the SEQR review process for a greater array of proposed multi-family housing projects and types, which would contribute to combatting the ongoing housing scarcity problem within New York State.

II. Comments on Proposed Amendments Implementing SEQR-Related Provisions of the EJSL

The NYSDEC also proposes certain updates to the SEQR regulations to implement the EJSL. These proposed amendments would formalize an agency's responsibility to consider potential disproportionate impacts upon disadvantaged communities in determining whether an action will

result in a significant adverse impact on the environment. Specifically, the NYSDEC proposes to amend the list of criteria for determining significance outlined in 6 NYCRR 617.7(c)(1) to include:

> *xiii. an action that may cause or increase a disproportionate pollution burden on a disadvantaged community that is directly or significantly indirectly affected by such action.*

A disadvantaged community ("DAC") is defined to have the same meaning as outlined in ECL § 75-0101(5). Maps depicting the locations of the DACs have been prepared by the Climate Justice Working Group ("CJWG"); these maps will be incorporated into the NYSDEC's Environmental Resource Mapper.

The NYSDEC also proposes corresponding revisions to the model SEAF and model FEAF. Revisions to the SEAF and FEAF require an applicant to determine whether its proposed project is located within, or within ½-mile of, a DAC and if impacts from the proposed project could affect a DAC. If so, the applicant is asked to identify the potential direct or indirect pollution impacts of the project that may occur within the DAC. The SEAF provides suggestions of potential pollution impacts that may be described in a narrative response, while the FEAF requires the applicant to specifically identify whether noise from construction or operations, air pollutant emissions, wastewater discharges, odors, light pollution, radiation sources, and/or solid waste generation, management, or disposal may cause potential direct or indirect pollution impacts within the DAC. On the FEAF, the applicant is also asked to identify any NYSDEC permits required for the proposed project.

In determining significance, an agency must consider whether the potentially affected DAC has been identified by the CJWG as having comparatively higher burdens or vulnerabilities. For a Type II or Unlisted action (i.e., based upon review of a SEAF), the agency is asked generally to confirm whether the proposed action will cause or increase a pollution burden within a DAC. For a Type I action (i.e., based upon review of a FEAF), an agency must consider whether the potentially affected DAC has been identified as having comparatively higher burdens or vulnerabilities as compared to other DACs, and must determine the degree to which the identified potential pollution burden will affect the DAC.

While the overall intention of assessing potential disproportionate pollution impacts on DACs is commendable, there are several aspects of the proposed rulemaking related to DACs that require refinement for effective implementation and protection of rights.

A. <u>Jurisdictional and Logistical Issues related to Consideration of DACs in Determination of Significance</u>

1. *The ½-Mile Radius Surrounding a DAC is too Large for Practical Consideration of Project Impacts within Certain Communities*

As noted in the RIS, DACs currently comprise 35% of all census tracts in New York State. Based upon a review of the current CJWG DAC map, it appears that a significant concentration of the census tracts located within New York City and the Mid-Hudson and Long Island regions are classified as DACs, with still larger portions of these regions located within ½-mile of a DAC. These regions are characterized by large populations with concentrated development. Travelling in a ½-mile radius from any given location within these regions can often result in reaching an entirely different community with vastly disparate socioeconomic characteristics. Assessing all "potential direct or indirect" pollution impacts within a full ½ mile radius of a DAC may be challenging, particularly when developments are located close together, and may result in an inflated perception of the significance of an action based upon attenuated impacts.

Further, identification of a ½-mile radius surrounding a DAC invites potential citizen challenges to final agency actions from an excessive number of individuals. Presently, a petitioner seeking to challenge an agency's action under CPLR Article 78 must show that it has suffered an injury in fact different than the public at large because of the action, which injury must fall within the zone of interests sought to be protected by the statute alleged to be violated. The inclusion of DACs and all areas within a ½-mile radius of such DACs in the SEQR regulations may be construed to provide standing to all persons located within these areas to challenge an agency's SEQR determination, greatly increasing the potential for challenges to such actions. Such uncertainty would likely result in a chilling effect on the development of housing within NY State, a necessary resource which the NYSDEC acknowledges is lacking.

We request that the NYSDEC consider that following alternatives to the proposed amendment:

1. The NYSDEC may consider decreasing the radius in which potential direct or indirect pollution impacts must be considered to ¼-mile surrounding a DAC. In the alternative, the NYSDEC may consider a phased approach to defining the appropriate radius surrounding a DAC to be considered, which radius would be reduced as the population size or density of the community in which the proposed development is to be sited increases.

2. The NYSDEC may also consider including an affirmative statement within the Draft SEQR Guidance addressing standing, specifically indicating that location within a DAC does not give rise to an injury in fact and that a person challenging an action would require more than a generalized grievance related to the consideration of impacts upon the DAC to have standing under CPLR Article 78.

3. Type II actions should not be required to assess impacts upon DACs. The NYSDEC may consider providing direction within the Draft SEQR Guidance to clarify this point.

We respectfully request that the NYSDEC consider the above-outlined alternatives to refine the proposed radius surrounding DACs in which potential pollution impacts must be considered and clarify the effect of location within a DAC to avoid overstating the potential impacts of an action and provide greater certainty in an agency's determination of the significance of an action to avoid the anticipated resultant chilling effect on the development of housing within NY State.

2. *Consideration of Impacts to DACs Results in Uncertainty for Type II Actions, including Newly Proposed Type II Actions*

The NYSDEC's proposal to add potential direct and indirect pollution burdens upon DACs to the list of criteria for determining significance may result in confusion in SEQR classification and frustration of purpose with respect to those actions designated as Type II, which would not otherwise require further review under SEQR. For example, certain small multi-family housing developments of the type which the NYSDEC proposes to add to the Type II actions list as part of this rulemaking may be located within or within ½-mile of a DAC, particularly if such developments are designed to further the State's housing goals. As written, it is unclear whether the location of these developments, coupled with the types of minor construction and siting aspects typically associated with these types of developments, would result in direct or indirect impacts upon the DAC that would require SEQR review of the development as an Unlisted action, rather than a Type II action.

We request that the NYSDEC consider that following alternatives to the proposed amendment:

1. The NYSDEC may consider eliminating proposed Questions 21 and 21.a from Part 1 of the revised model SEAF and proposed Questions 12 and 13 from Part 2 of the revised model SEAF, such that for Type II actions which "have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under Environmental Conservation Law, article 8" (6 NYCRR § 617.5(a)), applicants are not required to assess proximity to or potential impacts upon a DAC, and agencies are not required to assess the significance of such proximity or potential impact. This is consistent with the nature and intent of Type II actions.

2. In the alternative, the NYSDEC may consider expanding its Draft SEQR Guidance to provide a priority statement or other specific guidance as to the importance or weight of each consideration to be used in determining environmental significance under SEQR.

The Draft SEQR Guidance should clarify that potential indirect impacts upon DACs and/or within ½-mile radius of a DAC cannot be used to defeat the Type II designation of an action that has been determined not to have a significant impact on the environment and does not require further review under SEQR.

We respectfully request that the NYSDEC consider the above-outlined alternatives to eliminate confusion related to the significance of potentially identified impacts, and to streamline the SEQR process for those actions which categorically do not require environmental review.

3. *Uncertainty in SEQR Process caused by Effective Date of Regulation and Potential Future Changes to the DAC Map*

The RIS (SAPA 202-a.3.c) summarizes costs to the regulated community for implementation and compliance with the portion of the proposed rule intended to implement the EJSL, noting that such costs "will vary greatly and cannot be precisely quantified," with projects requiring preparation of an Environmental Impact Statement ("EIS") resulting in costs that may "exceed one million dollars on a very large, complex project with smaller projects costing in the tens of thousands or hundreds of thousands of dollars." The RIS acknowledges that implementation of the SEQR-related provisions of the EJSL will increase the number of actions that require an EIS. Other than this admittedly variable and superficial analysis of the costs of application fees, the RIS ignores the real costs to regulated persons. These range from the broad (e.g., turmoil in the real estate market caused by disincentives to land development) to the specific (e.g., companies leaving New York for other states where barriers to housing development don't exist, loss of bidders on public and private projects, loss of taxable valuation, loss of population due to loss of jobs). Further costs to the regulated community include delay in investment and financing due to uncertainty about the practical difficulties of assessing "potential indirect" impacts of a proposed action upon a community located half a mile away from such action.

The RIS also ignores the substantial and quantifiable cost to landowners/developers who have pursued land use approvals under existing regulations, sometimes over many years, and are well into the completion of a lengthy SEQR review process pending a final determination of significance from a lead agency. Further, there are substantial costs to developers with large, phased projects that have completed SEQR and obtained conceptual approvals, but still require site plan approval for each future phase. In these circumstances, an overall project layout would have been fixed at the time of the conceptual approval, and backed by significant investment. If enacted, the proposed revisions will take effect 30 days after publication in the New York State Register, and will apply to all actions for which a determination of significance has not been made and/or for which a lead agency has issued a positive declaration and a Draft EIS has not yet been accepted. This broad sweeping inclusion of all projects regardless of status in the SEQRA process

would put owners' reasonable investment backed expectations, and projects which are in the development stages described above, in jeopardy. There has been no documented outreach by the NYSDEC to the development community, or any effort to understand the financial losses that the regulations, as drafted, will impose. These are costs that should have been seriously evaluated in the RIS, together with appropriate alternatives to limit the potential costs.

In addition, under the Climate Leadership and Community Protection Act ("CLCPA"), the CJWG was charged with determining the specific criteria to verify whether a census tract qualifies as a DAC. The final criteria, along with the DAC map and list of disadvantaged communities statewide was adopted as final on March 27, 2023. However, the adopted criteria and the associated DAC map are not static. Pursuant to ECL § 75-0111(3), the CJWG is required to meet no less than annually to review the criteria and methods used to identify DACs, incorporate new data and scientific findings, and review and modify the identities of DACs. Adopting a rulemaking that is based upon data which are subject to change regularly is shortsighted, and will result in uncertainty in the development process, as well as potential violations of applicants' due process rights.

We request that the NYSDEC consider that following alternatives to the proposed amendment:

1. The NYSDEC should consider revising the effective date of the proposed regulations to further protect those who have invested heavily in design and SEQR evaluation based upon the presently existing regulations. Specifically, the existing regulations (and not the revised regulations) should apply to all land use applications (including applications for site plan, subdivision, special permit, or other local land use approval) that include all materials set forth in the municipal code for such applications, including a SEAF or FEAF as appropriate, which are submitted to a reviewing agency prior to the publication of the final rule.

2. The NYSDEC should also consider establishing the version of the DAC map in effect at the time that the NYSDEC adopts the final rule as the definitive DAC map for purposes of considering potential impacts that a project may have upon a DAC. A future rulemaking should be required at the time that any future changes to the DAC map are made to incorporate the updated DAC map into the SEQR process. As an alternative, the version of the DAC map in effect when an initial land use application, including a SEAF or FEAF as appropriate, is submitted to a reviewing agency, may be considered the definitive DAC map for purposes of considering potential impacts of that particular action. Changes to the DAC map during the application process should not result in changes in the areas or communities to be assessed by an applicant.

3. If the NYSDEC declines to adopt the suggestions provided in the above paragraph No. 2, the NYSDEC should consider establishing the DAC map in effect at the time an environmental determination is made to be the applicable DAC map for the project. However, we note that, while this option may provide a moderate degree of certainty for projects which require an EIS, it would leave projects which would otherwise receive a negative declaration at risk since many of those projects do not receive SEQR determinations until immediately prior to the corresponding land use approval being issued.

We respectfully request that the NYSDEC consider these changes to provide further protection for development projects which are nearing a determination of significance, or which have received conceptual approval for phased development under the presently existing regulations. This would alleviate the uncertainty of being asked to meet regulatory targets which may move during the design and development processes and protect due process rights.

B. Risks to Clean Energy Goals in Local Sitting of Distributed Generation ("DG") Projects:

The RIS analysis of potential Costs to the State (SAPA 202-a.3.c.ii) fails to address the impact that the proposed regulatory framework will have on timely deployment of Distributed Generation ("DG") energy technology, as required under the Climate Leadership and Community Protection Act ("CLCPA"). New York's nation-leading CLCPA prioritizes the achievement of the following:

- Increasing **distributed solar deployment** to 10,000 megawatts by 2025.
- Deploying 6,000 megawatts of **energy storage** by 2030.
- Generating 70% of electricity from renewable energy by 2030.
- Reducing by 40% GHGs from 1990 base by 2030 and by 85 percent by 2050.
- 100% Clean, Carbon-Free Electricity generation (emission free) by 2040.[1]

The NYSDEC, as a part of its proposed "Housekeeping Changes" regulations, classifies Major Solar facilities as Type II exempt. Major Solar facilities, constituting 25 megawatts or more, are

[1] *See* SB6599 as updated by subsequent Public Service Commission Orders; *see also* https://dps.ny.gov/clean-energy-initiatives#:~:text=jurisdictional%20load%20serving%20entities%20(LSEs,Clean%20Energy%20Standard.

within the purview of the Office of Renewable Energy Siting ("ORES") jurisdictional authority, and local environmental review is thus preempted for these projects.

However, most of the renewable energy siting projects in New York are "Community Distributed Generation" facilities.[2] DG involves generating electricity in smaller, decentralized facilities, often closer to where the electricity is needed. [3] Notably, these clean energy sites fall below, or are outside of, ORES jurisdictional authority, and are permitted *entirely* at and by the local level. Further, deployment of clean energy projects continues to be faced with a plethora of moratoria across the state, prohibiting and delaying renewable development.

Thus, the proposed DAC program will have a significant impact on the siting ability for renewable energy deployment throughout the State. The changes will delay both the Distributed Solar goal of the CLCPA, and the overarching objective of obtaining 70% renewable energy, particularly given the prominence of DG in New York's solar breakdown.[4] Specifically, the increased area of potential impact designated by the regulations, in addition to the proposed language in the FEAF Part II for reviewing impacts on DAC communities, will unintentionally capture and significantly delay necessary renewable projects.

The proposed FEAF Part II asks the Agency whether the proposed action affects or involves one or more of the following facility types: landfill, other *industrial*, manufacturing, or mining land uses; major oil or chemical bulk storage facility; municipal waste combustor; *power generation* facility; risk management plan site; remediation site; or scrap metal processor. (emphasis added). As community solar locations are often sited at the local level in *industrial* districts, and are fundamentally *power generation* facilities, the proposed FEAF Part II will likely trigger additional scrutiny by the designated Lead Agency.

In addition, NYSDEC purports to amend 6 NYCRR 617.2(l) to include the following definition of Pollution:

> "the presence in the environment of *conditions* and or contaminants in quantities of characteristics which are or may be injurious to human, plant or animal life or to property

---

[2] *See* https://www.eia.gov/state/analysis.php?sid=NY#60. CDG accounts for over 500 Solar PV installations across the State as compared to Major Solar which accounts for approximately 18 facilities. *See also* https://www.governor.ny.gov/news/governor-hochul-announces-approval-two-major-renewable-energy-projects-new-york-state.

[3] *See* https://www.epa.gov/energy/distributed-generation-electricity-and-its-environmental-impacts#:~:text=Distributed%20generation%20refers%20to%20a,and%20combined%20heat%20and%20power.

[4] *See* EIA *supra* Note 2.

> or *which unreasonably interfere with the comfortable enjoyment of life* and property throughout such areas of the state as shall be affected thereby." (emphasis added).

The terms "*unreasonably interfere with the comfortable enjoyment of life* and property" are problematic as there are likely no neighbors that would not seize upon this definition as meaning any discomfort caused by construction, land alteration or any other activity associated with building a new project. The definition is overbroad, at best.

However, as the definition of Pollution is adopted directly from the ECL § 1-0303, it is incumbent upon the NYSDEC to provide guiderails to prevent abuse of SEQR in this context. Here, it is feasible that because a DG solar action is classified as "industrial" or "power generation" and thus subject to additional scrutiny by the Agency, *any impacts* could be improperly incorporated into a finding of potential environmental impacts. In other words, the proposed amendments increase the potential for the Agency to require an Environmental Impact Statement ("EIS"). As these studies generally span a year or more*, this proposed change will effectively thwart the exact Climate goals set by the State of which we are on a timeline to meet*.

Additionally, this proposed change to the proposed FEAF Part II will have a direct impact on the designated funding from the CLCPA for Disadvantaged Communities. The CLCPA "investments and benefits" provision, codified as ECL § 75-0117, requires that Disadvantaged Communities receive at least 35% of the overall benefits of the State spending on clean energy and energy efficiency.

In early 2024, the New York State Energy Research and Development Authority ("NYSERDA") published guidance on how to apply the investments and benefits to disadvantages communities.[5] In its evaluation of investments, NYSERDA looks to place-based investments, where initiatives can reasonably prioritize or target investments to individuals, households, businesses, and other entities within specific geographic areas (e.g., DAC). [6] The third example of a place-based investment listed is "Distributed Energy Resources including community solar." Accordingly, the funding allocated by the State to increase deployment benefiting DAC communities is at risk of being effectively blocked by the proposed amendments.

[5] *See* NYSERDA, Draft Climate Act Disadvantaged Communities Investment and Benefits Reporting Guidance [PDF], https://climate.ny.gov/Resources/Disadvantaged-Communities-Criteria/Investments-and-Benefits-Reporting-Guidance.
[6] *Id.* at 7.

Thus, we respectfully request that the NYSDEC consider the following alternative to the proposed amendment:

1. The NYSDEC should amend the list of facility types to qualify *power generation* as *fossil fuel generation power generation* or *non-renewable power generation*. This change would alleviate increased potential for an Agency finding of potential adverse environmental impact for Distributed Solar or Battery Storage facilities and will aid in the States ambition to deploy renewable energy resources to establish a clean energy grid.

2. The NYSDEC should also consider amending the SEAF and LEAF to provide an opportunity for Lead Agencies to consider the positive environmental impacts of renewable energy projects, such as reduction of air pollution and greenhouse gasses. As it currently stands, the SEQRA review process frames clean energy generation as only having negative environmental impacts (such as tree removal) without acknowledgment or consideration of the overall environmental benefits.

We respectfully request that the NYSDEC consider these changes to provide further protection for clean energy development projects and to promote the State energy goals as codified by the CLCPA. As it stands, the proposed DAC program will have a significant impact on renewable energy deployment throughout the State.

III. ***Comments on Amendments related to Climate Change and Air Emissions***

We note that the proposed rulemaking does not amend 6 NYCRR 617, the formal regulations for SEQR, to address climate change and/or air emissions, but directly edits the FEAF to address these items.[7] In doing so, NYDEC requests that the Applicant identify whether the proposed action will "be vulnerable" to future physical climate risks such as damage from the 100- and 500-year flood, and sea level rise, and whether the proposed action will:

> *E.5.d. … increase the vulnerability of human or ecological communities to the following: i. drought?; ii. temperature extremes (hot or cold)?; iii. extreme storms including high winds?; iv. landslides?; v. coastal erosion?; vi. stormwater flooding; vii. other climate or weather hazards?*[8]

[7] We encourage the NYSDEC to identify the specific Legal Authorization (SAPA 202-a(3)(a)) enacted by the New York State Legislature in directing this amendment to the FEAF. The Needs and Benefits Statement refers to the Community Risk and Resiliency Act ("CRRA"), however, this Act does not direct NYSDEC to amend the SEQR regulations for climate adaption considerations such as this, nor any amendments made during the enactment of the CLCPA (Section 9, respectively).

[8] We note the FEAF also requests the Applicant identify considerations related to greenhouse gas emissions (GHG). We do not comment on those additions.

The NYSDEC explains in the Needs and Benefits statement (SAPA 202-a(3)(b)) that the proposed changes will "encourage projects to be re-sited and designed consistent with the New York State Flood Risk Management Guidance and Federal Flood Risk Management Standard." However, the RIS provided by NYDEC fails to include a statement which properly recognizes Duplication (SAPA 202-a(3)(f)) as required where there are other legal requirements of the state and federal governments which may duplicate, overlap, or conflict with the proposed rule.

These standards, as compared to the current required standards under the Federal Flood Insurance Rate Map (FIMA) and the New York State Building Code, notably increase the areas considered to have a higher risk for flooding, expanding over total increased elevation of the land-area projected to be inundated by the .2% annual-chance flood. [9] Thus, an applicant would be subject to *multiple different standards* designating flood hazard area. Moreover, this space is already occupied by the New York Department of State Building and Code Divisions, as well as is pre-empted in part by the establishment of areas projected to be impacted under FIMA. Thus, this effort to regulate flood impacted areas is duplicative and conflicts with other laws, thereby resulting in a violation of applicants' due process rights.

Additionally, the Needs and Benefits statement included in the RIS does not identify any "standards" which would inform an analysis of whether a proposed Action increases the "vulnerability" of certain populations upon occurrence of the extreme weather events listed (other than flooding). Thus, this portion of the FEAF proposed by the NYSDEC is asking Applicant to consider impacts which *have no generally accepted framework for analysis*.

The RIS notes that the Community Risk and Resiliency Act ("CRRA") has "task[ed] DEC with taking action to promote adaptation and resilience and help State agencies and other entities asses and reasonably foreseeable risks of climate change on proposed projects." However, this proposed amendment does not *help* entities assess risks of climate change. An effort which *helps* assess climate change risk would be publication of a framework of analysis on same. Rather, the NYSDEC here *requires* entities to assess various climate change risks without providing any guidance on how to achieve that end. Indeed, *the proposed updated workbooks are entirely silent on how an Applicant and Agency should answer these questions in FEAF.*

Finally, the RIS does not at all analyze the actual costs to implement these proposed changes. Instead NYDEC merely states "The costs of implementing the climate-related changes are about the same as for the environmental justice related changes." However, in stark contrast to the environmental justice amendments and as noted previously, there is little to no guidance on how

[9] *See generally* https://www.congress.gov/crs-product/IN12193.

to address these questions. Despite the two being factually different issues, the NYSDEC arbitrarily assumes without any basis that imposed costs will be similar.

Thus, NYDEC is effectively asking Regulated Persons and Local Agencies *to take on six-figure costs or more*, after providing no justification as to how they arrived at this conclusion and failing to assess whether these costs will be different in any way from what is estimated for the EJSL amendments. The imposition of costs and mandates upon local governments as a result of this change is particularly concerning given the fact that the NYSDEC has provided neither guidance nor amendments to the 6 NYCRR 617 to frame the breadth and nature of the inquiry.

We request that the NYSDEC consider all of the following alternatives to the proposed amendment before implementing any such change:

1. The NYSDEC should remove question E.5.d from the FEAF, until there is guidance on how to make the requested analysis.

2. The NYSDEC should promulgate a definition for "vulnerability" to further inform Regulated Parties and Local Agencies.

3. The NYSDEC should conduct a sufficient Costs Assessment for the proposed change.

We respectfully request that the NYSDEC consider the suggested change to the proposed FEAF as well as suggestions for comprehensible promulgation. Imposing duplicative and unclear requirements upon regulated parties and local governments risks due process infringement and demands more consideration upon the part of NYSDEC.

IV. ***Comments Suggesting an Addition to the Type II List of Actions***

In 2017, the NYSDEC proposed certain revisions to the SEQR regulations, which would have, among other things, expanded the then-existing list of Type II actions outlined in 6 NYCRR 617.5(c) to expressly include:

> *(14) Installation of cellular antennas or repeaters on an existing structure that is not listed on the National or State registers of historic places or located within a district listed in the National or State registers of historic places or that has not been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places pursuant to sections 14.07 or 14.09 of the Parks, Recreation and Historic Preservation Law.*

After receipt and review of public comments on the then-proposed amendments, on April 4, 2018 the NYSDEC chose to withdraw this element of its proposed rule, in favor of a no action

alternative, despite conceding that "from an environmental standpoint co-location is almost always preferable over construction of new towers,"[10] and that "in theory, for environmental reasons, co-location of cellular antennas or repeaters on an existing structure should almost always be encouraged over construction of additional towers."[11]

Nonetheless, the NYSDEC concluded that "[w]hile it is possible to adopt a Type II for co-location, doing so would require caveats for visual impacts to protect against visual impacts that would be highly subjective to implement and thereby make it more difficult to classify the action. Also, given the anticipated or reported changes in technology that are on the horizon, the Department finds it difficult to evaluate the potential impacts associated with the proposed Type II at this time. It is clear that both the technology and Federal regulatory environment are still evolving for wireless communications and it may be premature for the SEQR rules to be changed at this juncture."[12] The NYSDEC further concluded that "[w]hile the co-location of cellular antennas would remain subject to SEQR where a municipality has discretionary review authority (e.g., site plan review) of such antennas and repeaters, municipalities are likely to use the Short EAF to review wireless antennas and repeaters unless the action is classified as a Type I action in which case the Full EAF must be used. The Department expects that almost all co-location applications should be Unlisted where a municipality has discretionary jurisdiction to review co-location of the antenna. The Department also expects that most discretionary decisions involving co-location of antennas on existing structures will lead to a negative declaration. Along these lines, under Federal Communications Commission regulations, many of these actions are considered Categorically Excluded (federal equivalent of Type II action) under the National Environmental Policy Act (NEPA). However, because the proposed Type II did not contain any siting requirements, the Department found it difficult to categorically determine that the co-location of cellular antennas and repeaters would result in a negative declaration for all potential proposed locations. At the same time, local governments that choose to regulate antennas and repeaters will have some ability under SEQR to address the visual impacts of a siting where it substantially changes the physical dimensions of the tower or base station subject to all other Federal limitations on the exercise of discretion, or adopt a local law making such actions Type II for their approval purposes."[13]

[10] N.Y. Dept. of Envtl. Conserv., REVISED DRAFT GENERIC ENVIRONMENTAL IMPACT STATEMENT ON THE PROPOSED AMENDMENTS TO THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQR) REGULATIONS (April 4, 2018), pgs. iii-iv.
[11] *Id.* at pgs. 44-45.
[12] *Id.* at pg. 45.
[13] *Id.*

Since that time, any substantial changes to the technology and the Federal regulatory environment surrounding co-locations of this type have been resolved.[14] Further, the Federal Communications Commission has issued several Declaratory Rulings that provide guidance on implementing Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 (the "TRA"), which have since been codified to provide even greater clarity on municipal approval of co-location applications.[15] One such regulation defines the thresholds for whether co-location of cellular antennas on an existing structure (or other modification to an existing wireless facility) would result in a substantial change to the physical dimensions of such structure,[16] including whether such co-location or modification would result in visual impacts.[17] Therefore, the NYSDEC's prior concern that subjective caveats would be needed to assess the visual impacts of co-locations has been directly addressed, and objectively defined, by the Federal government. Accordingly, the NYSDEC should now take the opportunity to evaluate the potential impacts associated with expanding the list of Type II actions outlined in 6 NYCRR 617.5(c) accordingly.

Therefore, we respectfully request that the NYSDEC consider the following alternative to the proposed amendment:

1. The NYSDEC may consider adding "Installation of cellular antennas or repeaters on an existing structure that is not listed on the National or State registers of historic places or located within a district listed in the National or State registers of historic places or that has not been determined by the Commissioner of the Office of Parks, Recreation and Historic Preservation to be eligible for listing on the State Register of Historic Places pursuant to sections 14.07 or 14.09 of the Parks, Recreation and Historic Preservation Law" as a Type II action, consistent with its 2017 proposal to the list of Type II actions outlined in 6 NYCRR 617.5(c).

This proposed change would create a better alignment of SEQR with Federal law on co-location. Congress, as part of the TRA, provided that a state or local government "may not deny, and shall

---

[14] *See, e.g.*, City of Portland v. United States, 969 F.3d 1020 (9th Cir. 2020); League of California Cities v. Fed. Commc'ns Comm'n, No. 20-71765, 2024 WL 4179257 (9th Cir. Sept. 13, 2024); Extenet Sys., LLC v. Vill. of Kings Point, No. 21-CV-5772 (KAM)(ST), 2022 WL 1749200, at *17 (E.D.N.Y. May 31, 2022), aff'd sub nom. Extenet Sys., LLC. v. Vill. of Kings Point, No. 22-1265, 2023 WL 4044076 (2d Cir. June 16, 2023); Cellco P'ship v. City of Rochester, No. 6:19-CV-06583 EAW, 2024 WL 805640 (W.D.N.Y. Feb. 27, 2024).
[15] *See, e.g.*, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, 33 FCC Rcd. 7705, (2018); Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests, 35 FCC Rcd. 5977 (2020).
[16] *See* 47 CFR § 1.6100.
[17] *Id.* at § 1.6100(b)(7)(v)(indicating that a co-location or modification would cause substantial change to the physical dimensions of an eligible support structure, i.e., an existing tower or base station, if "[i]t would defeat the concealment elements of the eligible support structure").

approve" any request for co-location, removal, or replacement of transmission equipment on an existing wireless tower or base station, provided the action does not substantially change the physical dimensions of the tower or base station. Such co-locations, therefore, would not be subject to discretionary review under SEQR though local governments retain their authority under the municipal enabling acts as curtailed by Federal law.

Conclusion

Cuddy & Feder LLP appreciates the opportunity to offer comments to the NYSDEC on the draft SEQR Regulations, SEAF, and FEAF. We would be pleased to participate in any dialogue with the NSYDEC in furtherance of the NYSDEC's outreach to regulated persons, and to facilitate the NYSDEC's outreach to the development community.

Sincerely,

Lucia Chiocchio, Esq., Chair of Land Use, Zoning & Development Law Practice
Cuddy & Feder LLP

cc: Jessica Zalin, Esq.
Hailey Pedicano, Esq.
The Honorable Kathy Hochul, Governor of New York State