The Business Council

memo

TO:	Environment Committee Members
FROM:	Ken Pokalsky
SUBJECT:	Update on SEQR/UPA Legislation on "Disproportionate Impacts"
DATE:	1/12/23

New York State is moving toward finalization of new statutory standards for consideration of "disproportionate impacts" on disadvantaged communities (DACs) under SEQRA and permit reviews under the Uniform Procedures Act.

In its 2022 session, the NYS legislature passed S.8830, which would have imposed harsh, unworkable limitations on new and renewed permits located in or near DACs. This December, The Business Council helped negotiate chapter amendments, now introduced as S.1317 (the Assembly version of these agreed-to chapter amendments has not yet been introduced) that provide a more workable approach.

Note that the "Climate Leadership and Community Protection Act" (CLCPA) already directs agencies to avoid such impacts in all permitting, funding and other decision-making processes.

> CLCPA §7.3. In considering and issuing permits licenses, and other administrative approvals and decisions . . . all state agencies . . . shall not disproportionately burden disadvantaged communities as identified pursuant to subdivision 5 of section 75-0101 of the environmental conservation law. . . and . . . shall also prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities as identified pursuant to such subdivision 5 of section 75-0101 of the environmental conservation law.

Here is a summary of S.1317, and its effects on the final statute.

SEQRA Changes (ECL Article 8)

- Any required environmental impact statement (EIS) must assess the effects of an action on DACs, including whether the action would cause or increase a disproportionate pollution burden (using the definition of "pollution" in ECL §1-0303.19).

- In determining whether an EIS is required, an agency must consider whether the action would cause or increase a disproportionate pollution burden in a DAC, considering direct and significant indirect impacts.

- The Department of Environmental Conservation's (DEC's) SEQR regulations on determining environmental significance must include whether an action may cause or increase a disproportionate pollution burden in a DAC.

Uniform Procedures Act Changes (ECL Article 70)

- "Applicable permit" means any permit, except general permits, applied for under ECL Articles 17 (water discharge) and 19 (air permits), Title 17 of Article 23 (liquid natural and petroleum gas), Titles 3, 7, and 11 of Article 27 (waste transport permits, solid waste facilities, industrial hazardous waste management, and hazardous waste disposal siting), as well as Article 15, Title 15 permits for the withdrawal of more than 20 million gallons per day of cooling water.

- For a "new project," an applicant for an "applicable permit" is required to prepare an "existing burden report" that assesses existing "burdens," environmental and public health "stressors," the projected impact of the proposed action, and the potential benefits of the action, including possible reductions in pollution burdens within a DAC.

- For a renewal or modification of a "applicable permit," an existing burden report is required if the DEC determines that the project "may cause or contribute a more than *de minimis* amount of pollution to any disproportionate pollution burden" on a DAC, however this requirement may be waived if the permit would "serve an essential environmental, health or safety need" of the DAC.

- No burden report is required of an applicant for a permit renewal is a burden report was required for that permit within the prior 10 years, or if the action serves "an essential environmental, health or safety need" of the DAC.

- For a **new project**, DEC **shall not issue an applicable permit** if the project will cause or contribute more than a *de minimis* increase in pollution to a disproportionate pollution burden on a DAC.

- For **modifications and renewals**, the DEC **shall not issue a permit that would significantly increase the existing disproportionate pollution burden** on a DAC.

- For all applicable permits, DEC is required to require "appropriate," "reasonable and practical" operational changes that would reduce the pollution burden on a DAC.

- The DEC and Department of Health are required to develop guidelines for preparation of existing burden reports, and the DEC is directed to adopt any other regulations necessary to effectuate implementation of this law.

- This law takes effect two years after approval of these chapter amendments, i.e., January 1, 2025.

We see several areas where the final language is unclear, and that may be addressed in regulation. They include:

- There is no definition of a "new project," and the distinction between a "new project" and a permit modification is unclear.
- There is no definition of how "disproportionate burden" is calculated, here or in the CLCPA (We have reached out to the DEC to call for business input into development of a formal definition or approach).
- The permit decision criteria are based on disproportionate <u>pollution</u> in a DAC, however the "existing burden report" requires an assessment of "<u>burdens</u>," including those used to define DACs (most of which are not pollution-based), and an assessment of "environmental or public health stressors." It is unclear how this calculation of non-pollution "burdens" or "stressors" will be used in calculating disproportionate <u>pollution</u> burdens.
- It authorizes the DEC to require appropriate, reasonable and practical operational changes in a permit that reduce the pollution burden on the community, decisions that would be made after the completion of a burden report, but the burden report is required to assess "operational changes to the project that would reduce the pollution burden." As result, an applicant will conduct the burden assessment based on one set of proposed operational changes, and then the DEC can require other operational changes in the permit.
- Note that the decision criteria for modifications and renewals is virtually identical, except that the former refers to the "issuance of the permit," while the latter refers to "the project." It is unclear whether this is a substantive distinction.

The final legislation will impose additional procedural and compliance burdens on permit applicants. While problematic, this is still a significant improvement over the original legislation.

As a final note, if you have recent experience developing either an environmental justice assessment under Commissioner Policy 29, or a disadvantage community impact assessment under CLCPA §7.3, I would appreciate any feedback you have on the process, as well as any material you can share on the assessment, its findings, and how they were reflected in a draft or final permit.

As always, we welcome any comments or questions.