Comments Regarding the Draft Title V Air Permit Renewal for the Harlem River Yards Plant

March 29, 2023

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VIA ELECTRONIC MAIL & U.S. MAIL
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Re: Comments and Request for Public Hearing under 6 NYCRR Part 621.8
Draft Title V Air Permit Renewal for the Harlem River Yards Plant
688 East 132nd St., Bronx, NY 10454
DEC ID: 2600700726, Application ID: 2-6007-00726/00003

1. Introduction

We, the undersigned elected officials and organizations, respectfully submit the following comments addressing the Draft Title V Air Permit for the Harlem River Yards plant ("HRY" or "the Facility"), DEC ID: 2600700726, Application ID: 2-6007-00726/00003. The undersigned also request a public hearing under 6 NYCRR Part 621.8 due to the serious environmental justice implications of the increased emissions at the Facility.

Before approving any renewal Title V permit for HRY, the New York Department of Environmental Conservation ("DEC") must:

1. Consider the South Bronx's existing pollution burden, and disproportionate impacts of this facility's continued operation at current levels, in the review and analysis of the permit application.
2. Conduct a full analysis of the permit application under the NY Climate Leadership and Community Protection Act.
3. Impose significant emissions reductions conditions on the permit to reduce the pollution impact on South Bronx residents.
4. Grant a public hearing to allow South Bronx residents a meaningful opportunity to express their opinions.

HRY has significantly increased operations over the past five years, and, thereby, emissions of both greenhouse gases ("GHGs") and local air pollutants.[1] The Facility operated 131 days in 2018. In 2022, it operated 211 days, a 61% increase over the last 5 years. Even more troublingly, the number of days when the Facility operated for over 10 hours increased from 46 days in 2018 to 109 days in 2022, a 137% increase over 5 years. The Facility's Total Gross Load in 2018 was 44,612 megawatt-hours ("MWh"). In 2022, it was 125,135 MWh, a 180% increase over 5 years. Problematically, the New York Power Authority ("NYPA"), which owns the Facility, "projects that the facility will be operating in 2030 similarly to its current day operations."[2] Maintaining this high level of operations and emissions for the next seven years is clearly inconsistent with and interferes with the state's ability to reduce GHG emissions in the state by 40% by 2030 and ensure that 70% of all electricity generated in New York be renewable by 2030.

Even more problematically, the Facility is located in the South Bronx, one of the most "disadvantaged communities" in the entire state of New York.[3] To make matters worse, NYPA operates another peak power plant, known as Hell Gate, within a few blocks of HRY. Both the DEC and NYPA, as state agencies, must prioritize reductions of GHG emissions and co-pollutant emissions in disadvantaged communities under the New York Climate Leadership and Community Protection Act ("CLCPA"), and renewal of this permit does nothing of the sort.

It is imperative that this permit application is reviewed comprehensively, keeping in mind the CLCPA's mandates as well as the spirit of New York's newly passed cumulative impacts legislation. The fact that DEC has not yet scheduled a public hearing under 6 NYCRR Part 621.8 is disappointing and unacceptable.

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According to the UN Intergovernmental Panel on Climate Change, we have eight years to keep global warming levels close to 1.5 degrees Celsius by making significant cuts to carbon

[1] *See Clean Air Markets: Power Sector Emissions Data*, EPA, https://www.epa.gov/airmarkets/power-sector-emissions-data (last updated Dec. 21, 2022); Clean Air Markets Program Data, *Custom Data Download*, EPA https://campd.epa.gov/data/custom-data-download (In the left panel, under "Data Type", select "Emissions" from the Data Type dropdown, "Annual Emissions" from the Data Subtype dropdown, "Facility" from the Aggregation dropdown, and then click "Apply". In the left panel, under "Filters", apply "2017-2022" for the Time Period filter and apply "Harlem River Yard" for the Facility filter. Click "Preview Data".)

[2] Letter from Joshua Ramos, NYPA, to Caitlyn Nichols, DEC, re: Response to June 2021 DEC Notice of Incomplete Application ("NOIA") 2 (July 22, 2021).

[3] *See* NY Disadvantaged Communities Criteria Map, The Off. Website of NY, https://climate.ny.gov/disadvantaged-communities-map.htm.

pollution.[4] This will require "unprecedented transitions in all aspects of society."[5] Reducing our reliance on fossil fuels, by examining available alternatives and mitigating measures, are nothing short of imperative.

To reduce GHG emissions in the state by 40% by 2030, ensure that 70% of all electricity generated in New York be renewable by 2030, and achieve a zero emissions electric sector by 2040, all of which are mandated by the CLCPA, New York State cannot continue to approve air permits that allow fossil-fueled power plants to emit the same level of GHGs as they have in the past. To have the highest chance of successfully achieving these goals, DEC must consider *now* how to phase out the state's fossil fuel generation and replace it with renewables and storage, as well as consider smart investments in transmission to begin to alleviate the disproportionate pollution burden from energy generation in disadvantaged communities.

A business-as-usual approach is especially troubling given CLCPA Section 7(3)'s statutory mandate to prioritize emissions reductions in overburdened communities. Moreover, the Facility is owned and operated by NYPA, a public authority that has the same statutory obligation as DEC under the CLCPA to prioritize reductions of GHG emissions and co-pollutant emissions in disadvantaged communities. The draft permit and permit application include no assessment of the disproportionate impacts the Facility has on the surrounding community – one of the most environmentally overburdened communities in the entire state – and there are no measures to reduce or mitigate the Facility's emissions in the permit.

In fact, rather than reducing emissions, the Facility's emissions have increased over the past four years. Renewing the permit, with no changes to permitted emissions, no specific conditions for mitigation, or any other permit condition designed to alleviate the burden on neighboring disadvantaged communities or reduce emissions in anticipation of the 2030 and 2040 mandates under the CLCPA, is irresponsible and contrary to law.

2. Both DEC and NYPA are Statutorily Required to Conduct a Full CLCPA Analysis

DEC and NYPA, both state agencies, must comply with CLCPA Section 7(2) before the permit can be re-issued. The statute states:

> 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, **all state agencies**, offices, authorities, and divisions **shall consider** whether such

[4] In 2018, the Intergovernmental Panel on Climate Change ("IPCC") issued a landmark report concluding that we need to cut carbon emissions by 45% from 2010 levels by 2030 to have a chance at limiting global warming levels to 1.5 degrees Celsius. IPCC, *Global Warming of 1.5°C* at 12 (2018) https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_Full_Report_HR.pdf. In 2021, another IPCC landmark report showed the pace of warming, finding that without immediate, rapid, and large-scale reductions in greenhouse gas emissions, limiting warming to close to 1.5°C or even 2°C will be beyond reach. IPCC, *Climate Change 2021: The Physical Science Basis* at v (2021) https://report.ipcc.ch/ar6/wg1/IPCC_AR6_WGI_FullReport.pdf

[5] IPCC, *Global Warming of 1.5°C* at v.

> decisions are **inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits** established in article 75 of the environmental conservation law. Where such decisions are deemed to be inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits, each agency, office, authority, or division **shall provide a detailed statement of justification** as to why such limits/criteria may not be met, **and identify alternatives or greenhouse gas mitigation measures to be required where such project is located**.[6]

Section 7(2) requires both DEC and NYPA to provide a justification and identify alternatives or mitigation measures for any permitting of a project that would be inconsistent with or would interfere with the CLCPA's greenhouse gas reduction mandates.

Both DEC and NYPA must also satisfy CLCPA Section 7(3) before the permit can be re-issued. The statute plainly states:

> 3. In **considering and issuing permits**, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, pursuant to article 75 of the environmental conservation law, **all state agencies**, offices, authorities, and divisions **shall not disproportionately burden disadvantaged communities** as identified pursuant to subdivision 5 of section 75-0101 of the environmental conservation law. **All state agencies**, offices, authorities, and divisions **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.[7]

Despite the two "shalls" mandating the opposite, this permit disproportionately burdens a disadvantaged community and fails to prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities. This is contrary to law and requires DEC to impose significant conditions on the permit.

3. NYPA's Responses to DEC's Requests for Additional Information Are Incomplete

NYPA's application for the HRY Title V permit should not have been deemed complete, for the reasons set out in Section 5 below.

DEC issued at least three Notices of Incomplete Application ("NOIAs") to NYPA over 2020 and 2021, two of which focused heavily on the need for NYPA to do a more thorough

[6] CLCPA § 7(2) (emphasis added).

[7] CLCPA § 7(3) (emphasis added).

CLCPA analysis.[8] NYPA's responses over the course of 2020, 2021, and 2022 were not compliant with the plain terms of the CLCPA.[9]

In addition, the unnecessarily long amount of time this back-and-forth between the agencies took led to insufficient engagement with the community about the impacts or the mitigation possible at this heavily polluting facility in their backyard. All the while, the operations at the Facility and air pollution from the Facility were increasing substantially (see Section 4.B). This is unacceptable for a state agency that has its own obligations, beyond DEC's, to comply with the CLCPA.

4. The Facility, Initially Promised to be Temporary, Now Operates More than Ever

A. HRY Was Meant to be a Temporary Solution

NYPA's HRY was not designed to operate and pollute through 2030 as the draft permit envisions. In the year 2000, power shortages were projected in the New York City metropolitan area by the New York Independent System Operator ("NYISO") and the New York State Public Service Commission. In the absence of additional generating capacity in the area, it was feared that rolling blackouts, such as those that had recently been imposed in California, would soon become necessary, especially during the peak-demand periods of summer. In response to this perceived need, NYPA quickly installed eleven small power plants in the New York City area that together added about 450 megawatts ("MW") of new generating capacity. This action, which was known as the PowerNow! project, was initiated in August 2000 and completed in time for the summer of 2001. Notably, to speed development of the plants, NYPA evaded both review under the law governing electrical facility siting at the time and issued a negative declaration under the State Environmental Quality Review Act ("SEQRA"), which was later overturned in court for its failure to adequately consider the impacts of fine particulate matter emissions.[10] In 2004, soon after the Facility was constructed, the State of New York audited NYPA and confirmed that "The PowerNow! units are intended to provide a **temporary** solution to New York City's lack of power generating facilities."[11] NYPA's PowerNow! units include HRY.

[8] Oct. 16, 2020 DEC NOIA; June 2, 2021 DEC NOIA; Aug. 13, 2021 DEC NOIA3; *see also e.g.*, Letter from NYPA to DEC, re: Response to 2021 DEC NOIAs (Jan. 14, 2022) ("updated several times based on DEC feedback in fall / winter '21"); *see also* NYPA Response to June 2021 DEC NOIA2, *supra* note 2. (referring to NOIA2 follow-up email requests and additional points).

[9] Letter from NYPA to DEC, re: Response to Oct. 2020 DEC NOIA (Oct. 26, 2020); NYPA Response to June 2021 DEC NOIA2, *supra* note 2.; Letter from NYPA to DEC, re: Response to 2021 DEC NOIAs (Jan. 14, 2022).

[10] *See* UPROSE v. Power Auth. of New York, 285 AD2d 603 (2d Dept 2001).

[11] Alan G. Hevesi, Division of State Services, *A Report By The New York State Office Of The State Comptroller: New York Power Authority, Power Generation In The New York City Area, No. 2001-S-64* at 39 (2004) https://web.osc.state.ny.us/audits/allaudits/093004/01s64.pdf.

B. EPA Data Shows a Sharp Increase in the Facility's Operations, GHG Emissions and Local Air Pollution

As the following table demonstrates, HRY's Total Gross Load, Days Operating, and Days Operating More than 10 Hours, have all increased substantially since 2018:[12]

Year	**Total Gross Load (MWh)**	***Percentage increase***	**Days Operating**	***Percentage increase***	**Days Operating More than 10 Hours[13] (% of operating days)**	***Percentage Increase***
2018	44,612	-	131	-	46 (35%)	-
2022	125,135	*~ 180%*	211	~ 61%	109 (52%)	~ 137%

As the following table demonstrates, both CO2 and NOx emissions have also increased substantially since 2018:[14]

Year	**CO2 Mass (short tons)**	***Percentage increase***	**NOx Mass (short tons)**	***Percentage increase***
2018	**26,702.401**	**-**	**2.386**	**-**
2022	**74,509.104**	*~ 179%*	**6.397**	*~ 168%*

This data showing substantially increased emissions is seriously concerning and as described below, is inconsistent and interferes with the state's emissions reductions mandates and does not prioritize emissions reductions in disadvantaged communities, as required by the plain terms of the CLCPA. It is equally troubling, and inconsistent with the CLCPA, that "NYPA projects that the facility will be operating in 2030 similarly to its current day operations."[15]

These tables and the underlying data from the EPA's Clean Air Markets Power Sector Emissions Database do not include upstream emissions, which are also significant.

The chart below shows a comprehensive picture of how HRY's operations have increased significantly since 2018,[16] and particularly in the last two years.

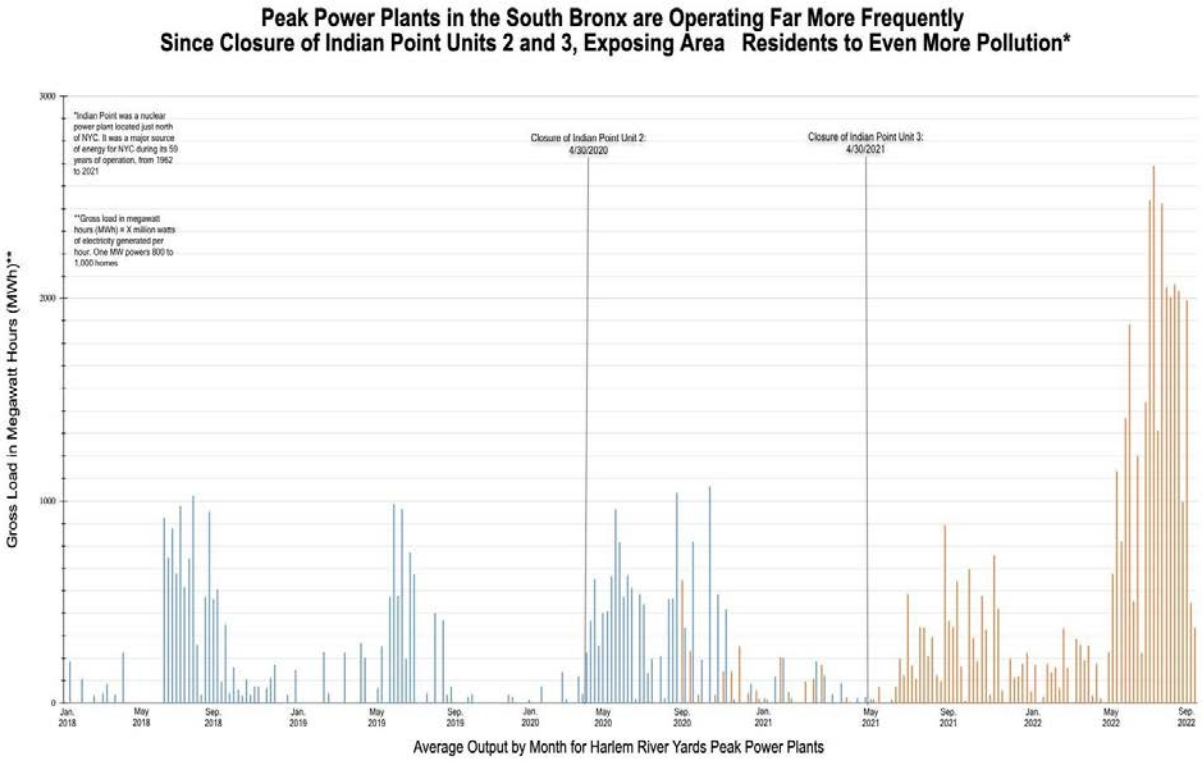
[12] Clean Air Markets Data, EPA, *supra* note 1.

[13] Compiled from EPA Clean Air Markets Data. Note: Operation time represents the sum of operating time for both generators (HR01 and HR02).

[14] Clean Air Markets Data, EPA, *supra* note 1.

[15] NYPA Response to June 2021 DEC NOIA2, *supra* note 2.

[16] Compiled by South Bronx Unite, based on EPA Clean Air Markets Data.



5. Substantive and Significant Issues Exist That Could Lead DEC to Deny or Impose Significant Conditions on the Permit

DEC's and NYPA's CLCPA analysis is wholly insufficient because it ignores the facts on the ground – that the Facility is in a pattern of increasing, rather than decreasing, its GHG emissions and local air pollution. This is even more disappointing because the Facility is run by a public power authority that has its own CLCPA mandates and has studied mitigation measures, but has chosen not to include any concrete plan to reduce emissions at a plant in one of the most disadvantaged communities in New York State.

A. CLCPA Section 7 Applies to This Permit Renewal Application

An existing major source of GHG emissions without commitments to decrease emissions is just as inconsistent and incompatible with the CLCPA's climate mandates as a proposed new source. A more thorough CLCPA analysis is needed here, where GHG emissions and local air pollution have recently increased. A robust analysis of emissions reductions measures is especially needed because the Facility is located in a disadvantaged community, a public power authority owns the facility, and real mitigation measures can be achieved over the life of the permit.

The CLCPA's mandatory emission reductions, under DEC regulations, limit statewide emissions in 2030 to no more than 245.87 million metric tons of CO2 equivalent,[17] from 376.18

[17] *See* 6 NYCRR part 496.4.

million metric tons in 2019,[18] and existing facilities that currently hold air permits contribute substantially to the total emissions. The drastic reductions required under the CLCPA will not come from only permitting decisions on new polluting facilities. Existing facilities must also reduce their emissions, lest the state's emissions increase, or at best plateau, rather than go down.

DEC's multiple requests for additional information related to CLCPA consistency from NYPA are more than illustrative of DEC's statutory obligations under Section 7.[19] But while DEC requested information from NYPA, the information NYPA submitted was not sufficient for a full CLCPA analysis and there appears to be no indication DEC conducted one. As discussed below, there are major gaps in the application materials and the record around key measures needed to determine whether and how the Facility contributes to disproportionate impacts on a disadvantaged community, whether continued operations under the same permit conditions are justified, and whether pollution and GHG emissions can be reasonably mitigated during the permit term. Without this information, there is no way DEC (or NYPA) could have fulfilled its obligations under CLCPA Section 7(2) and Section 7(3), as detailed below.

Under a CLCPA Section 7(2) analysis, increasing GHG emissions must be found to be inconsistent with the CLCPA emission reduction mandates and thus require further analysis of the permit's justification and mitigation measures.

A comparison of 2022 and 2018 operating days and emissions is illustrative:

- HRY operated 131 days in 2018. In contrast, in 2022, it operated 211 days, a 61% increase over the last 5 years.[20]
- HRY's days of operation where the Facility operated more than 10 hours increased from 46 days in 2018 to 109 days in 2022, a 137% increase over 5 years.[21]
- The Facility's Total Gross Load in 2018 was 44,612 MWh. In 2022, it was 125,135 MWh, a 180% increase over 5 years.[22]

This significant increase in operations has of course translated into significant increases in GHG emissions and local air pollutants, which will only continue for the next seven years: "NYPA projects that the facility will be operating in 2030 similarly to its current day operations."[23]

- CO2 emissions from HRY in 2018 were 26,702.401 short tons. In 2022, the carbon pollution was 74,509.104 short tons, a 179% increase.

[18] DEC, *2022 Statewide GHG Emissions Report: Summary Report* at iv (2022) https://www.dec.ny.gov/docs/administration_pdf/ghgsumrpt22.pdf.

[19] DEC NOIAs and NYPA Responses, *supra* note 8; NYPA Responses to DEC NOIAs, *supra* note 9.

[20] Clean Air Markets Data, EPA, *supra* note 1.

[21] *Id*.

[22] *Id*.

[23] NYPA Response to June 2021 DEC NOIA2, *supra* note 2.

- In 2018, HRY emitted 2.386 short tons of NOX emissions. In 2022, that pollution increased to 6.397 short tons, which constitutes a 168% increase over the 5 years of the permit.

This is plainly inconsistent with and interferes with DEC's and NYPA's CLCPA obligations under Section 7(2) and Section 7(3).

Additionally, Governor Hochul recently signed groundbreaking cumulative impacts and environmental justice legislation, S8830/A2103D, which will, in the future, similarly require an analysis of disproportionate pollution impacts for many permits, including this one, and measures to reduce disproportionate burdens where feasible.

B. DEC Cannot Approve a Permit Renewal Here Without a Full Disproportionate Impacts Analysis under CLCPA Section 7(3)

CLCPA Section 7(3) prohibits agencies from imposing disproportionate impacts on disadvantaged communities when considering and issuing permits, licenses and other administrative approvals and decisions pursuant to the Climate Law. Section 7(3) of the CLCPA contains two complementary requirements. First, state agencies, offices, and authorities, "in considering and issuing permits, licenses, and other administrative approvals and decisions . . . shall not disproportionately burden disadvantaged communities."[24] Second, state agencies "shall also prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities."[25] Together, these mandates give state agencies and other state entities the responsibility to ensure that New York's transition to a net-zero emissions economy will be equitable. Agencies' permitting and other decisions must not only avoid harm to overburdened and climate-vulnerable communities but must also prioritize localized reductions of co-pollutants to improve public health and advance equity.

The draft permit for HRY fails to follow both of these statutory requirements. Rather, by issuing this renewal permit, DEC would allow a power plant to continue emitting CO2 and other air pollutants, business-as-usual, without considering measures the Facility could take to reduce its emissions, or institute alternatives or mitigation measures. The draft permit allows the Facility to continue to disproportionately burden the surrounding communities, which are among the most environmentally overburdened and experience among the highest population vulnerability in the state, with regards to air pollution and the other externalities of fossil fuel infrastructure. This ignores DEC and NYPA's affirmative obligation to prioritize emissions reductions in the communities surrounding HRY and is contrary to law.

i. Information Submitted in the Application is Insufficient to Analyze Disproportionate Impacts

The permit renewal application failed to include sufficient information to allow DEC to analyze disproportionate impacts, and DEC appears to have not done any such analysis at all. A

[24] CLCPA § 7(3).

[25] *Id*.

renewal permit cannot be approved without a full Section 7(3) analysis if it may burden disadvantaged communities.

In response to DEC's request for information to support a Section 7(3) analysis, NYPA initially submitted only a list of the Facility's emissions of EPA-designated Hazardous Air Pollutants. As a supplement, in response to DEC's further request, NYPA submitted further information about criteria pollutant emissions from the Facility as well as several readings from EPA ambient air quality monitors in the wider surrounding area, used for measuring compliance with the National Ambient Air Quality Standards ("NAAQS"). NYPA even referred to its twenty-year-old Environmental Impact Statement – which was only written after a court ordered NYPA to conduct a full review under SEQRA, based on a determination that its initial negative declaration failed to consider PM 2.5 impacts on the surrounding community[26] – to assert the Facility has no significant adverse air quality impacts on the community. NYPA's responses to DEC's NOIAs regarding Section 7(3) simply do not take this provision seriously.

An analysis under Section 7(3) should include several steps. The threshold question is whether the decision will affect a disadvantaged community. This would be the case if a facility is located in a disadvantaged community or if its operation would have an impact on a disadvantaged community, for example, by emitting air pollutants that air dispersion modeling shows are likely to affect that community. If so, the agency must then examine whether the decision would disproportionately burden the affected disadvantaged communities. This requires identifying potential burdens, and analyzing whether they are experienced disproportionately by disadvantaged communities. An agency must find that a decision has a disproportionate burden if said decision either: (1) adversely impacts more residents of disadvantaged communities than non-disadvantaged communities; or (2) results in more severe adverse impacts for residents of disadvantaged communities, which could occur because, for example, health burdens or other socioeconomic stressors in a disadvantaged community make air pollution impacts more dangerous to health, or because disadvantaged communities are more directly exposed to a pollution source.[27] Under Section 7(3), agency decisions shall not disproportionately burden disadvantaged communities; therefore, the agency must either decide not to take an action where such burdens are unavoidable, or it must choose an alternative or incorporate mitigation measures that eliminate disproportionate burdens.

Here, the Facility is located in some of the most disadvantaged communities in the state, according to DEC's draft criteria, and its emissions likely affect those surrounding communities. Air pollutants like PM 2.5 and NOx, both of which are criteria pollutants, can only be classified as burdens. As set forth below, HRY's criteria pollutant emissions likely disproportionately affect disadvantaged communities in several ways: the facility is located directly in disadvantaged communities, likely causing a greater impact there than in more distant non-disadvantaged communities; most likely, the vast majority of people adversely affected by HRY's emissions live in disadvantaged communities as opposed to non-disadvantaged communities; and finally, the existing disparate air pollution and health burdens in the

[26] *See* UPROSE v. Power Auth., 285 AD2d 603.

[27] *See, e.g.*, Linda S. Adams, Cumulative Impacts: Building a Scientific Foundation, Office of Environmental Health Hazard Assessment (2010), https://oehha.ca.gov/media/downloads/calenviroscreen/report/cireport123110.pdf

surrounding communities mean that the impact of HRY's air emissions in surrounding disadvantaged communities has more severe adverse effects for people in those communities.

The continued operation of HRY affects disadvantaged communities. A glance at New York's draft Disadvantaged Communities Criteria Map shows HRY surrounded by areas designated as disadvantaged communities under the state's draft criteria. The entire South Bronx and neighboring areas of East Harlem and Upper Manhattan across the Harlem River are all among the most overburdened areas of New York State. As shown in the map below, nearly all census districts in the surrounding areas have an environmental burden, under the criteria used by New York's Climate Justice Working Group, higher than 90% of all other census districts in the state, with some districts' environmental burden rated higher than 100% of all other census districts. Similarly, all have a population vulnerability rating higher than 90% of all other census districts in the state.[28]

Additional data from New York's draft Disadvantaged Communities Criteria Map shows that the census district where the Facility is located has a higher percent of households below 80% of area median income than 95% of all other census districts in New York, a higher percent of households below the federal poverty level than 87% of all other census districts, and a higher rate of unemployment than 90% of all other census districts.[29] It also has distinctly poor health outcomes, including a higher asthma emergency room admission rate than all other districts, a rate of COPD emergency visits higher than 86% of all other census districts, a higher rate of low birth weight than 80% of all other census districts, and a higher premature death rate than 95% of all other census districts.[30] NYPA's application makes little reference to the disadvantaged community criteria statistics for surrounding communities. NYPA has included demographic information from the area in its own publications, however, such as a 2022 study on adaptation of its "Small Clean Power Plants", including HRY.. That study noted that, within a one-mile radius of the Hell Gate facility and HRY, "96% [of residents] are part of a minority group and 70% live in low-income households." [31]

The part of the South Bronx surrounding HRY has, for decades, been host to environmentally harmful facilities and infrastructure. The overall environmental burden in the census district where the Facility is located is higher than 100% of census tracts statewide. The census district has more diesel trucks and power generation facilities than 98% of all other census districts, more vehicular traffic than all other census districts, and a higher level of PM 2.5 than 74% of all other census districts.[32] Another power plant owned and operated by NYPA, the Hell Gate plant, is next door in the neighboring census district.

There can be no question here that HRY's air emissions impact some of the most overburdened and vulnerable neighborhoods in the state of New York. Even if, as NYPA claims,

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[28] *See* NY Disadvantaged Communities Criteria Map, *supra* note 3.

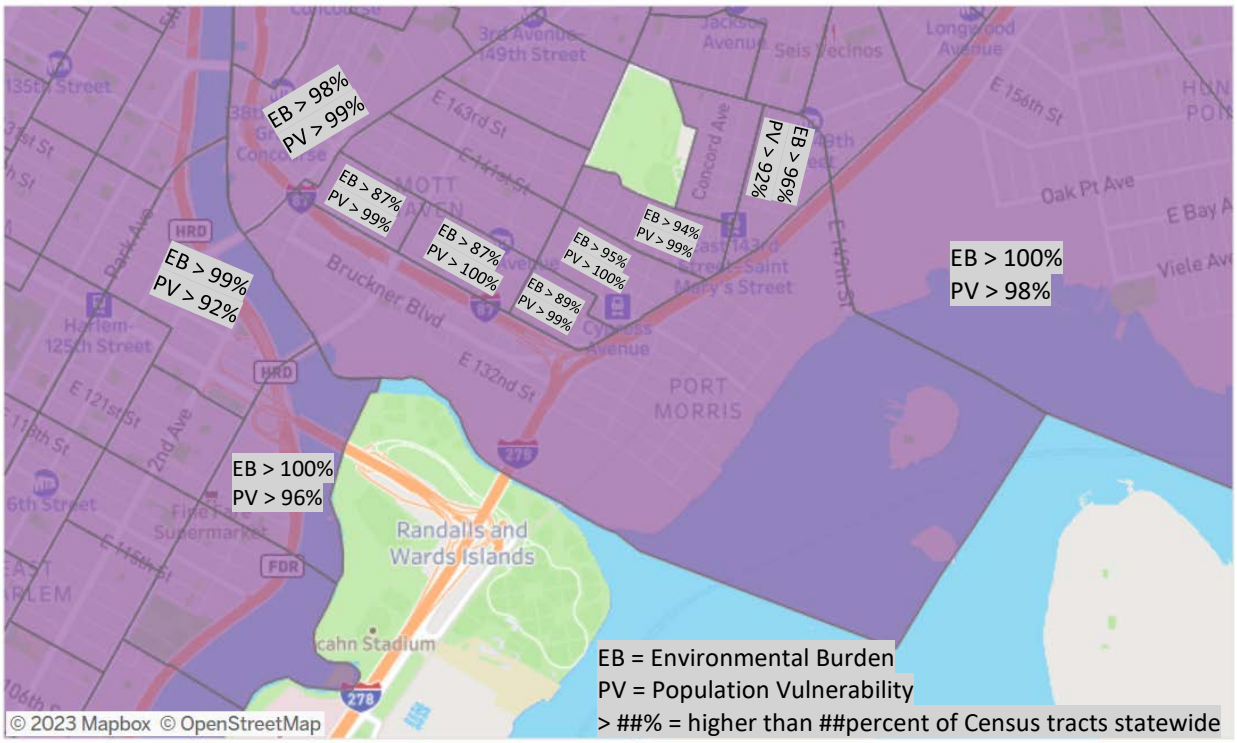
[29] *See id.*

[30] *See id.*

[31] NY Power Auth., *Small Clean Power Plant Adaptation Study* 28 (2022) https://www.geenergyconsulting.com/content/dam/Energy_Consulting/global/en_US/pdfs/NYPA-SCPP-Adaptation-Study.pdf.

[32] *See* NY Disadvantaged Communities Criteria Map, *supra* note 3.

the stack height means co-pollutant emissions like PM 2.5 and NOx are dispersed farther and do not directly impact the immediate surrounding neighborhoods – a claim for which no supporting documentation was submitted – they likely do impact some of the many disadvantaged communities elsewhere in the Bronx, Queens or upper Manhattan. NYPA does not appear to have submitted any documentation of whether HRY's operation affects disadvantaged communities.



The continued air emissions from HRY appear to disproportionately burden disadvantaged communities. While there is no guidance from DEC for considering disproportionate burden in permitting, the plain meaning of "disproportionate" requires a comparison: does approving the renewal permit burden disadvantaged communities more than others? There are several ways a disadvantaged community could be disproportionately burdened by issuance of a permit to a polluting facility, as stated above, yet it appears that NYPA's application did not include any information relevant to disproportionate burdens, nor does it appear DEC considered the Facility's impacts on disadvantaged communities as compared to other communities.

In response to requests from DEC for additional information related to disproportionate impacts, NYPA submitted information designed to show that HRY's emissions are comparatively low and that overall air quality in the Bronx for PM 2.5 is below the NAAQS thresholds. However, this is not the relevant comparison or data for an analysis of disproportionate burdens, which must examine HRY's impacts on overburdened and vulnerable communities as compared to other communities. For example, NYPA submitted several readings for PM 2.5 and NO2 from air monitors located in other neighborhoods in the Bronx that are used

to monitor air quality for compliance with the NAAQS.[33] The implication is that because those monitor readings are below the NAAQS, national standards set by the EPA, there is no disproportionate impact in this community. Those readings do not illuminate the *disproportionate* burdens the Facility may cause in disadvantaged communities as opposed to those that are not designated as disadvantaged under the state's criteria. Just because air monitors show levels below the NAAQS for certain pollutants in other areas of the Bronx does not mean this particular facility does not disproportionately pollute the air in disadvantaged communities in the South Bronx.[34] Similarly, NYPA's January 2022 response to DEC's 2021 NOIA argues that HRY's emission rates are comparatively lower than other New York fossil fuel power plants, but again this is not relevant to an analysis of disproportionate burdens from *this* facility on disadvantaged communities.

Given the data for the surrounding neighborhoods and the draft Disadvantaged Community Criteria Map, it is hard to imagine that the Facility does not disproportionately burden disadvantaged communities in comparison to non-disadvantaged communities. First, even without any air dispersion modeling, it is likely the vast majority of people affected by harmful air pollutants from HRY are residents of disadvantaged communities given that all immediately surrounding areas, as well as most areas in a wider radius from the Facility, are designated as disadvantaged under the state's draft criteria. Disproportionately more residents of disadvantaged communities are harmed by the Facility than residents of non-disadvantaged communities.

In addition, New York's own data shows that the communities surrounding HRY already experience disproportionate environmental burdens compared to the rest of the state, and that a high proportion of residents, the vast majority of whom are people of color, have heath conditions that could make them more vulnerable to harm from air pollution. An independent analysis found that HRY, along with the neighboring Hell Gate plant, was the worst of all peaker plants in New York on a "cumulative vulnerability index" comparing the socioeconomic and environmental burdens of New York peaker plants on immediately surrounding communities.[35]

However, there appears to have been no analysis of how emissions from HRY might interact with existing environmental and health burdens in surrounding disadvantaged communities such that its emissions may impact people in those communities more severely, especially given the Facility's increase in operating hours and corresponding increased emissions over the past several years. Without a thorough analysis of disproportionate burdens from renewal of this permit, DEC will have failed to comply with the requirements of Section 7(3) of the CLCPA. The agency cannot reasonably conclude, without any analysis, that issuance of this renewal permit for a

[33] Letter from NYPA to DEC, re: Response to 2021 DEC NOIAs (Jan. 14, 2022).

[34] Additionally, the selective submission of data on PM 2.5 emissions obscures the fact that the New York Metro Area remains out of compliance with 2008 ozone NAAQS and was recently downgraded to "severe" nonattainment. NOx, which is also emitted from HRY, is a precursor pollutant to ground-level ozone.

[35] *Opportunities for Replacing Peaker Plants with Energy Storage in New York State: Cumulative Vulnerability Index*, Physicians, Scientists, and Eng'rs for Healthy Energy, https://www.psehealthyenergy.org/our-work/energy-storage-peaker-plant-replacement-project/new-york/ (last updated 2022).

major fossil fuel combustion plant will not disproportionately burden the surrounding disadvantaged communities.

ii. DEC and NYPA Failed to Consider How to Prioritize Emissions Reductions in this Community

If ever a community should be prioritized for co-pollutant emissions reductions, it is the Mott Haven neighborhood surrounding the Facility and the South Bronx more broadly. DEC cannot "prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities" if it does not review any ways to reduce GHG emissions and co-pollutants from this power plant.[36] Lowering emission limits, including for co-pollutants, and/or requiring a plan to transition to renewable energy sources would help avoid contributing to disproportionate air pollution burdens on surrounding disadvantaged communities. Reviewing potential measures to reduce emissions in the context of this renewal permit must be part of DEC's statutory obligation for this provision of Section 7(3) to have any meaning. Yet NYPA failed to submit any concrete information about measures to reduce emissions, and DEC appears not to have considered any permit conditions to require emissions reductions.

As a state authority, NYPA is also required to prioritize emissions reductions in disadvantaged communities under CLCPA Section 7(3), and it has recognized that obligation in other contexts. For example, NYPA partnered with environmental justice groups across New York City specifically to study the potential to replace its "small clean power plants" including HRY, with battery storage. Part of the motivation for that study, it stated, was that other "states and utilities are considering how emissions reductions can be accelerated in environmental justice communities, where residents have continually borne the worst impacts of pollution."[37]

The NYPA study, published in April 2022, acknowledges that its New York City peaker plants, like HRY , are located in environmental justice communities, and that "the retirement of fossil fuel resources results in significant reduction of local pollutants, which leads to health improvements in currently affected communities."[38] The report highlights the fact that "Kathy Hochul, in her 2022 State of the State address, reaffirmed New York's commitment to renewable development that directly supplants dirty, fossil fuel power plants, especially in communities that have historically been subjected to the negative health effects of fossil fuel-based electric generation."[39]

In that study, NYPA specifically examines the potential to hybridize the Hell Gate plant, right next to HRY, with battery storage to reduce its run times and emissions by 2030. The study finds that adding battery storage, even if it doesn't fully displace the Hell Gate plant, would lead to significant CO2 and NOx emissions reductions that would

[36] CLCPA § 7(3).

[37] NY Power Auth., *Small Clean Power Plant Adaptation Study, supra* note 31 at 6.

[38] *Id*. at 28.

[39] *Id*. at 6.

benefit the surrounding community.[40] After publishing the study, NYPA issued a request for proposals to develop battery storage projects using its peaker plant sites and related electrical infrastructure in New York City.[41] The request for proposals was based on the study's "promising results" indicating that NYPA plants in New York City "could begin the transition to low or zero carbon emission technologies well ahead of NYPA's VISION2030 goal of decarbonization by 2035."[42]

The draft renewal permit and all renewal application materials in the record fail to consider actual implementation of this effort by NYPA to prioritize emissions reductions in disadvantaged communities under the CLCPA by incorporating storage technology to reduce the use of its plants including HRY. The fact that NYPA is engaged in this effort on a parallel track demonstrates there are likely reasonable measures that could reduce emissions from the Facility, and makes the decision to issue a draft renewal permit that continues to allow high GHG and criteria pollutant emissions from the Facility even more troubling.

DEC must take its obligation to prioritize emissions reductions in disadvantaged communities seriously and incorporate it into its permitting decisions. For the CLCPA to be fully implemented, agencies like DEC and NYPA must communicate about emissions reductions measures for facilities seeking permit renewals and permit conditions should be implemented to reinforce those measures – especially those already being considered by the permittee.

C. DEC Failed to Analyze the Permit under CLCPA Section 7(2)

In addition to Section 7(3), the CLCPA requires all state agencies, offices, authorities or other entities to evaluate the consistency of their permitting, licensing, contracting and other relevant decisions with the CLCPA's emissions reductions mandates. If the decisions may be inconsistent, the agency must consider justifications for taking the action anyway and consider mitigation measures to be implemented. Again, it appears that this analysis was not fully conducted here, especially given the trend of increasing emissions from the facility, changing conditions related to the future need for frequent operations of the Facility, and potential mitigation measures, some of which are already being considered by NYPA, as described above.

iii. This Facility's Increasing Emissions Trend and No Plan to Get to Zero Emissions by 2040 Is Not Consistent with, and May Interfere with, the CLCPA

With HRY's emissions and days of operation steadily increasing over the past five years, DEC must conduct a more detailed analysis of the renewal permit's consistency or interference with the CLCPA statutory requirements. New York State's current GHG emissions far exceed

[40] *Id*. at 31 ("The modeling of hybridization at the Hell Gate site led to projected regional CO2 reductions of 23,000 tons and local NOX reductions in New York City of 12 tons . . .").

[41] NYPA Press Release, *New York Power Authority Issues Solicitation for Battery Storage Proposals to Use Its Small Clean Power Plant Sites and Electrical Infrastructure*, NY Power Auth., (Apr. 21, 2022), https://www.nypa.gov/news/press-releases/2022/20220421-battery.

[42] *Id*.

requirements for an 85% reduction in emissions by 2050. In the electricity sector in particular, the CLCPA mandates reducing emissions to zero by 2040. Renewing permits for major GHG emissions sources such as this one, without considering their inconsistency and interference with New York's 2040 and 2050 emissions requirements, hamstrings New York State's ability to achieve those mandates.

New York State relies heavily on fossil-fueled power plants for electric capacity. This reliance percentage is greater in the New York City area. In 2020, a mere 27.4% of statewide electric generation came from renewables, while 43.4% of generation came from fossil plants.[43] On a capacity basis, the situation is even worse, with the state relying on gas plants for more than half its electric capacity.[44] The state therefore must substantially decrease reliance on fossil fuels in order to decrease greenhouse gas emissions and achieve 70% renewable generation by 2030 and zero-emissions electricity by 2040.

To operate a zero-emissions grid in 2040, New York must not only increase zero-emissions generation to meet projected demand but must also ensure that the reliable functioning of the power grid does not depend on the continued operation of GHG-emitting fossil fuel-fired facilities. Consistent with Governor Hochul's recognition of the need for a blueprint to wean the State off its reliance on the dirtiest peaker plants by 2030,[45] New York must take affirmative steps to wean itself off its reliance on the rest of the fossil fuel powered fleet by 2040.

Notably, NYPA has publicly committed to transition its power generation facilities to zero emissions by 2035, including in its VISION2030 plan. Yet, when DEC requested further information from NYPA in its NOIA about plans to reach zero emissions by 2040 for HRY, NYPA's response was extremely vague and did not discuss the Facility at all.[46]

DEC and NYPA must both conduct a more detailed analysis of projected GHG emissions over the full permit term and beyond, as well as, put forward a concrete plan to reduce emissions by 40% in seven short years and reach zero emissions by 2040, to determine CLCPA consistency. DEC and NYPA must do this with the input of the community via a legislative public hearing under 6 NYCRR Part 621 because the Facility's increased emissions, as well as lack of a concrete plan to reduce emissions by 2030 and reach zero by 2040, are likely to be inconsistent with the CLCPA.

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[43] *See* NYISO, *Gold Book: 2021 Load & Capacity Data Report* 73 (2021), https://www.nyiso.com/documents/20142/2226333/2021-Gold-Book-Final-Public.pdf/b08606d7-db88-c04b-b260-ab35c300ed64.

[44] *See New York State Profile and Energy Estimates: Profile Analysis*, U.S. Energy Info. Admin., https://www.eia.gov/state/print.php?sid=NY (last updated Nov. 17, 2022).

[45] Governor Hochul recently announced that she will direct the New York State Energy Research and Development Authority, Department of Public Service, and DEC "to develop a blueprint to guide the retirement and redevelopment of New York's oldest and most-polluting fossil fuel facilities and their sites by 2030." NY Governor's Off., *New York State of the State 2022: A New Era for New York* 150 (2022), https://www.governor.ny.gov/sites/default/files/2022-01/2022StateoftheStateBook.pdf.

[46] NYPA Response to June 2021 DEC NOIA2, *supra* note 2 at 4 (describing its overall plans but providing no plan or detail – and certainly no commitment – for HRY specifically); Aug. 13, 2021 DEC NOIA3) ("NYPA should provide a plan to transition to zero GHG emission technology"); NYPA Response to 2021 DEC NOIAs, *supra* note 33 (not providing any more detail or specific plans, referring back to its July 22, 2021 general information).

iv. DEC Has Not Provided an Analysis or Statement Concerning the Justification for this Permit, as Required by Law.

Under the second prong of the Section 7(2) analysis, if DEC intends to approve or renew a permit that is inconsistent with or interferes with attainment of the CLCPA's statewide GHG emissions reductions mandates, it "shall provide a detailed statement of justification as to why such limits/criteria may not be met . . . ."[47] In the context of a renewal of a CO2 emitting plant, a CLCPA justification requires a demonstration that the power plant is necessary for grid reliability, and a further demonstration that the reliability need cannot be addressed through any combination of CLCPA-consistent resources such as renewable energy, energy storage, demand response, energy efficiency, and/or transmission.[48] Even if there is reason for DEC and NYPA to believe the permit renewal is justified under those factors, DEC must perform this analysis, and a permit cannot be issued until it has been conducted, following a public hearing under Part 621.

NYPA submitted no information related to the need for the continued level of HRY operations going forward, nor did DEC request such information. This omission is especially noteworthy given the increasing amount of transmission capacity interconnecting in the next few years into Zone J, which will reduce the state's reliance on its peaker plants located in overburdened communities in New York City.

a) Increased Transmission Assets Near the Facility

Tier 4 of the Clean Energy Standard[49] includes infrastructure projects to "increase the penetration of renewable energy in New York City [NYISO Zone J]."[50] The two projects that were approved under Tier 4 each interconnect in Zone J, nearby in Northwest Queens. One of the selected projects, the Clean Path New York ("CPNY") proposal, will deliver 1,300 MW of

[47] CLCPA § 7(2); *see also* DEC, *Notice of Denial of Title V Permit - Astoria Gas Turbine Power* 1–2 (Oct. 27, 2021) https://www.dec.ny.gov/docs/permits_ej_operations_pdf/nrgastoriadecision102721.pdf; DEC, *Notice of Denial of Title V Permit - Danskammer Energy Center* 6 (Oct. 27, 2021) https://www.dec.ny.gov/docs/permits_ej_operations_pdf/danskammerdecision102721.pdf.

[48] NY Climate Action Council, *Scoping Plan: Full Report* 227 (2022) https://climate.ny.gov/-/media/project/climate/files/NYS-Climate-Action-Council-Final-Scoping-Plan-2022.pdf.

[49] "The Clean Energy Standard (CES) requires that 70% of New York State electricity will come from renewable energy sources by 2030. All renewable energy consumed by end-use customers in the State contributes to the CES, including energy supported by past, present, and future State renewable energy policies . . . The Clean Energy Standard (CES) was designed to fight climate change, reduce air pollution, and ensure a diverse and reliable low-carbon energy supply . . . ." NYSERDA, *Clean Energy Standard Annual Progress Report: 2021 Compliance Year - Final Report* at S-5, 1 (2023) https://www.nyserda.ny.gov/All-Programs/Clean-Energy-Standard/Important-Orders-Reports-and-Filings/Filings-Orders-and-Reports (in the chart under the heading "Filings, Orders, and Reports" click the title of the report dated Jan. 31, 2023).

[50] *Id*. at 6; Tier 1 projects could be developed in or around the HRY Facility but NYPA has 0% compliance with Tier 1. And NYPA elected not to participate in Tier 2. *Id*. at 28–29, 33.

renewable energy from Delaware County, NY to Queens by 2027.[51] The other selected project, the Champlain Hudson Power Express ("CHPE") will deliver 1,250 MW of energy from Québec to Queens by 2026.[52] Both of these completion dates are within the five-year period of the air permit.

In addition to approximately 2,500 MW interconnecting nearby via the Tier 4 projects, additional transmission lines will bring thousands of megawatts of offshore wind generation to Zone J.[53] Under the CLCPA, New York is obligated to develop 9 GW of offshore wind by 2035,[54] all or nearly all of which is anticipated to be built offshore near New York City and Long Island. It appears that up to 1,250 MW of offshore wind may interconnect in Mott Haven, near HRY.[55] This new renewable generation also appears to have not been evaluated by DEC or NYPA, though it would impact how much electricity is interconnecting near the Facility into the local grid.

There also appears to have been no review conducted analyzing the headroom of nearby or new transmission and distribution lines, nor any analysis of new interconnections and its impact on local demand. It is DEC and NYPA's obligation to do this analysis under Section 7(2), not not-for-profit organizations located in and serving an overburdened environmental justice community.

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[51] *Id*. at 6 ("NYSERDA's contracts with each project are for the purchase of renewable energy certificates for clean energy delivered into New York City. NYSERDA's purchase of these RECs will commence for each respective project once the project has (1) obtained all required permits and local approvals, (2) completed construction, and (3) is delivering power to New York City. The CHPE project is expected to begin operation in 2026. The CPNY project is expected to begin operation in 2027."); *see also* Avangrid Networks, *Purchase of New York Tier 4 Eligible Renewable Energy Certificates T4RFP 21-1* 119–20, 129 (2021), https://www.nyserda.ny.gov/-/media/Project/Nyserda/Files/Programs/Clean-Energy-Standard/Tier4-Step-2-Bid-Submission-Response/Excelsior-Connect.pdf.

[52] NYSERDA, *CES 2021 Compliance Year Final Report* at 6; *see also* Hydro-Québec & Transmission Devs., *Proposal Narrative: Champlain Hudson Power Express Project Proposal* 5-2, 5-14 (2021) https://www.nyserda.ny.gov/-/media/Project/Nyserda/Files/Programs/Clean-Energy-Standard/Tier4-Step-2-Bid-Submission-Response/Champlain-Hudson-Power-Express.pdf .

[53] *See Offshore Wind Projects*, NYSERDA, https://www.nyserda.ny.gov/All-Programs/Programs/Offshore-Wind/Focus-Areas/NY-Offshore-Wind-Projects.

[54] Public Service Law § 66-p(5).

[55] *Order On Power Grid Study Recommendations*, at 19, NY PSC Case Nos. 20-E-0197, 18-E-0071, 15-E-0302 (Jan. 20, 2022) ("The OSW Study's base case … selected the following POIs and injection capacities: Zone J (NYC): Farragut (1,400 MW), Rainey (1,250 MW), **Mott Haven (1,250 MW),** and West 49th St. (1,200 MW); …") at https://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B23F0F463-A059-4CFC-9134-4535F660611F%7D; *see also* NYS PSC & NYSERDA, *Initial Report on the New York Power Grid Study* (Jan. 19, 2021) at 58 & Appx D at D-128 ("2. OSW Points of Interconnection (POIs) The OSW Study identified POIs through an iterative screening process. It started with every New York City area and Long Island substation above 69 kV and applied a thermal transfer screen analysis to identify 36 substations that could accept at least 300 MW of OSW. For those 36 substations, production cost simulations were conducted to identify 20 substations with the least curtailments. The study then evaluated six POI combinations that could deliver 5,000 to 7,000 MW into the NYC area, with the remainder located in Long Island. The study's base case …selected the following POIs and injection capacities: • Zone J (NYC): Farragut (1,400 MW), Rainey (1,250 MW), **Mott Haven (1,250 MW),** and West 49th St. (1,200 MW).") (emphasis added).

b) The Availability of Battery Storage at the Facility

Additionally, in a separate study of its "small clean power plants," NYPA hired a consultant to analyze the need for its NYC peaker plants, including HRY, to evaluate their need to continue operating and at what levels, and to examine whether battery storage might be able to replace all or some of the peakers' services to the grid. The study notably projects that the need for the peakers to operate as they currently do will substantially decrease as transmission lines are built to supply renewable energy into New York City.[56] None of this information was supplied to DEC to help determine consistency with the CLCPA, and in fact, NYPA directly contradicted its own study when it stated to DEC that it "projects that the facility will be operating in 2030 similarly to its current day operations."[57]

c) An examination of the use of HRY's electricity is needed

NYPA, in its second response to DEC's NOIA, notes that "[c]urrently, and projected for over the next five years" the electricity demand supplied by HRY is "in the New York City area."[58] Yet NYPA does not include where in the "area" HRY's electricity is actually being used, whether its electricity is being used by the host community that is bearing the burdens of the dirty generation of HRY's electricity or where else that electricity may be going.

In its Section 7(2) justification analysis, NYPA should have also included a detailed analysis of the customers for HRY's electric power – whether they are NYC-based or outside the city, and whether and how NYPA power from HRY is or is not bid into the NYISO electricity markets.[59] The community has a right to know if HRY's power is being used for market participation that may or may not be to serve local peaking grid service, or for profit where the externalities are felt by South Bronx communities who do not receive the proportional benefits.

v. Neither DEC Nor NYPA Considered or Identified Alternatives or Mitigation Measures, a Violation of the CLCPA

For each inconsistent or interfering decision that is deemed justified, DEC – and NYPA – must "identify alternatives or greenhouse gas mitigation measures to be required where such project is located."[60] DEC and NYPA therefore must explain whether they have considered alternatives before a fossil fuel generation source can be permitted, including, but not limited to, decreasing emission limits, transitioning to a more renewable energy source, or the use of energy

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[56] NY Power Auth., *Small Clean Power Plant Adaptation Study* at 2, 3, 4, 17.

[57] NYPA Response to June 2021 DEC NOIA2, *supra* note 2 at 4.

[58] *Id*. at 4.

[59] See, e.g., Alan G. Hevesi, NYPA Power Generation in NYC Report at 29 (describing NYPA's power contracts with city agencies at that time and the NYPA supply to NYC as compared to Westchester County: "In the absence of such contracts, some or all of NYPA's government customers may someday decide to obtain their power elsewhere, and much of the power produced by the new plant may have to be sold in competitive markets at prevailing market prices.").

[60] CLCPA § 7(2); *see also* DEC, *Notice of Denial of Title V Permit Astoria Gas Turbine Power* 1–2 (Oct. 27, 2021) https://www.dec.ny.gov/docs/permits_ej_operations_pdf/nrgastoriadecision102721.pdf; DEC, *Notice of Denial of Title V Permit Danskammer Energy Center* 6 (Oct. 27, 2021) https://www.dec.ny.gov/docs/permits_ej_operations_pdf/danskammerdecision102721.pdf.

storage, demand response, energy efficiency, and/or transmission enhancements and any combination thereof.[61]

The alternatives or mitigation options for existing sources may vary depending on the type of facility and the nature of the need for the facility. But that does not mean that both DEC and NYPA should not address appropriate alternatives or mitigation measures consistent with Section 7(2) in permit renewals. DEC, and here NYPA, must conceive alternatives or mitigation plans over several different time scales, including in permits considered and issued today, to ensure that we have a safe and reliable plan to meet the 2030, 2040 and 2050 GHG emissions reduction and co-pollution reduction requirements set forth in the CLCPA.

Mitigation measures at HRY over the next five years are especially important given the CLCPA's aggressive GHG emissions reduction targets on a short timeline, rather than approving the same GHG emissions as in previous permits – especially where emissions and pollution are perplexingly *increasing* at the Facility. Yet the draft permit for HRY makes no changes at all to the emission limits in the previous permit. In order to meet CLCPA limits in 2030 and 2040, emissions reductions must start as soon as possible to fully transition to zero emissions. At a minimum, DEC should require NYPA to adhere to an emissions trajectory that lowers emissions throughout the five years, holding it accountable to reach 2030 mandates as well as zero emissions generation by 2040.

In addition, neither NYPA nor DEC has identified renewable energy or storage options on or near the site. This is despite NYPA's own study, referred to above, finding that battery storage is a promising option to reduce the operations of its fossil fuel peakers in the city and NYPA's issuance of an request for proposals to explore development of battery storage using its peaker plant sites and associated electrical infrastructure.

The failure by both state agencies to seriously consider and seriously plan for alternatives or mitigation measures at the Facility, and the failure of DEC to impose any conditions on the permit, does not comply with statutory requirements under Section 7(2) and requires a Part 621 public hearing.

6. DEC Should Impose Significant Conditions on the Permit to Substantially Reduce the Impact on the Surrounding Community

DEC should impose significant conditions on the permit. The undersigned organizations request that DEC fulfill its obligation to prioritize emissions reductions in disadvantaged communities such as the communities surrounding HRY by requiring NYPA to reduce the Facility's actual emissions during the term of this permit. First, HRY is currently permitted to emit way above any actual emissions levels. Second, the Facility, as detailed above, is on a trajectory of increasing GHG emissions and co-pollutants instead of reducing them. The permit should incorporate emissions limits to enforce actual operational reductions over the life of the permit and incorporate binding commitments on the part of NYPA, to further reduce emissions before the state's 2030 and 2040 CLCPA mandates.

[61] See, e.g., NY Climate Action Council, *Scoping Plan: Full Report*, at 227.

Additional mitigation measures may also be considered to address the Facility's impacts on the community, such as other air quality mitigation measures and measures related to waterfront access.

7. About the Surrounding Community

As discussed above, the surrounding community is historically and currently among the most environmentally overburdened in the state, which strengthens both the moral and legal urgency for permit conditions at the Facility. This section gives additional background and context for DEC to consider regarding the community hosting HRY.

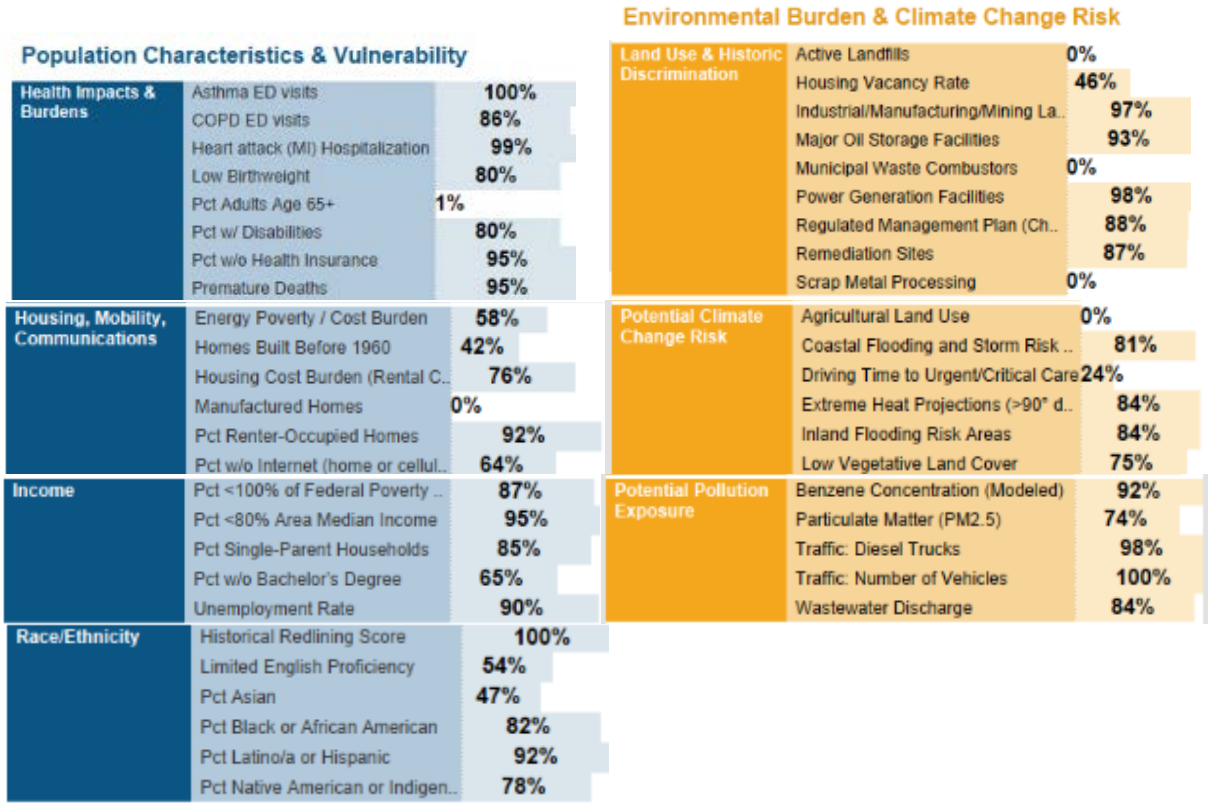
The Mott Haven and Port Morris community is home to approximately 60,000 people, primarily Black, Puerto Rican, and immigrants from Mexico and Africa. Less than 3% of residents are white. The community is rich in culture, abundantly resourceful, fiercely creative, and has an inspiring history of activism. At the same time, the neighborhood has the unfortunate stigma of being the poorest Congressional district in the country: 39% of residents and 49% of children live in poverty.

The area is an epicenter of racial, social, and environmental injustice due to the legacy of redlining and decades of public policies devaluing the lives of Black, Brown, and immigrant communities. Among the many ways, this has manifested in the heavy concentration of local polluting facilities and infrastructure such as peaking power plants, expressways, bridges linking to other boroughs, heavy duty diesel truck-intensive warehouses, and multiple waste transfer stations. Not surprisingly, the area has the worst air quality in the city and has among the lowest access to green space per capita. This combination has resulted in disproportionately high illnesses ranging from asthma and heart disease to cognitive impairment and dementia. This has resulted in asthma rates eight times higher than the national average and 21 times higher than in any other NYC neighborhood. Not surprisingly, the community has been among the worst hit by the pandemic due to the high prevalence of respiratory illnesses.

A. Air Pollution and Health Burdens in the Community

The Mott Haven and Port Morris neighborhoods experience higher-than-average air pollution, with an annual average fine particulate matter (particles with aerodynamic diameter ≤ 2.5 μm; PM2.5) level of 8.6 μg/m3, higher than both the Bronx borough-wide average (7.8 μg/m3) and the NYC average (7.5 μg/m3). Mott Haven has a very high incidence of child asthma, with 17% of children ages 4 and 5 diagnosed with asthma, as well as high asthma emergency department visits, at 647 visits per 10,000 children aged 5 to 17, compared to the Bronx (410 visits) and NYC (223 visits). Other health concerns include elevated obesity, diabetes, and hypertension rates, which can be exacerbated by air pollution. In addition, Mott Haven has nearly double the rate of pedestrian hospitalizations than NYC as a whole, at 43 versus 23 hospitalizations per 100,000 people.

Below are relevant data on environmental, economic and health burdens in the census district where HRY is located, taken from New York's Disadvantaged Communities Criteria Map:



Children, pregnant women, and the elderly with respiratory and cardiovascular diseases are particularly vulnerable to adverse health outcomes from exposure to air pollution. Social and economic inequalities in these neighborhoods are stressors that magnify the impacts of air pollution. Air pollution exposure for various populations can have the following health consequences:

- *Prenatal*: preterm birth, low birth weight, infant mortality, harm to cognitive development
- *Adolescence*: development of asthma, asthma attacks, coughing, and wheezing, reduced lung function, harm to cognitive development, increased risk for heart and lung disease later in life
- *Adults*: stroke, lung cancer, diabetes, worsened asthma, heart disease, heart attacks, premature death
- *Elderly*: dementia and cognitive decline, a decline in lung function, heart failure

B. High Levels of Traffic, Particularly Truck Traffic, Contribute to Poor Air Quality in Addition to HRY

NYPA's HRY lies at the confluence of a national and regional transportation infrastructure, with multiple expressways and bridges converging in the neighborhood that concentrate the environmental impacts of car and truck pollution in the South Bronx, funneling

vehicles from outlying suburbs through an environmental justice community. In addition, the siting of truck-intensive warehouses like the Fresh Direct warehouse and Hunts Point Wholesale Market in this community brings thousands of idling diesel trucks and their emissions to this area every day.

Automotive congestion worsened between 2017 and 2019 in residential and mixed-use neighborhoods of Mott Haven and Port Morris, according to a study led by researchers at Columbia University Mailman School of Public Health, in collaboration with South Bronx Unite.[62]

Mott Haven and Port Morris have a long history of developments that caused traffic to increase, starting in 1939 with the construction of the six-lane Major Deegan Expressway, and in 1962, the six-lane Bruckner Expressway. In 1991, the Harlem River Yards, a 106-acre state-owned lot on the Port Morris waterfront was leased to a private developer for 99 years who has subleased the site to several traffic-intensive operations, including a shipping and distribution center, multiple municipal waste transfer facilities, and a printing and distribution facility operated by the New York Post. The surrounding area is also host to several private waste transfer facilities and four NYPA power plants: the two turbines at HRY, and two additional turbines at the neighboring Hell Gate plant.

C. The Harlem River Yards Industrial Site Exacerbates Environmental Burdens

NYPA's decision to site and – with its current application for a renewed air permit – to continue increasing its operation of a fossil-fueled power plant at the Harlem River Yards continues an injustice that originated with the initial taking of public land owned by the New York State Department of Transportation ("DOT") for private use at the Harlem River Yards. In August 1991, the Galesi Group, a for-profit developer acting through Harlem River Yard Ventures, Inc. ("Ventures"), signed a ninety-nine-year lease agreement with the DOT to develop a state-of-the-art transportation and industrial park at the ninety-six-acre Harlem River Yards in the South Bronx. The community resistance to the Harlem River Yards industrial site, which began in the mid-1990s, sought to apply the public trust doctrine to the proposed land use in order to safeguard public access to the waterfront and provide needed stormwater mitigation.[63]

The Harlem River Yards, where HRY is located, was originally slated for development of an intermodal terminal that would allow freight to remain on railcars as it traveled east across the Hudson River, rather than stopping in neighboring states for transfer onto trucks. Notably, at this time, trucking was the primary mode of transferring cargo in New York City – 90% of cargo in New York City moved by trucks, compared to only 41% nationally. The terminal would not only bring efficiency and modernization to the rail freight system in the downstate New York, but it

[62] Anisia Peters et al., *Assessing neighborhood-scale traffic from crowd-sensed traffic data: Findings from an environmental justice community in New York City*, 133 Env't Sci. & Pol'y 155, 156–157 (2022) https://www.sciencedirect.com/science/article/abs/pii/S1462901122000971.

[63] For further discussion, see Akilah M. Browne & A. Mychal Johnson, *Public Land for Public Good: A Call for a Reparative Application of the Public Trust Doctrine in New York*, 30 NYU Env't L. J. 303 (2022), https://www.nyuelj.org/wp-content/uploads/2022/11/Browne_Johnson_ReadyForPrinter-Round-2-LS.pdf.

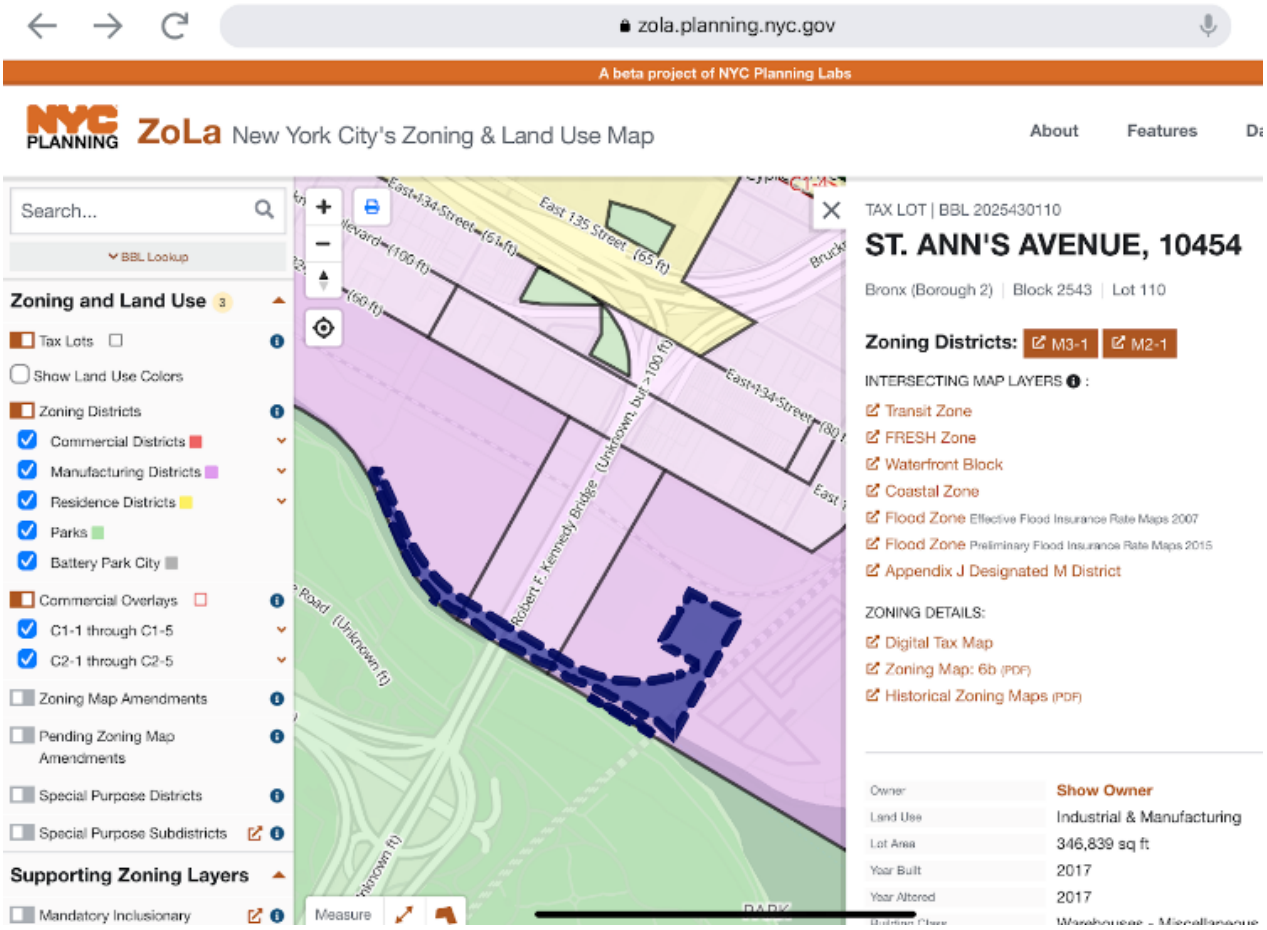
would also alleviate traffic congestion, air pollution and damage to the region's bridges and streets by taking more trucks off the road. The plan was pivotal to New York State's freight access, air pollution mitigation and manufacturing preservation goals.

Today, those goals have yet to be realized. Instead of developing a freight terminal to facilitate transport of goods by rail, as was originally promised, the private owner has successively sub-leased the land to private companies, largely for truck-intensive uses. The leasing and sub-leasing of this land has concentrated industrial facilities in an environmental justice community and encouraged further industrial infrastructure. In fact, the only rail cars that have been handled at the Harlem River Yards since the 1991 lease agreement was signed carry New York City's solid waste shipped by the Bureau of Solid Waste Management, which subleases a portion of the land from Ventures. Ventures also subleased the land to the Wall Street Journal and New York Post (until 2020), as well as Federal Express (Fed Ex), 21st Century Fox America and Fresh Direct – none of which serve intermodal freight purposes nor maximize public benefit for the region. Indeed, these are all private, for-profit companies that received a windfall on public land, benefitting from public subsidy and public funds, to only serve private purposes.

These nearby facilities, which overburden Mott Haven and Port Morris, must be considered in the context of the disproportionate impacts analysis needed under Section 7(3) for this Facility's permit application and even further show the need for additional community input through a Part 621 public hearing.

D. Due to Residential and Planned Green Space Development Near the Facility, Its Emissions Affect More People

Since HRY was built in 2001, far more residential development has occurred close to the site and plans are in effect to use the surrounding waterfront as public green space, meaning far more people are affected by the Facility's operations today. When the Facility was first built, it was in an area separated by several blocks from the residential community. Since then, the New York City Department of City Planning and other agencies have taken concrete steps to provide for residential development, public access, limited maritime industry along the waterfront. Thanks to the efforts of city, state, and private developers, the NYPA power plant now has greater population impacts. As shown in the below zoning map, a residential district abuts HRY's site.



In 2014, DEC prioritized the Mott Haven-Port Morris Waterfront Plan for its Open Space Plan to provide underserved residents in the South Bronx with access to a public open space waterfront, climate change resiliency, coordination with residential rezonings as well as with areas of designation within Vision 2020 and 2030 NYC Comprehensive Waterfront Plan and connection to bigger capital projects already funded or under development, such as the Randall's Island Connector. The Port Morris Waterfront plan would provide flood mitigation for critical infrastructure within a Zone B flood zone of a Significant Marine Industrial Area ("SMIA") and reduce the quantity and impact of Combined Sewage Overflow ("CSOs") currently in violation of the Federal Clean Water Act. The Mott Haven-Port Morris Waterfront Plan integrates Green Infrastructure with recreational design in unoccupied or underutilized open spaces to help offset the toxic effects of inevitable storm surges, ensuring ongoing economic benefit for low-income Bronx families from the investment and breathing cleaner air and enjoying green space.

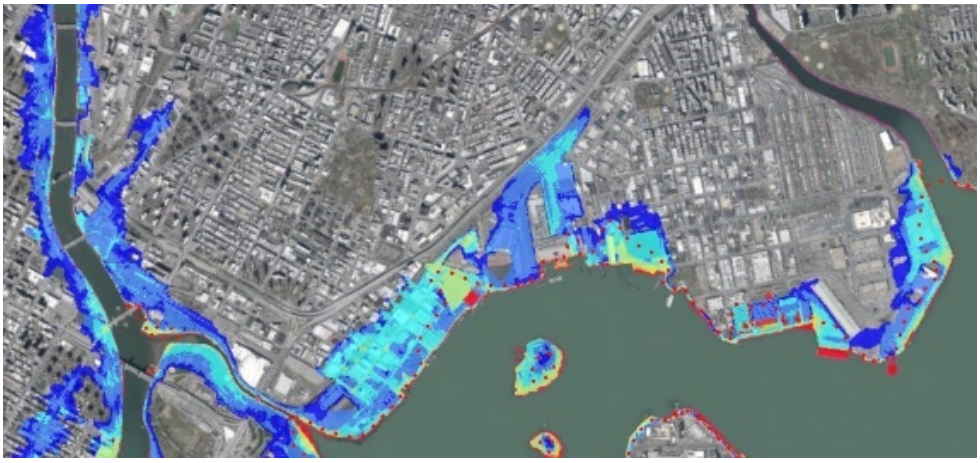
The first phase of the Waterfront Plan will include the redevelopment of the 132nd Street Pier into a public waterfront park. The Pier is located in a Zone B flood zone of an SMIA and its redevelopment will help mitigate the effects of climate change and potential flooding of industry and electrical infrastructure along the waterfront. The project will also integrate designated open spaces on currently unoccupied portions of the Harlem River Yards to help offset potentially toxic effects of inevitable storm surges flooding the current businesses that lease space

(including the Facility, waste transfer station, FedEx hub and NY Post print and distribution center).

This redevelopment and residential rezoning must be considered in the context of disproportionate impacts. NYPA cannot rely on an Environmental Impact Statement from 2001 to claim there are no significant air quality impacts on the surrounding community, when far more people live and recreate near the Facility now than did when it was built.

E. Climate Risk in the South Bronx: Flooding

The lot area for the Facility fronts the Bronx Kill, which is a narrow strip of the Harlem River between Randall's Island and the Bronx. The siting of HRY makes it particularly vulnerable to both coastal and non-coastal flooding impacts and impacts throughout the South Bronx, as documented in the FEMA Flood maps below.



In addition, the Facility appears to lack necessary State Pollutant Discharge Elimination System or stormwater permits. The lack of appropriate water discharge regulation or stormwater management would contribute a high level of pollutants unabated, untreated, and with no permits for discharging onsite and into the Harlem River.

8. Public Hearing Request

The undersigned organizations respectfully request a public hearing under 6 NYCRR Part 621.8 due to the serious environmental justice implications of the increased emissions at the Facility.

Under 6 NYCRR Part 621.8 (c) and (d), a public hearing should be held because a significant degree of public interest exists and this comment letter raises substantive and significant issues that could (and should) lead DEC to deny or impose significant conditions on the permit.

9. Conclusion

In summary, the undersigned organizations believe NYPA's application should not have been deemed complete, that its CLCPA analysis was woefully deficient for all the reasons laid out above. The undersigned organizations also believe a Part 621 public hearing is required because a significant degree of public interest exists and this comment letter raises substantive and significant issues that should lead DEC to deny or impose significant conditions on the permit.

The state has clearly shown the need to prioritize reductions of GHG emissions and local pollution with Section 7(3) of the CLPCA and the recent passage of the Cumulative Impacts Bill. This air permit is where those legislative and executive commitments must be realized. NYPA should be required to conduct a full CLCPA analysis, and the draft permit should be significantly modified to include concrete, specific, and binding conditions to reduce GHG emissions and local pollution.

Respectfully submitted,

South Bronx Unite

Bronx Council for Environmental Quality

Earthjustice

Congressman Ritchie Torres

Senator Gustavo Rivera

Assembly Member Amanda Septimo

Assembly Member Jessica González-Rojas

Assembly Member Karines Reyes, R.N.

Assembly Member Zohran Mamdani

Bronx Climate Justice North

Bronx River Alliance

Brooklyn Level Up

Christ Church Riverdale's Social Justice Ministry

Clean+Healthy New York

CUNY Center for Urban Environmental Reform

Energy Justice Network

Environmental Advocates NY

Environmental Defense Fund

Friends of 4 Parks Alliance

Harlem River Working Group

Harvard Environmental & Energy Law Program

Heat Cool Smart Brooklyn

Loving The Bronx

Mott Haven/Port Morris Community Land Stewards

Moving Forward Unidos

New Economy Project

New York City Community Land Initiative

New York Lawyers for the Public Interest

North Bronx Racial Justice

Northwest Bronx Community and Clergy Coalition

Northwest Bronx Indivisible

PEAK Coalition

Riverkeeper

Sierra Club Atlantic Chapter

The Point CDC

Waterfront Alliance

WE ACT for Environmental Justice

We Stay/Nos Quedamos

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