



To: Kate Kornak, NYSDEC Region 4 Headquarters

From: Public Employees for Environmental Responsibility

Date: August 28, 2023

RE: Renewal of the Mined Land Reclamation and Solid Waste Management permit application for Dunn Mine and C&D Facility comment

Public Employees for Environmental Responsibility (“PEER”)¹ submits the following comments addressing the renewal of the Mined Land Reclamation and Solid Waste Management permit application for the Dunn Mine and C&D Facility (Permit ID: 4-3899-00006; MLF# 40346) (the “Facility”).

Given the immense climate, local air impacts, and environmental justice issues from the Facility’s continued operation, the New York State Department of Environmental Conservation (“DEC”) must deny the permit application for the Facility until at the Facility until SA Dunn & Company LLC (“Dunn” or the “Applicant”) can show compliance with the Climate Leadership and Community Protection Act (“CLCPA”).

The Applicant’s permit renewal is inconsistent with the statutory provisions of the CLCPA and interferes with the attainment of statewide greenhouse gas emission limits, for the reasons set out below.

I. The Continuation of GHG Emissions from the Facility is Inconsistent with the CLCPA

Recognizing that “[c]limate change is adversely affecting economic well-being, public health, natural resources, and the environment of New York,” the state legislature enacted the CLCPA to strengthen New York’s statewide mandates for both emissions reductions and requiring the accelerated adoption of renewable energy generation sources.² Across all sectors, the CLCPA limits GHG emissions to 60% of 1990 levels by 2030 and 15% of 1990 emissions by 2050.³ Under Section 7(2) of the CLCPA, DEC is required to consider whether permitting

¹ PEER is a nonprofit organization headquartered in Silver Spring, Maryland. PEER’s mission includes educating the public and speaking out, as well as providing legal defense to those who speak out, about environmental ethics and compliance with environmental laws. PEER works nationwide with government scientists, land managers, environmental law enforcement agents, field specialists, and other resource professionals committed to responsible management of America’s public resources.

² CLCPA § 1.

³ N.Y. E.C.L. §§ 75-0107(1).

actions are inconsistent with or interfere with the statewide greenhouse gas emission limits set by law.⁴

The Climate Action Council's Final Scoping Plan states that the CLCPA "necessitates a dramatic shift in the way waste is managed, to the point that landfills and combustors are only used sparingly for specific waste streams, and reduction and recycling are robust and ubiquitous."⁵ It further instructs DEC to (1) "require improved emissions monitoring programs at all applicable solid waste management facilities" and (2) "require[s] reductions in emissions at these facilities."⁶ Dunn has conceded that GHG emissions from the Facility will continue to increase before peaking in 2032. Furthermore, Dunn has not explained how the modification to create a berm will lead to reductions in GHG emissions.

Therefore, neither the continuation of GHG emissions, nor the "modest reduction" claimed by Dunn, is a dramatic shift that would help limit GHG emission levels.

II. DEC Must Apply CLCPA Section 7 Analysis to This Permit Application

DEC is required to undertake a CLCPA analysis for all permits it issues, including permits for the continuation of emissions, to determine whether its decision to issue the permit is consistent with the CLCPA. The broad language of Section 7 of the CLCPA does not authorize what ultimately amounts to a categorical exemption. There is no exception in the statute for permit renewals or modifications. As stipulated in *Overton v. Town of Southampton*, 857 N.Y.S.2d 214, 215 (App. Div. 2008), "[w]here statutory language is clear and unambiguous, the court should give effect to its plain meaning." Therefore, DEC must give effect to the CLCPA's plain and mandatory language and require full consideration of greenhouse gas impacts in the context of permit renewals and modifications.

The drastic reductions required under the CLCPA will not come from permitting decisions on new polluting facilities or major modifications alone. Existing facilities must also reduce emissions as well. 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, from an estimated 348 million metric tons in 2015,⁷ and solid waste management facilities are of particular importance. Thus, the requirements of the CLCPA apply to DEC's review of the permit application here.

III. CLCPA Section 7(3) Was Improperly Applied

⁴ <https://www.dec.ny.gov/press/126753.html>

⁵ CAC Final Scoping Plan, 319 (2022).

⁶ *Id.*

⁷ 6 NYCRR Part 496.5.

Decisions impacting disadvantaged communities are required to comply with Section 7(3) of the CLCPA which requires that decisions made by state agencies do not disproportionately burden those communities. Section 7(3) requires that state agencies prioritize reductions of GHG emissions and co-pollutants in disadvantaged communities (“DACs”). This prioritization must be included in the analyses regarding justification and mitigation required by Section 7(2). Further, even when an action is compliant with Section 7(2), DEC must deny permit applications when a proposed project would result in disproportionate burdens to DACs pursuant to Section 7(3). *See* CLCPA § 1(4), S.B. 6599, 242d Sess. (N.Y. 2019) (“In considering and issuing permits, licenses, and other administrative approvals and decisions . . . all state agencies . . . shall not disproportionately burden disadvantaged communities.”). As such, CLCPA Section 7(3) must be considered concurrently with Section 7(2) when determining whether agency actions are compliant with the CLCPA, especially in permitting or renewing greenhouse gas emitting sources.

A complete Section 7(3) analysis must consider a broad set of pollution burdens on disadvantaged communities, including burdens resulting from conventional or criteria air pollutants like particulate matter. The Climate Action Council notes that the truck traffic and odors associated with landfills are burdens on disadvantaged communities. Additionally, economic impacts must also be considered under the CLCPA, including impacts on property values caused by a renewal or modification of a permit. Here, Dunn mistakenly stated it was only bound to consider hazardous co-pollutant burdens and “excluded non-HAP air pollutants, like particulate matter, from its analysis.” A broader and more robust inquiry into air pollutant burdens is required.

Dunn failed to demonstrate that the permit renewal and modification will advance Section 7(3)’s mandate to prioritize emissions reductions in disadvantaged communities.

IV. The Facility is Not Capable of Complying with New York’s New Cumulative Impacts Bill

New York’s Cumulative Impacts bill amends the New York State Environmental Quality Review Act (SEQRA) to require analysis of “cumulative impacts” on “disadvantaged communities” before a permit is approved or renewed.

As mentioned above, Dunn has stated that emissions from the facility will continue to increase between now and 2032. This is an admission that Dunn intends to “significantly increase the existing disproportionate pollution burden on the disadvantaged community,” which plainly violates Environmental Conservation Law §70-0118(3).

While the law does not go into effect until next year, it would be arbitrary and capricious for DEC to grant a permit to an application that has so plainly expressed its intention to violate this Environmental Justice law in future application cycles.

In fact, granting the Solid Waste Permit to the applicant in the absence of a clearly expressed plan and intention to comply with Environmental Conservation Law §70-0118(3) would violate 6 CRR-NY 360.16(g)(2), which requires applicants for permit renewals to make a “demonstration that the facility will be capable of compliance with all applicable requirements of the ECL . . . and a description of how compliance with the requirements . . . will be ensured.”

V. Issuance of the Permits would Violate New York’s Environmental Rights Amendment.

New York’s Constitution guarantees “[e]ach person shall have a right to clean air and water, and a healthful environment.” The Environmental Right creates an overarching legal obligation on all government officials in the state to ensure that whenever they contemplate taking action, they consider and protect people’s right to clean water and air, and a healthful environment. The Environmental Rights Amendment (“ERA”) was passed in response to “recent water contamination and ongoing concerns about air quality” that “highlighted the importance of clean drinking water and air as well as the need for additional protections.”⁸ On November 2, 2021, voters passed a proposition adding the ERA to New York’s constitution, giving environmental rights the highest constitutional standing and protection. As such, DEC has an enhanced obligation to ensure environmental rights are protected.

Here, the continued operation of the landfill is likely to result in increased, unregulated PFAS exposure diminishing our rights to clean water and a healthful environment. To the extent that PFAS air emissions are not being monitored, PFAS exposure from the facility would also infringe upon our rights to clean air. Further, there are inadequate air monitoring of the air pollutant impacts of the facility, particularly PM2.5, which could threaten clean air and a healthful environment. The continued operation of the landfill would also result in exposure to harmful pollutants, like Benzene, at levels that threaten clean air and a healthful environment.

VI. Conclusion

DEC has broad discretion to deny a solid waste permit under CRR-NY 360.16(e), and exercising this discretionary authority would be in line with the environmental justice goals of the state and the New York Constitution.

Respectfully submitted,

⁸ New York State Assembly, Memorandum in Support of Legislation, available at: https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A01368&term=2021&Summary=Y&Memo=Y

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