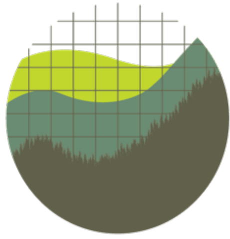

April 5, 2024

To: New York State Department of Environmental Conservation and New York State Energy Research and Development Authority

Re: Draft Climate Act Disadvantaged Communities Investment and Benefits Reporting Guidance

The Institute for Policy Integrity at New York University School of Law (Policy Integrity)[1] respectfully submits the following comments to the New York State Department of Environmental Conservation (DEC) and New York State Energy Research and Development Authority (NYSERDA) regarding their *Draft Climate Act Disadvantaged Communities Investment and Benefits Reporting Guidance* (Draft Guidance). Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

DEC and NYSERDA (collectively, the Agencies) seek comments on the Draft Guidance, which proposes an approach for State agencies, authorities, and entities to report the benefits of their clean energy and energy efficiency spending to calculate the State's compliance with the Climate Leadership and Community Protection Act's (CLCPA) requirement that a minimum of 35 percent, with a goal of 40 percent, of the benefits of clean energy and energy efficiency spending accrue to disadvantaged communities (DACs).[2] In these comments, we offer the following recommendations:

- The final guidance should include clear definitions for defined terms that are part of the benefits-of-spending metric, and establish a reporting methodology that aligns with the relevant statutory provision.

- The methodology presented in the section for estimating health impacts from electricity savings is unclear, and the Agencies should provide a detailed example to improve clarity and comprehension.

[1] The document does not purport to represent the views, if any, of New York University School of Law.
[2] N.Y. Env't Conserv. Law § 75-0117.

- Overall, the Agencies should refine the discussions about their methods for calculating health benefits and include illustrative examples to demonstrate how their methodology can be applied in different scenarios.

- The Agencies should consider analyzing health benefits at a more granular scale than at the county level.

- The Agencies should issue a revised version of the Draft Guidance for public comment before finalizing the guidance.

Background

The CLCPA amended the Environmental Conservation Law by adding a new Article 75 concerning climate change. Given that DACs are disproportionately impacted by climate change and pollution from the energy system,[3] the CLCPA included provisions to ensure a more equitable approach to distributing energy investments and associated benefits. According to the CLCPA,

> State agencies, authorities and entities…shall, to the extent practicable, invest or direct available and relevant programmatic resources in a manner designed to achieve a goal for disadvantaged communities to receive forty percent of overall benefits of spending on clean energy and energy efficiency programs, projects or investments in the areas of housing, workforce development, pollution reduction, low income energy assistance, energy, transportation and economic development, provided however, that disadvantaged communities shall receive no less than thirty-five percent of the overall benefits of spending on clean energy and energy efficiency programs, projects or investments and provided further that this section shall not alter funds already contracted or committed as of the effective date of this section.[4]

To show compliance with this provision (the Benefits of Spending Provision), State agencies, authorities, and entities must track and report their clean energy and energy efficiency investments and subsequent benefits accrued in DACs. In December 2023, the Agencies released for public comment the Draft Guidance, which proposes a methodology to be used by State agencies, authorities, and entities to account for and report applicable spending and investments and expected benefits (overall and attributable to DACs).

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[3] N.Y. Env't Conserv. Law § 1(7); N.Y. Env't Conserv. Law § 75-0101(5). *See also New York State Disadvantaged Communities Barriers and Opportunities Report*, NYSERDA (Dec. 2021) https://www.nyserda.ny.gov/All-Programs/Energy-and-Climate-Equity-Strategy/Climate-Justice.

[4] N.Y. Env't Conserv. Law § 75-0117.

I. The Final Guidance Should Include Clear Definitions for Defined Terms That Are Part of the Benefits-of-Spending Metric, and Establish a Reporting Methodology That Aligns with the Benefits of Spending Provision.

The Benefits of Spending Provision requires that DACs receive at least thirty-five percent of the "overall *benefits of spending* on clean energy and energy efficiency programs, projects or investments in the areas of housing, workforce development, pollution reduction, low-income energy assistance, energy, transportation and economic development."[5]

1. Investments

As used in this provision, the word "*investments*" appears to be merely one of several categories of *spending* with respect to which a certain percentage of overall *benefits* is required to inure to DACs. The Draft Guidance uses "investments" to be roughly the equivalent of spending and seems to treat it as the primary category of benefit.

The Draft Guidance adopts "the Investments and Benefits Requirement" as its name for the requirement that "no less than 35 percent of benefits of spending go to DACs."[6] The ultimate metric should consist of a fraction: Benefits in DACs/Overall Benefits. Rather than prescribe a methodology for calculating the *benefits of spending* and determining the *percentage of those benefits* that accrue to DACs, the Draft Guidance states that "[t]o demonstrate New York State compliance with the investment and benefits requirements, each agency, authority, and entity that makes clean energy or energy efficiency investments shall track and report annually the *investments* occurring in DACs, associated *co-benefits*, and any other related *outcomes* in DACs associated with these *investments*."[7] The relationship between any of these terms (investments, co-benefits, and outcomes) and the key terms of the Benefits of Spending Provision (benefits and spending) is unclear, but the fact that the Draft Guidance does not provide examples of "benefits" and directs agencies to track and report "investments occurring in the DACs" implies that "investments" might be considered a component of, or even a proxy for, the "benefits of spending" that DACs are entitled to receive.

Indeed, treating "investments" as equivalent to spending, and spending as equivalent to benefits, could cause inaccurate reporting of benefits to DACs. *Total investments* may not be directly relevant to the *outcomes* envisioned in the Benefits of Spending Provision. Although it might be acceptable to include direct spending within a DAC as a type of benefit to that DAC, not all funds involved in any given "investment" project necessarily go to the same party in the same location; for example, portions of investment funds will likely benefit parties outside of DACs, such as manufacturers who produce materials for building clean energy technology deployed in

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[5] *Id*.
[6] Draft Guidance at 2.
[7] Draft Guidance at 3 (emphasis added).

DACs. If public funds are used to construct a facility in a DAC, any portion of those funds that is used to purchase materials from non-DAC entities cannot be considered part of any benefit to the DAC, even though the placement of those materials in the DAC might yield actual benefits.

The Draft Guidance's implied treatment of "investment" as potentially a species of benefit runs counter to the statutory text as well as customary definitions of "investment." For example, "invest[ing]" is defined as "mak[ing] use of for future *benefits* or advantages."[8] This definition implies that benefits are the *result* of investments, an understanding that is broadly consistent with the statutory use of the term "investments" as one of several types of *spending* that might result in *benefits*.

2. Benefits

The Benefits of Spending Provision focuses on ensuring DACs receive a specified share of overall benefits, yet the Draft Guidance does not define the term "benefits," or use it very much. As noted above, the Draft Guidance proposes that to demonstrate compliance with the so-called "Investment and Benefits Requirement" (that is, the requirement that DACs receive at least 35% of the *benefits* of certain *spending*), agencies, authorities, and entities should track and report "investments occurring in DACs, associated co-benefits, and any other related outcomes."[9] While the ultimate use of this tracking is unclear, in the absence of a stated definition for "benefits of spending," it seems possible that the Draft Guidance is implying that "benefits" consist of the sum of investments, co-benefits, and other outcomes. Notably, the Draft Guidance defines some of the *benefits of spending* that disadvantaged communities are concerned with (e.g., fewer health impacts from pollution reduction, energy bill savings)[10] as "*co*-benefits," a term that does not appear in the CLCPA's Benefits of Spending Provision and is not clearly defined in the Draft Guidance.

Conflating investments and benefits undercuts the Benefits of Spending Provision of the CLCPA and presents practical problems. If the Agencies count "investments" (presumably money invested in communities) as "benefits of spending" *in addition to* the actual benefits arising from the spending (on investments or otherwise), this could misrepresent the benefits accrued in DACs to the extent that the spending itself may not fully go to DACs, as noted in the preceding section. For example, if a State agency that is subject to the guidance invests five million dollars deploying a fleet of electric buses in a DAC, a portion of that *spending* may go to an out-of-DAC

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[8] *Invest*, MERRIAM-WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/invest (last accessed Mar. 22, 2024). In economics, "investment" is defined as "additions to the stock of productive assets or capital goods." PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 420 (19th ed. 2010).

[9] Draft Guidance at 3.

[10] *See* Letter to Governor Cuomo from the N.Y. Renews Coalition, *Recommendations on Compliance with the Disadvantaged Community Investment Mandate* (Feb. 2020) at 3–4, https://climate.law.columbia.edu/sites/default/files/content/Approval%20Draft-%20CLCPA%20Community%20Investment%20Guidance%20Letter-3.pdf.

factory to build the buses. Therefore, when the State agency calculates the overall benefits of spending accrued in DACs, the entity could include the five million dollar investment in the "overall benefits" denominator, but should only include a portion of the investment in the "benefits to DACs" numerator. The Draft Guidance's methodology, on the other hand, might cause agencies to count the full five million dollar investment as if it were a benefit to the DAC.

Additionally, categorizing certain results as "co-benefits" raises several concerns. First, the Draft Guidance does not explicitly categorize *any* outcome as a "benefit" but categorizes anything that is not an investment as a "co-benefit." Specifically, many of the programmatic outcomes most important to DACs,[11] such as energy bill savings[12] and improved public health impacts,[13] are categorized as "co-benefits" rather than as "benefits."

Second, the use of the term "co-benefits" raises questions about whether these benefits will be viewed as indirect or secondary benefits, and thus are to be treated differently than other benefits when calculating whether State agencies, authorities, and entities have reached their thirty-five percent goal. In the context of benefit-cost analysis, for example, some have argued that co-benefits are secondary to other benefits.[14] To avoid risk that certain categories of benefits will be improperly disregarded or inconsistently tracked across federal agencies, the Office of Management and Budget revised Circular A-4 (the federal guidance for cost-benefit analysis) to move agencies away from assigning different treatment to "co-benefits," "ancillary benefits," "indirect benefits," and "direct benefits".[15]

If the Draft Guidance categorizes some outcomes as "co-benefits," some agencies, authorities, and entities may think they are secondary benefits, which could decrease the likelihood that they will rigorously track and report these outcomes, especially if they incorrectly regard tracking "investments" as a simple and acceptable substitute for tracking benefits. To this end, without clarification that co-benefits are not subject to secondary treatment, benefits may be inconsistently reported across agencies, authorities, and entities. To the extent that the Agencies need to do further work to establish reliable methodologies for tracking and monetizing these

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[11] *See* Letter to Governor Cuomo from the N.Y. Renews Coalition, *Recommendations on Compliance with the Disadvantaged Community Investment Mandate* (Feb. 2020) at 3, https://climate.law.columbia.edu/sites/default/files/content/Approval%20Draft-%20CLCPA%20Community%20Investment%20Guidance%20Letter-3.pdf.

[12] Draft Guidance at 12–13.

[13] Draft Guidance at 13–15.

[14] Industry groups have argued that EPA should not count co-benefits, or ancillary benefits, in its cost-benefit analysis. *See* Policy Integrity, Comments to EPA on Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process (submitted Aug. 3, 2020), https://policyintegrity.org/documents/EPA_CBA_under_CAA_Joint_Comments_2020.08.03.pdf.

[15] *See, e.g.,* OMB, *Circular A-4* at 39–40 (2023).

benefits,[16] as the Draft Guidance recognizes,[17] relegating certain benefits to the status of "co-benefits" could result in less focused attention to the need to improve these methodologies.[18]

3. Recommended Changes to the Draft Guidance

To clarify how State agencies, authorities, and entities should report benefits of spending, a revised version of the Draft Guidance should be made available for stakeholder comment, and the finalized guidance should incorporate the following changes compared to the Draft Guidance. First, the guidance should clearly define *benefits* and adopt a reporting methodology that does not imply that investments are benefits by their very nature. Instead, the guidance should provide a methodology for determining what portions of investments should count as a benefit to DACs.

Any updated version of this guidance should also include a table with examples of benefits. For example, the guidance could specify that certain portions of funding for projects that lead to local emission reductions associated with fossil-fuel combustion is an investment that constitutes a benefit to the DAC, certain portions of funding for such an investment (for example, purchases of equipment from *outside* the DAC for a project *inside* a DAC) do *not* constitute benefits to the DAC, and the anticipated local emission reductions themselves (however those are monetized) *do* count as benefits to the DAC. The current Table 3, Co-Benefits Categories for Climate Act Reporting, might be suitable to be repurposed as a table describing "benefits." This new table could be expanded to include many of the policy priorities and DAC benefit metrics federal agencies have designed for the Justice40 Initiative,[19] which similarly seeks to ensure that 40 percent of the overall benefits of certain federal investments flow to DACs.[20] Some useful metrics, for example, could include remediation impacts on water and soil in DACs, the number of new job positions filled by DAC residents, and the number and value of new clean energy assets owned by DAC residents.[21]

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[16] Some "co-benefit" categories, such as health benefits related to outdoor/ambient air quality and employment impacts, may require additional resources to properly track and report, and may not be readily linked to specific investments. If the Agencies need a term for benefit categories that may be more difficult to track and monetize, then the Agencies could call these benefits "not-yet-monetized" benefits.

[17] *See* Draft Guidance at 15.

[18] For a brief discussion of how the tracking of public health benefits to DACs could be improved, see Section III of these comments.

[19] *See About Community Benefit Plans*, DEPT. OF ENERGY, https://www.energy.gov/infrastructure/about-community-benefits-plans (last accessed Apr. 4, 2024). N.Y. Renews, a coalition of grassroots, state, and national organizations, stated similar policy priorities in its past recommendations on compliance with the CLCPA's Benefits of Spending Provision. *See* Letter to Governor Cuomo from the N.Y. Renews Coalition, *Recommendations on Compliance with the Disadvantaged Community Investment Mandate* (Feb. 2020) at 3–4, https://climate.law.columbia.edu/sites/default/files/content/Approval%20Draft-%20CLCPA%20Community%20Investment%20Guidance%20Letter-3.pdf.

[20] Exec. Order No. 14,008, 86 Fed. Reg. 7619 (February 1, 2021).

[21] *See About Community Benefit Plans*, DEPT. OF ENERGY, https://www.energy.gov/infrastructure/about-community-benefits-plans (last accessed Apr. 4, 2024).

Relatedly, the guidance should either clarify that co-benefits will be counted in the same manner as benefits or omit the term *co-benefits* to avoid the risk of insufficient attention to the benefits that are so labeled. These improvements would provide State agencies, authorities, and entities with clearer guidance on how to comply with the CLCPA and increase the transparency of their accounting for overall benefits and benefits accruing in DACs.

II. The Methodology Presented in the Section for Estimating Health Impacts from Electricity Savings Is Unclear, and the Agencies Should Provide a Detailed Example to Improve Clarity and Comprehension.

The methodology suggested by the Agencies on Page 14 of the Draft Guidance for estimating health impacts from electricity savings is unclear. It is not clear that "electricity savings" is the subject matter; the second paragraph on the same page appears to present a methodology to estimate health benefits from *avoided generation*. However, the conversion of the benefit into "per GWh generated" in the second paragraph seems inconsistent with this understanding.

To clarify the overall purpose of the methodology and how the calculations are to be performed, the Agencies should provide one or more illustrative examples. Ideally, the finalized guidance would illustrate how the stated methodology would apply in the case of several different types of interventions that could give rise to electricity savings and/or avoided generation, including the construction of new non-emitting generation or energy storage, energy efficiency, and flexible demand measures.

III. The Modeling Approach Suggested by the Agencies, COBRA, Has Low Spatial Granularity (County Level). The Agencies Should Use an Alternative Modeling Approach that Estimates Benefits from Emission Reductions at a More Granular Scale than at the County Level.

The modeling tool used by the Agencies, COBRA, estimates health benefits from emission reductions at the county level, which lacks the spatial detail that can be found at more granular scales, such as at the zip-code or the block levels. The Agencies should use a modeling approach that estimates these benefits at a more granular scale since the locations where DACs exist can be smaller than counties.

EPA's COBRA tool reports benefits at the county level since it is unable to account for emissions and pollutant concentrations at a more granular scale, which will lead to inaccurate measurement of benefits for local and hyper-local level emission reductions. The Agencies should quantify health benefits from emission reductions at more granular scales, and can consider the following modeling options for monetizing the benefits:

- BenMAP, a tool developed by EPA to quantify the economic and health impacts of air pollution changes. The level of granularity is variable and can be chosen by the user, but the grid cell sizes can be as small as 1 km × 1 km.
- The Estimating Air pollution Social Impact Using Regression (EASIUR) model, which predicts the marginal social cost from air pollutants emitted anywhere in the United States at a 36 km × 36 km grid scale.
- InMap (Intervention Model for Air Pollution), an open source, emissions-to-health impact model that estimates the human health impacts caused by annual total air pollutant emissions. InMap's horizontal resolution varies between 1 km × 1 km in populated regions, and 48 km × 48 km in unpopulated regions and over oceans.

Using any of these granular modeling approaches will allow the Agencies to obtain more accurate marginal health benefit estimates from avoided emissions, compared to COBRA.[22] However, computational and modeling constraints may make other, somewhat less granular tools more desirable. One such approach is the Zip-code Air Pollution Policy Assessment (ZAPPA) tool that is not mentioned in the Draft Guidance, but was mentioned during a New York Cap-and-Invest presentation given by the Agencies.[23] Although we are not specifically familiar with ZAPPA, it appears that it may be a promising approach that introduces a higher level of granularity compared to COBRA (though not as granular as the other approaches discussed above) without being too computationally intensive. The Agencies can consider discussing the use of this tool in this context as well, which will have the additional benefit of being consistent with other policy frameworks for which the Agencies are providing guidance.

IV. The Agencies Should Release a Revised Version of the Draft Guidance for Further Public Comments Before Finalizing the Guidance.

Revising the Draft Guidance according to our recommendations discussed above could provide agencies, authorities, and entities with a clear and thorough reporting methodology that ensures successful compliance with the Benefits of Spending Provision. Specifically, the Agencies should clarify their definition of key terms like "benefits" to ensure alignment with the statute, refine the description of their methods for calculating health benefits from avoided generation, and estimate health benefits from reduced air pollution at a more granular scale than at the county level. Because the changes we are recommending are extensive, however, Stakeholders should have an opportunity to review them before the issuance of final guidance.

[22] For more information about the various modeling approaches *see* Jeffrey Shrader et al., Inst. For Pol'y Integrity, *Valuing Pollution Reductions* (2018), https://policyintegrity.org/files/publications/valuing_pollution_reductions2.pdf; Kirk R. Baker et al., *A Database for Evaluating the InMAP, APEEP, and EASIUR Reduced Complexity Air-Quality Modeling Tools*, 28 DATA IN BRIEF 1 (2020).

[23] *See* DEC & NYSERDA, New York Cap-and-Invest Pre-Proposal Stakeholder Outreach: Preliminary Scenario Analyses, slide 42 (Jan. 26, 2024), https://capandinvest.ny.gov/-/media/Project/CapInvest/Files/2024-01-26-NYCI-Preproposal-Analysis-Webinar.pdf

Although the Agencies may prefer prompt implementation of the Benefits of Spending Provision, speedy issuance should not come at the expense of accurate accounting of overall benefits, benefits to DACs, and whether the 35% requirement in the Benefits of Spending Provision has been met. Therefore, the Agencies should revise the Draft Guidance and then provide another opportunity for the public to comment *before* adopting a final version.

Respectfully,

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