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The Climate Leadership and Community Protection Act's Environmental Justice Promise

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THE CLIMATE LEADERSHIP AND COMMUNITY PROTECTION ACT'S ENVIRONMENTAL JUSTICE PROMISE

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The Sabin Center for Climate Change Law develops legal techniques to fight climate change, trains law students and lawyers in their use, and provides the legal profession and the public with up-to-date resources on key topics in climate law and regulation. It works closely with the scientists at Columbia University's Earth Institute and with a wide range of governmental, non-governmental and academic organizations.

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1. INTRODUCTION

In 2019, New York State Governor Andrew Cuomo signed the Climate Leadership and Community Protection Act ("CLCPA") into law. The CLCPA was passed with the objective of addressing climate change and minimizing the adverse impacts on the "economic well-being, public health, natural resources, and the environment of New York." S. 6599, 2019-2020 Sen., Reg. Sess. § 1 (N.Y. 2019). The CLCPA seeks to meet these objectives by reducing statewide greenhouse gas emissions, scaling up renewable energy to avoid further climate change, and improving the resiliency of the state in order to address unavoidable climate change impacts. *Id.* The law created the Climate Action Council that is tasked with developing a scoping plan to meet the state's greenhouse gas reduction targets. N.Y. ENVTL. CONSERV. LAW § 75-0103(1).

The CLCPA acknowledges the outsized health and socioeconomic burden that "disadvantaged communities"[1] ("DACs") have historically endured, and continue to endure. The law aims to address the disproportionate impacts from climate change and environmental pollution on DACs by, among other things, prioritizing the allocation of public investment in these communities. S. 6599, 2019-2020 Sen., Reg. Sess. §§ 2, 7 (N.Y. 2019). Although the CLCPA does not identify DACs, the law created a Climate Justice Working Group, which is responsible for establishing the criteria that will be used to identify DACs. N.Y. ENVTL. CONSERV. LAW § 75-0111(1)(b). Under the CLCPA:

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[1] This paper uses the term "disadvantaged communities" because of the term's use in the CLCPA and other climate statutes. However, it is important to note that "disadvantaged communities" is not the preferred term among many impacted populations. Some communities prefer terms such as "environmental justice communities" or "frontline communities."

> Disadvantaged communities shall be identified based on geographic, public health, environmental hazard, and socioeconomic criteria, which shall include but are not limited to: i. areas burdened by cumulative environmental pollution and other hazards that can lead to negative public health effects; ii. areas with concentrations of people that are of low income, high unemployment, high rent burden, low levels of home ownership, low levels of educational attainment, or members of groups that have historically experienced discrimination on the basis of race or ethnicity; and iii. areas vulnerable to the impacts of climate change such as flooding, storm surges, and urban heat island effects.
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> *Id.* § 75-0111(1)(c).

The CLCPA's investment provisions explicitly commit the state to direct resources to DACs due to the historic disproportionate burden these communities have endured because of legacies of discrimination. *See* S. 6599, 2019-2020 Sen., Reg. Sess. § 1 (N.Y. 2019). The CLCPA provides 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." N.Y. ENVTL. CONSERV. § 75-0117. The CLCPA also sets a goal that DACs receive "forty percent of overall benefits of spending on clean energy and energy efficiency programs, projects or investments."[2] *Id*. The statute instructs all state agencies, authorities, and entities to

[2] The CLPCA specifically lists certain types of programs, projects and investments wherein benefits accrue: "housing, workforce development, pollution reduction, low income energy assistance, energy, transportation and economic development." N.Y. ENVTL. CONSERV. § 75-0117. Notably, this list is only included in the CLCPA's provision that sets forth the 40% goal. However, New York State seems to apply this limiting list to both the 35% investment mandate and the 40% goal in developing measurements for benefits. *See* Dec. 16, 2020 Meeting,

work towards those targets, in consultation with the Climate Justice Working Group and the Climate Action Council. *Id*.[3]

Understanding New York's implementation of these provisions is important not just for New Yorkers. On a national scale, the Biden-Harris Administration's climate plan includes community investment targets modeled after the CLCPA. *See* Exec. Order No. 14,008, 86 Fed. Reg. 7,619 (Jan. 27, 2021). Similar to New York's CLCPA, President Biden seeks to direct forty percent of the benefits of federal investments to DACs, in the areas of clean energy and energy efficiency; clean transit; affordable and sustainable housing; training and workforce development; the remediation and reduction of legacy pollution; and the development of critical clean water infrastructure. *Id.* at Sec. 223. Like New York State, the Federal Government is also working to identify DACs. Members of Congress introduced the Environmental Justice Mapping and Data Collection Act of 2021, legislation aimed at creating a mapping system that would identify and connect environmental justice communities to policy outcomes. S. 101, 117th Cong. (2021).

The CLCPA investment provisions raise a number of complex threshold questions, including, as discussed above, how to define DACs and direct benefits to them. This paper focuses on the issues associated with what qualifies as a "benefit" and how "benefits" are quantified, and the importance of including community input in answering these questions. As

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CLIMATE JUSTICE WORKING GROUP, available at https://climate.ny.gov/Climate-Justice-Working-Group.

[3] The statute's text instructs agencies to work with the *Environmental* Justice Working Group, but the CLCPA did not establish such an entity. We therefore assume that this refers to the Climate Justice Working Group.

discussed below, New York's decision to require that a certain percentage of "benefits"—rather than a certain percentage of funding—accrue to DACs is distinct from and more complex than the approaches of other states that funnel investments towards such communities. The manner in which "benefits" are defined and measured is key to ensuring that the state is held accountable for investing in DACs, and that these investments truly reach DACs and meet their environmental, public health, and socioeconomic needs.

This paper discusses two possible methods for defining "benefits"—tracking state dollars spent ("inputs" approach) and quantifying and tracking climate benefits ("outputs" approach). The "inputs" approach simply allocates a certain percentage of state investment to benefit DACs. The "outputs" approach, by contrast, requires quantifying the benefits to a community, which is more difficult to implement and shifts greater discretion to state government in the development of benefit identification and valuation. In the context of the CLCPA, it is important to note that New York environmental justice advocates have called for measuring state investment by dollars spent: in other words, for an "inputs"-oriented rather than an "outputs"-oriented approach. NY Renews—a coalition that has long advocated for climate justice in New York State and played a pivotal role in the CLCPA's passage—has argued that New York should "[m]easure compliance with [the investment mandate] by dollars spent, not value of benefits," because doing so "provides the clarity and consistency that the Administration and staff of the State's agencies, authorities and entities need to meaningfully carry out the [investment mandate]."[4] These critiques underscore the need for the state to involve DACs and their advocates in the process of defining "benefits," especially if the state pursues the "outputs"-oriented approach.

Section 2 discusses the "inputs" approach, describing statutes and programs in California and Virginia that require that a certain percentage of funding flow to DACs. Section 3 discusses New York's statute and the state's options for interpreting the CLCPA's investment provisions. Section 4 provides a status update of the state's implementation and discusses challenges and opportunities going forward.

2. LESSONS FROM OTHER STATES

One method of addressing climate injustice is to ensure that a certain percentage of a state's expenditure on climate change programs flows to DACs. Because this approach focuses primarily on the dollar amounts spent rather than the end results of environmental programs, we refer to it as the "inputs" approach. California and Virginia have both taken this path.

In 2006, California passed the Global Warming Solutions Act, which requires the state to develop climate programs to meet greenhouse gas reduction targets. A.B. 32, 2005-2006 Leg., Reg. Sess. (Cal. 2006). Subsequently, California passed two bills imposing mandates to invest funds generated from climate programs towards projects that benefit DACs. Senate Bill 535, passed in 2012, requires 25% of California's Greenhouse Gas Reduction Fund, the auction

[4] *See, e.g.*, Letter to Governor Cuomo from the NY Renews Coalition, *Recommendations on Compliance with the Disadvantaged Community Investment Mandate* (Feb. 2020) at 2, *available at* https://bit.ly/3tiGu3G [hereinafter "NY Renews Letter"].

proceeds from California's cap-and-trade program, to be invested in projects that benefit DACs. S.B. 535, 2011-2012 Leg., Reg. Sess. (Cal. 2012). The California Environmental Protection Agency is in charge of identifying DACs, and the California Air Resources Board determines which projects qualify as benefitting DACs. *See id.* §§ 2, 4.[5] The second bill, Assembly Bill 1550, passed in 2016, adds an additional obligation to the requirement that 25% of the Greenhouse Gas Reduction Fund be invested in projects that benefit DACs—it requires the projects to be located within DACs. A.B. 1550, 2015-2016 Leg., Reg. Sess. § 3(a) (Cal. 2016). Assembly Bill 1550 also includes investment mandates specifically targeting low-income communities. *Id.* § 3(b), (c).[6]

California created the California Climate Investments, a statewide initiative to oversee proceeds from the cap-and-trade program and coordinate investments in a way that supports programs and projects that, among other things, provide meaningful benefits to DACs.[7] In 2018, the California Air Resources Board issued Funding Guidelines to determine which projects qualify as benefitting DACs.[8] As reported by the state, California is meeting and

[5] *See also California Climate Investments Funding Guidelines for Administering Agencies*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/resources/documents/california-climate-investments-funding-guidelines-administering-agencies.

[6] Notably, 5% of the Greenhouse Gas Reduction Fund must be spent on low-income communities anywhere in the state, and 5% must be spent on low-income communities located outside of, but within ½ mile, of DACs. California sometimes refers to DACs and low-income communities collectively as "priority populations."

[7] California Climate Investments oversees investments in energy efficiency projects, public transit, low-carbon transportation, and affordable housing. *See California Climate Investments to Benefit Disadvantaged Communities*, CAL. ENVTL. PROT. AGENCY, https://calepa.ca.gov/EnvJustice/GHGInvest/.

[8] To count towards the statutory minimum of 25% contained in Senate Bill 535, the project must provide "direct, meaningful, and assured benefits to priority populations" and follow the qualifications as laid out in the 2018 Funding Guidelines. *See* CAL. CLIMATE INVESTMENTS, 2020 ANNUAL REPORT 15 (2020).

exceeding the investment targets required by Senate Bill 535 and Assembly Bill 1550. Prior to the implementation of Assembly Bill 1550, 34% of the Greenhouse Gas Reduction Fund was spent on projects outside of and benefitting DACs, and 20% was spent on projects located in and benefitting DACs.[9] Since August 2017, 39% of the Fund was spent on projects located in and benefitting DACs.[10]

Beyond climate policy, another example of allocating state funding towards DACs is California's Active Transportation Program. In 2013, California passed Senate Bill 99 to establish the Active Transportation Program, which encourages increased use of active modes of transportation, such as biking and walking. S.B. 99, 2013-2014 Leg., Reg. Sess. (Cal. 2013). One of the goals of the bill is to ensure that DACs "fully share in the benefits of the program." *Id.* § 15. The bill mandates that 25% of overall program funds benefit DACs during each program cycle. *Id.*

Virginia set aside funding for DACs in climate legislation passed in 2020. The Virginia Clean Energy Economy Act requires utilities to source electricity from renewable sources. H.B. 1526, 2020 Leg., Reg. Sess. (Va. 2020). Utilities that fail to meet targets as scheduled, must pay deficiency payments, which are deposited into a fund. VA. CODE § 56-585.5(D)(5). The Act allocates 50% of the fund towards job training programs in historically economically disadvantaged communities, and 30% of the fund towards renewable energy programs located in historically economically disadvantaged communities. *Id.* The statute defines "historically

[9] *Id.* at 17.
[10] *Id.*

economically disadvantaged communities" as (i) a community in which a majority of the population are people of color or (ii) a low-income geographic area. *Id.* § 56-576.

California and Virginia demonstrate how to direct benefits to DACs through an "inputs"-oriented investment approach. Both states require a certain percentage of funding to benefit DACs; they do not quantify the benefits themselves. A primary advantage of the "inputs"-oriented investment approach is that implementation and accounting are fairly straightforward. State agencies develop procedures for identifying DACs and the types of programs and projects for which spending would qualify towards the statutory minimum. Progress is relatively easy to track and the state can be held accountable to whether or not state spending meets the statutory minimum.

3. NEW YORK'S OPTIONS

As discussed, the CLCPA provides that DACs "shall receive no less than thirty-five percent of the overall benefits of spending on clean energy and energy efficiency programs, projects or investments." N.Y. ENVTL. CONSERV. § 75-0117. In addition to the investment mandate, the CLCPA also sets a goal that DACs receive forty percent of the benefits of state spending on clean energy and energy efficiency programs, projects or investments. *Id*. The state must therefore determine how to define and quantify "benefits." One option is to take an "inputs"-oriented approach to defining benefits, like California and Virginia, and assess whether DACs receive at least thirty-five percent of the state *funding* for clean energy and energy efficiency.

The CLCPA's use of the term "benefits" seems to support the view that the statute allows for an "inputs"-oriented approach to calculating investment in DACs. However, the use of the more general term "benefits" indicates that the investment requirement may be met either by calculating the state's expenditure on certain programs or in other ways. In other words, while New York could approach its investment mandate in a similar manner to the tack taken by California and Virginia, the statute provides more flexibility.

The legislative history of the CLCPA also suggests that the statute is intended to provide the state with discretion when calculating "benefits."[11] Environmental justice advocates had for years pushed for a bill called the Climate and Community Protection Act, which was ultimately folded into the CLCPA.[12] The Climate and Community Protection Act would have directed 40% of state clean energy *funding* to DACs; and during negotiations over the CLCPA, environmental justice advocates also pressed for a requirement that a particular percentage of funding go to DACs.[13] The more flexible language emerged from those negotiations, to the

[11] During the floor debate on the CLCPA, Assembly Environmental Conservation Chair Steve Englebright was asked about the investment mandate. In response to a colleague who asked, "isn't it 40 percent of all clean energy spending? Isn't that what it is?" he responded, "it's either the benefits or the money" and "it's the money or the benefits." NYS Assembly 2019 Debates, included in Governor's Bill Jacket 2019 Chapter 106 at pp. 356, 378.

[12] *See* David Roberts, *New York Just Passed the Most Ambitious Climate Target in the Country*, VOX, July 22, 2019, https://www.vox.com/energy-and-environment/2019/6/20/18691058/new-york-green-new-deal-climate-change-cuomo; Press Release, Food and Water Watch, June 10, 2019, included in Governor's Bill Jacket 2019, Chapter 106; Letter from Food and Water Watch and others to Governor Andrew Cuomo (June 10, 2019), included in Governor's Bill Jacket 2019, Chapter 106.

[13] *See* Roberts, *supra* note 12; Press Release, Food and Water Watch, June 10, 2019, included in Governor's Bill Jacket 2019, Chapter 106; Letter from Food and Water Watch and others to Governor Andrew Cuomo (June 10, 2019), included in Governor's Bill Jacket 2019, Chapter 106.

disappointment of many advocates. "Frontline communities need more than a vague commitment for benefits," Annel Hernandez of the NYC Environmental Justice Alliance told Vox's David Roberts at the time. "We need direct investments to catalyze our transition to the clean renewable energy economy."[14] Since the CLCPA does provide flexibility, to fulfill the investment mandate, the state could either take an "inputs"-oriented approach as California and Virginia have and advocates have pushed for, or identify "outputs" that qualify as "benefits" and then assess the percentage of those outputs that are enjoyed by DACs.

As discussed, environmental justice advocates were largely disappointed with the rejection of language that would have required that a particular percentage of funding, rather than benefits, flow to DACs. Given the ultimate emergence of the term "benefits," NY Renews has advocated that the state develop an investment rubric "to ensure high and consistent standards for what qualifies as beneficial spending so that benefits will actually accrue" to DACs and produced a non-exhaustive list of benefits that should qualify, including reduced localized pollution, health benefits related to reduced exposure to extreme heat and cold, and economic benefits related to job creation and energy efficiency savings.[15] NY Renews also recommends that the investment rubric distinguish between "direct benefits"—programs and projects that are directly located in DACs or are community-based—and "indirect benefits"—those that are not located in DACs but may benefit DACs.[16]

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[14] Roberts, *supra* note 12.

[15] NY Renews Letter, *supra* note 4, at 3–4.

[16] *Id.* at 4.

Disputes over school funding provide some precedent for looking at outputs to determine whether the state has fulfilled a statutory mandate. In *Campaign for Fiscal Equity v. State*, an advocacy group alleged that New York's method of funding schools violated its duty under the state constitution to provide an adequate education to public school students. *See* 100 N.Y.2d 893, 902 (2003). The Court of Appeals held that to prevail, the plaintiffs needed to establish a correlation between the state's inputs and the resulting outputs such as test scores and graduation rates. *Id*. at 908. The Court declined to adopt a simple inputs-approach, rejecting "[t]he premise that some expenditure level, if high enough relative to figures nationwide, simply must be 'enough,' without reference to student need, local costs, and the actual quality of inputs and outputs." *Id*. at 921. This case illustrates the importance of focusing on the quality of the outputs.

In fact, the economist Roger Colton has compared school funding decisions with energy efficiency resource allocation. Similar to what advocates are urging the state to do in defining benefits in the CLCPA, Colton advocates for an "equity-plus principle" that "introduces explicit consideration of outcomes into equity evaluations." Such an approach assesses the effectiveness of energy use reduction programs, measured in kilowatt hours, but also considers access to those programs. As Colton explains, "[b]y focusing on outcomes the equity-plus standard keeps the focus of the equity assessment on the *recipient* of the resources rather than on the *provider* of resources."[17]

[17] Raya Salter, et al., ENERGY JUSTICE: US AND INTERNATIONAL PERSPECTIVES 128, 128 (Edward Edgar Publishing 2018).

The school funding example illustrates the importance of focusing on the recipient of the resources and the actual impact of the outputs on the community. As the state works to defines "benefits" in the CLCPA context, it is therefore critical that the state include DACs in the process of defining "benefits," as community members are best informed as to what they need and what would most benefit them. The CLCPA's use of such a broad term creates a risk that the state could escape its responsibility to divert additional and meaningful investments to those communities. Without involving DACs in the conversation, the state would run the risk of focusing on "benefits" that DACs do not truly need, or that are not equitably distributed. Or, the state could define "benefits" to include existing outputs that benefit the entire state and only indirectly or negligibly benefit DACs, and then claim that 35% of benefits already go to DACs without enacting real change to investment decisions.

Fulfilling both the spirit and the letter of the investment mandate therefore requires bringing DACs into the process early on, listening to their concerns and perspectives, and ensuring that the state is held accountable to its commitments. Indeed, NY Renews' list of suggested benefits includes "[b]enefits related to democratic participation, such as access to community-determined climate and clean energy planning and decision making processes and accountability frameworks,"[18] underscoring the need to involve DACs in the decision-making process rather than simply conferring benefits that the state deems appropriate. It is important to note that DACs are not a monolith. Given that communities consist of members from diverse

[18] *Id.* at 4.

backgrounds, and community sentiment is varied, the state must adopt procedures that would meaningfully and consistently involve impacted community members.

4. SNAPSHOT OF NEW YORK'S PROCESS

New York State is currently developing procedures to define benefits and operationalize the CLCPA investment provisions. As provided by the statute, the investment provisions apply to "clean energy and energy efficiency programs, projects or investments." N.Y. ENVTL. CONSERV. § 75-0117. The state is currently in the process of developing procedures to measure benefits for each of the programs.[19]

The New York State Energy Research & Development Authority ("NYSERDA") has been particularly active in seeking to comply with the CLCPA's investment mandate, and NYSERDA's efforts thus far illustrate the challenges in ensuring that the state is using suitable benefits measurements. In November 2019, NYSERDA submitted a petition to the Public Service Commission ("PSC") seeking an expansion of $573 million in funding and an extension of its NY-Sun program until 2025.[20] The NY-Sun program supports distributed solar energy through incentives and other resources in furtherance of the CLCPA's target of developing 6,000 megawatts of solar energy by 2025. *See* NY PUB. SERV. LAW § 66-p (5). In the petition,

[19] *See* Jan. 19, 2021 Meeting, CLIMATE ACTION COUNCIL, available at https://climate.ny.gov/Climate-Action-Council/Meetings-and-Materials. Sectors include agriculture and forestry, energy efficiency and housing, land use, power generation, transportation, waste, among others. *See Advisory Panels*, NEW YORK STATE, https://climate.ny.gov/Advisory-Panel.

[20] *Petition Requesting Additional NY-Sun Program Funding & Extension of Program Through 2025*, Nos. 03-E-0188 & 14-M-0094 (N.Y.P.S.C. Nov. 25, 2019).

NYSERDA developed a Solar Energy Equity Framework for identifying climate benefits realized through NY-Sun, which appears to be an "outputs"-oriented approach. Benefits include: cost savings to low- and moderate- income households; cost savings to affordable housing providers; jobs and training opportunities; resilience at the building and community level; reduced co-pollutants in environmental justice communities; and opportunities to own and/or directly participate in community energy projects. *Id.* at 13. However, the exact methods for accounting the benefits towards the 35% mandate have yet to be finalized. *See id.*

Environmental justice advocates criticized NYSERDA's proposal. New York City Environmental Justice Advocates ("NYC-EJA") was "alarmed by the State's lack of commitment to the equity principles enshrined by the CLCPA" because NYSERDA's proposal included only $135 million dedicated to "projects benefitting low-to-moderate ("LMI") customers, affordable housing, environmental justice communities, and disadvantaged communities," amounting to 23.6% of the total $573 million requested.[21] NYC-EJA expressed concern that "NYSERDA's lack of commitment to provide adequate financial support for disadvantaged communities, as stipulated in the CLCPA, allows for a dangerous precedent and continued marginalization of disadvantaged communities."[22] In arguing that NYSERDA fell short of the investment mandate by failing to allocate sufficient dollars for DACs, NYC-EJA appears to have advocated for an "inputs" approach, consistent with the advocacy of other environmental justice groups discussed above.

[21] Comments of NYC-EJA, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard*, Nos. 03-E-0188 & 14-M-0094, at 3 (N.Y.P.S.C. Feb. 11, 2020).

[22] *Id*. at 4.

The New York Energy Democracy Alliance ("EDA") similarly advocated for "using dollars as a backstop proxy for 'benefits' until or unless a better measurable indicator emerges" averring that "NYSERDA's petition is almost entirely devoid of metrics and goals in the equity section . . . [I]t is [not] appropriate for the Commission to approve a budget for equity without goals that the public (whose dollars will be used to fund this petition) can hold the agency accountable to."[23] With respect to other potential ways to measure "benefits," EDA recommended that the PSC "set a goal that 40% of residential customers offtaking from new solar arrays in New York . . . should be low or moderate income households," and "also set a measurable goal related to benefits from solar for the broader range of disadvantaged communities."[24] EDA also asked the PSC to require that 40%, rather than 35%, of benefits accrue to DACs to fulfill the spirit of the CLCPA.[25]

Interestingly, in ruling on NYSERDA's request for additional funding, the PSC appears to have made a decision that aligns with the "inputs"-oriented method while declining to adopt advocates' other suggestions. The PSC determined the request met the CLCPA's investment mandate because 35% of the funding would go to DACs. *Proceeding on Motion of NYSERDA Requesting Additional NY-Sun Program Funding and Extension of Program Through 2025*, 2020 WL 2557072 (N.Y.P.S.C. May 14, 2020). The PSC noted its obligation under the CLCPA to ensure "that disadvantaged communities receive at least thirty-five percent of the benefits of clean

[23] Comments of New York Energy Democracy Alliance, *Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard*, Nos. 03-E-0188 & 14-M-0094, at 8 (N.Y.P.S.C. Feb. 11, 2020).

[24] *Id*. at 9.

[25] *Id*. at 8.

energy programs." *Id*. at *12. The PSC further observed that it is not currently possible to strictly comply with this requirement since the Climate Justice Working Group is still in the process of establishing the criteria to identify DACs. *Id*. But, the PSC determined that at least $200 million—or thirty-five percent of the new funding—would accrue to low-to-moderate income, affordable housing, and environmental justice and DACs, and therefore the goal was satisfied. *Id*. In accounting for the 35%, the PSC included $65 million in community adders—or additional incentives—that NYSERDA expects to be available for benefitting LMI customers, affordable housing, environmental justice communities, and DACs, rejecting NYC-EJA's argument that NYSERDA failed to direct sufficient dollars to DACs. *Id*. The state's approach to NY-Sun illustrates the challenge in operationalizing the CLCPA's investment mandate and the relative simplicity of applying the "inputs" approach to effectuate the investment mandate. However, the NY-Sun case also demonstrates that disagreement over accounting can arise under the "inputs" approach as well, underscoring once again the importance of a transparent, inclusive process for determining whether a given program or project meets the investment mandate.

NYSERDA is also working to incorporate the CLCPA's investment mandate into its clean energy standard ("CES").[26] In June 2020, the PSC and NYSERDA issued a White Paper on Clean Energy Standard Procurements to Implement New York's Climate Leadership and

[26] In December 2020, NYSERDA also adopted regulations requiring auction proceeds from the Regional Greenhouse Gas Initiative, the Northeast regional cap-and-trade program, to be "consistent" with the investment provisions of the CLCPA. N.Y. COMP. CODES R. & REGS. tit. 21 § 507.4(d) (revised on Dec. 1, 2020).

Community Protection Act.[27] The White Paper proposed a regulatory structure to achieve the CLCPA's greenhouse gas reduction and renewable energy targets.[28] NY Renews commented that "[t]he White Paper reflects a legacy CES that ignores the equity and justice provisions of the CLCPA, and fails to analyze the CES's impacts on disadvantaged communities," and that despite New York's stated equity commitments, "*in no instance does the White Paper expressly detail prioritizing hiring in environmental justice areas or otherwise prioritizing environmental justice concerns.* This amounts to literal lip service with regards to disadvantaged communities and is contrary to the letter of State law."[29] NY Renews urged the state to amend the White Paper to, among other things, require an analysis of the jobs and other economic benefits that the CES has provided and will provide to DACs; include comprehensive labor standards; and "include a compliance framework to implement and track the CLCPA's energy justice provisions related to disadvantaged communities."[30]

In an October 2020 order adopting the White Paper, the PSC noted NY Renews' comments and directed NYSERDA "to build upon its workforce development policies that promote good jobs in disadvantaged communities."[31] While the PSC did not enact a

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[27] White Paper on Clean Energy Standard Procurements to Implement New York's CLCPA, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Case No. 15-E-0302 (issued June 18, 2020).

[28] *Id*. at 2.

[29] Final Comments of NY Renews, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Case No. 15-E-0302 at 2-3 (Aug. 31, 2020) (emphasis in original).

[30] *Id*. at 4.

[31] Order Adopting Modifications to the Clean Energy Standard, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Case No. 15-E-0302 at 118-120 (issued Oct. 15, 2020).

compliance framework as requested, the PSC did direct NYSERDA 1) in future CES procurements, to require developers to identify the benefits and burdens to DACs that are likely to result from each project; 2) present clear guidance in each solicitation of how impacts to DACs will be assessed; and 3) incorporate metrics on CES investments into its reporting on the impacts in DACs.[32]

As illustrated by the state's recent efforts to implement the CLCPA's investment mandate, determining suitable measurements for benefits continues to be very much in flux. State representatives are in consultation with the Climate Justice Working Group to develop measurements that are meaningful for communities. In the December 16, 2020 Climate Justice Working Group meeting, NYSERDA representative Chris Coll reported there are three ongoing "workstreams" that are concurrent and necessary for the final determination of benefits.[33] First, the Climate Justice Working Group has yet to finalize the criteria for identifying DACs, which the state will use to inform the determination of benefits to DACs. Second, the state is evaluating its portfolio of clean energy and energy efficiency programs[34] to identify which programs are subject to the CLCPA investment mandate. Third, the state is in the process of developing procedures to measure benefits for each of the programs. In a Climate Action Council meeting on January 21, 2021, the state indicated that each sector-specific recommendation made to the Council for meeting the CLCPA's greenhouse gas reduction and

[32] *Id*. at 20.

[33] *See* Dec. 16, 2020 Meeting, CLIMATE JUSTICE WORKING GROUP, available at https://climate.ny.gov/Climate-Justice-Working-Group.

[34] In the areas of housing, workforce development, pollution reduction, low income energy assistance, energy, transportation and economic development, as provided for by the CLCPA. *See* N.Y. ENVTL. CONSERV. § 75-0117.

renewable energy targets must include an "anticipated benefits and impacts assessment."[35] Specifically, the assessment should include an explanation of how the state's strategies would decrease greenhouse gas emissions and expand economic opportunities in DACs, result in health impacts or other co-benefits, and provide just transition and related industry benefits, as well as any other relevant information for assessing benefits and impacts.[36]

As of now, the state plans to present these sector-specific recommendations to the Climate Action Council by April 2021.[37] From April through October 2021, the state will host consultation meetings with the Climate Justice Working Group, prior to finalizing and releasing the draft-scoping plan for public comment by December 2021.[38] Climate Justice Working Group members have highlighted the importance of meaningfully and consistently involving DACs in the creation of the benefits measurements.[39] The state acknowledged that it would seek community input in defining what qualifies as a benefit, but the exact processes of inclusion have not been clearly specified, beyond consultation with the Climate Justice Working Group. The critical questions of who represents the "community" and how community sentiment is determined remain to be answered.

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[35] *See* Jan. 19, 2021 Meeting, CLIMATE ACTION COUNCIL, available at https://climate.ny.gov/Climate-Action-Council/Meetings-and-Materials. Sectors include agriculture and forestry, energy efficiency and housing, land use, power generation, transportation, waste. *See Advisory Panels*, NEW YORK STATE, https://climate.ny.gov/Advisory-Panel.

[36] *Id.*

[37] *Id.*

[38] *Id.*; *see* N.Y. ENVTL. CONSERV. LAW § 75-0103(1).

[39] *See* Dec. 16, 2020 Meeting, CLIMATE JUSTICE WORKING GROUP, available at https://climate.ny.gov/Climate-Justice-Working-Group.

Finally, as discussed, the investment mandate applies to *all* state agencies. While NYSERDA seems to have taken the lead, it is incumbent on other state agencies that fund clean energy, and energy efficiency to develop an equitable framework that gives effect to the investment mandate.

5. CONCLUSION

The CLCPA is one of the—if not the single—most ambitious piece of climate legislation ever enacted in the United States, both with respect to greenhouse gas reduction and clean energy targets, and the extent to which the law requires New York to incorporate equity considerations into its climate policy on a statewide basis. In addition to its broad scope, the investment mandate allows state agencies considerable discretion in defining and quantifying benefits, which presents both challenges and opportunities. In order to ensure that the CLCPA's promise is fulfilled, and that it truly delivers to the communities that the statute was meant to serve, it is critical that the state treat DACs as partners moving forward.

The Biden-Harris Administration's adoption of an approach that mirrors the CLCPA, setting a goal that DACs receive forty percent of benefits from federal climate investments, and the potential for other states to follow suit, makes it even more important that New York fully fulfill the CLCPA's goals. New York's leadership on tackling climate change, and doing so equitably, is more important than ever.