

### NYS Proposed Bill to Require Enhanced Public Participation Plans for Major Projects: Will It Pass This Time Around?

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*Last year, New York Senator Jessica Ramos introduced S. 2510-A, which would require all major projects located in or adjacent to a “disadvantaged community” to submit a written enhanced public participation plan to NYSDEC as part of the proposed project’s permitting process. This article summarizes the bill’s requirements and explores both the benefits and drawbacks of the bill as currently drafted.*

Last year, New York Senator Jessica Ramos introduced S. 2510-A (the Bill), which would require all major projects (i.e., projects with significant impact on the environment based on criteria established by the New York State Department of Environmental Conservation (NYSDEC)) located in or adjacent to a “disadvantaged community” to submit a written enhanced public participation plan to NYSDEC as part of the proposed project’s permitting process. The written enhanced public participation plan process would require multiple public hearings, quarterly reports, public notices and certifications.

During the last legislative session, the Bill died in the Assembly. Now that a new legislative session has begun, the Bill has again been working its way through the Legislature, having passed the Senate on Feb. 15 and been referred to the Assembly’s Standing Committee on Environmental Conservation. The road to passage is still far off.

This article summarizes the Bill’s requirements and explores both the benefits and drawbacks of the Bill as currently drafted.

#### **Disadvantaged Communities**

The New York State Climate Leadership and Community Protection Act of 2019 (CLCPA) adopted the concept of disadvantaged communities, building upon the previously defined potential environmental justice areas established by NYSDEC Commissioner Policy 29 (CP-29)—Environmental Justice and Permitting (March 19, 2003). CP-29 requires projects that are likely to affect potential environmental justice areas, which include some but not all disadvantaged communities, to submit and implement enhanced public participation plans.

Disadvantaged communities are defined by the CLCPA, codified at Environmental Conservation Law (ECL) §75-0101(5), as “communities that bear [the] burdens of negative public health effects, environmental pollution, [the] impacts of climate change, and possess certain socioeconomic criteria, or comprise high-concentrations of low- and moderate-income households.” ECL §70-0111 established the Climate Justice Working Group

(CJWG) to develop the criteria to identify disadvantaged communities so that these underserved communities would benefit from the transition to clean energy, i.e., reduced pollution and economic opportunity. The disadvantaged communities criteria were finalized on March 27, 2023, and incorporated into an interactive map identifying the communities by census tract.

Section 7(3) of the CLCPA “requires all state agencies, offices, authorities and divisions [to] not disproportionately burden such disadvantaged communities and [instead] prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities [when issuing permits, licenses, and other administrative approvals and decisions].”

On Sept. 27, 2023, NYSDEC issued a draft DEC Program Policy (DEP 23-1, Permitting and Disadvantaged Communities) to help implement CLCPA Section 7(3). In that draft policy document, enhanced public participation plan requirements refer to CP-29.

As stated in the Bill’s legislative findings, disadvantaged communities suffer from elevated rates of respiratory illnesses as a result of “the disproportionate and inequitable siting of pollution sources,” which in turn may be a result of “inadequate notice” and “inadequate opportunities for community input and participation during the environmental permit process.” (See Section 1 of S. 2510-A, adding new ECL Article 59, Section 59-0101 – Declaration of legislative findings and intent). The Bill statutorily would extend CP-29’s public participation requirements to all disadvantaged communities, further involving disadvantaged communities in the environmental regulatory process.

## **Public Participation Under the Bill**

If the Bill is passed, applicants of major projects located in or adjacent to a disadvantaged community would be required to submit their written enhanced public participation plans to NYSDEC alongside the current application materials for an environmental permit or approval. After receiving a written enhanced public participation plan, NYSDEC would provide for a public comment period for at least 60 days. Once the public comment period ends, NYSDEC could require the applicant to revise the plan to address issues and deficiencies that were brought to their attention during the public comment period.

The Bill will require that a written enhanced public participation plan contain the following:

- A description of the proposed project including potential environmental impacts and whether the project will cause or increase a disproportionate pollution burden on the disadvantaged community;
- A description of the disadvantaged community in or adjacent to which the proposed project is located (including maps);
- The location of sensitive receptors in the disadvantaged community, including hospitals, schools, elder care facilities, day care facilities, parks and other sensitive areas identified by the community;
- A list, developed in consultation with the disadvantaged community, of representative stakeholders in the community, including local elected officials and community based organizations;
- A description of the manner in which public notices and other written information about the project will be posted and distributed to the community on a regular basis;

- A schedule for holding public meetings (minimum of three) in the disadvantaged community to provide information about the project, receive input from the community and describe how the input will be incorporated into the project design, development and implementation;
- Location in the disadvantaged community of document repositories and a website where information will be posted (such information to include all written communication between the applicant and NYSDEC). Notably, the Bill would also require applicants to provide easy to read written information, and translate the same into the 12 most common non-English languages within the disadvantaged community;
- Implementation schedule for the public participation plan; and
- Provision for submission of quarterly progress reports to NYSDEC and stakeholders regarding implementation of the plan.

At the end of the process, the Bill would require applicants to submit to NYSDEC (1) a certification that it complied with the enhanced participation plan and (2) a final report listing all the issues that the community raised during the public review process and how the applicant addressed these issues. Another 60-day minimum public comment period on the certification and final report would be provided.

Concurrently, NYSDEC would present the certification and final report to the public, and once again request public comments regarding the documentation for at least 60 days. Following the comment period, NYSDEC must issue a written determination as to whether the applicant fully and completely implemented the enhanced public participation plan.

## Prospects

While the Bill on its face could seemingly provide a tangible opportunity for disadvantaged communities to have a stronger voice on major projects in their communities, some requirements may be considered duplicative or too costly and time consuming, especially for projects involving renewable energy or affordable housing.

Other pieces of legislation have already considered what public participation requirements are necessary in these instances. For example, Public Service Law Article 10, governing power plant siting, or the Accelerated Renewable Energy Growth and Community Benefits Act of 2020, with its implementing regulations at 19 NYCRR Part 900 (Subparts 900-1 – 900-15), providing for the faster siting of solar and wind energy projects, or provisions for the Low-Income Housing Tax Credit or New Market Tax Credit programs, all have built-in public participation requirements. Perceived over-regulation may lead to a second failure to pass this Bill.

Sheppard Mullin will continue to monitor the advancement of the Bill through the legislative process and provide updates.

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