

August 26, 2024

New York State Department of Environmental Conservation
47-40 21st St.
Long Island City, NY 11101

Re: Title V Permit for Rikers Island Facility

Dear Caitlyn P. Nichols:

We are a coalition of organizations that endorse the plan for [Renewable Rikers](#), and we write because we are committed to achieving environmental justice for all New Yorkers. That includes decarcerating Rikers Island, drastically reducing harmful greenhouse gas and co-pollutant emissions that disproportionately harm New York City's Black and Brown communities, including by replacing the Rikers jails with environmentally beneficial uses like renewable energy production and storage, and ultimately ending our reliance on fossil fuels. The Draft Title V Air Facility Permit for the collection of electrical and steam power-generating equipment comprising the Rikers Island facility (hereinafter the "Draft Permit") is contrary to each of these goals, and we strongly oppose granting the permit as is.

Formed in 2019, the Renewable Rikers coalition is comprised of individuals and communities who are directly impacted by incarceration and the criminal legal system, alongside legal and advocacy organizations fighting for decarceration and environmental justice. Our coalition is driven by the need to transform the 413-acre piece of land known as "torture island" into a place of hope, sustainability, and restorative justice. We fought for the Renewable Rikers Act,¹ signed into law by former Mayor de Blasio in 2021, and we continue to demand its enforcement.

The Draft Permit is wholly inconsistent with the decarceral and environmental justice goals animating the Renewable Rikers coalition. As is, the Draft Permit must be denied because (1) even though this facility solely supplies energy for the Rikers jails, the permit terms fail to account for the timeline set forth in local law for Rikers' reduction in population and ultimate closure; and (2) despite this facility's location within and near several vulnerable and already overburdened communities, the permit will lead to an increase in GHG emissions and does not contain sufficient mitigation measures to protect these communities.

We are particularly concerned with the following aspects of the Draft Permit:

- Indication that this Title V permit will be granted for the typical five year period (i.e., through 2029), even though Rikers Island Correctional Facility is legally required to close in 2027;
- The removal of Nitrogen Oxides (NOx) and Particulate Matter (PM10) emission limits from the permit for eight boilers;²
- The major modification raising the NOx limit for the cogeneration units to 52 tons per year; and

¹ The Renewable Rikers Act refers to New York City Local Laws 16, 17, and 31 of 2021 which, among other things, require the New York City Department of Corrections to transfer jurisdiction of the island to the Department of Citywide Administrative Services and stop using Rikers Island to house incarcerated people no later than August 31, 2027. *See infra* Section 1.C.

² *See* Page 2, Paragraph 2 of the Permit Review Report for Permit ID: 2-6007-00259/00033

- The use of Emission Reduction Credits (ERCs), instead of emission reduction, as an alternative for compliance with existing regulation.

The people most impacted by this facility are particularly vulnerable to environmental harm. Further, many New Yorkers are relying on the legally mandated plan to close the Rikers jails so the island can be used for sustainability and resiliency purposes and house environmental infrastructure that makes it possible to decommission polluting and aging facilities currently burdening disadvantaged communities. In light of this reality, DEC must ensure that the Draft Permit reflects the reality of operations at Rikers while adequately safeguarding the people incarcerated at Rikers and living in its vicinity. Part I below provides background on the history of Rikers Island's carceral use, the ways that Black and Brown New Yorkers are disproportionately affected by both carceral and environmental harms, how the Renewable Rikers laws aim to correct this injustice, and why the Draft Permit must also take this information into account. Part II describes the vision for Renewable Rikers, mandated by the Renewable Rikers laws passed in 2021.³ Part III discusses how the Draft Permit is inconsistent with New York state climate laws and the state constitution. Finally, Part IV provides suggestions for how the Draft Permit could effectively account for air pollution burdens already borne by people incarcerated at Rikers and surrounding environmental justice communities.

I. Background

A. *People Incarcerated on Rikers Island Have Long Been Subjected to Grave Environmental Harm*

Rikers Island holds a long history of social and environmental harms that have disproportionately burdened Black and Brown people. Since the Riker family sold the island to New York City in 1884, the city has treated the island as a dumping ground for garbage and used the labor of incarcerated people to expand the island using metal, refuse, cinders, and subway dirt.⁴ By the 1920s, Rikers Island was in such poor condition that the state Commission of Corrections urged New York City to find an alternative location for the new jail it was planning.⁵ Ignoring this recommendation, the city constructed jail facilities on Rikers Island in 1934; however, shoddy construction led to substandard conditions from the outset.⁶

For decades, these jails on Rikers have been overcrowded and subject to horrific environmental conditions, not least of which were the rotting trash piles left to mold on the island. Though city officials have failed to conduct investigations into environmental or soil quality on Rikers, numerous complaints to date indicate the likely presence of methane emissions from organic waste degradation, as well as the presence of carcinogenic polycyclic aromatic hydrocarbons associated with coal ash waste.⁷ Further, the Rikers jail complex is less than 300 feet from LaGuardia Airport's runways, meaning that people incarcerated or working there are exposed to jet fuel emissions and disruptive noise levels. On top

³ N.Y.C. Council, "Council Votes to Pass the Renewable Rikers Act," NYC.gov (Feb. 11, 2021), <https://council.nyc.gov/press/2021/02/11/2069/>.

⁴ Janos Marton, #CLOSERikers: *The Campaign to Transform New York City's Criminal Justice System*, 45 Fordham Urb. L.J. 499, 504-05 (2018).

⁵ *Id.*

⁶ *Id.*

⁷ Reg'l Plan Ass'n, *A Plan for Renewable Rikers*, at 9 (2022), https://s3.us-east-1.amazonaws.com/rpa-org/pdfs/Final-RikersReport_10.30.22.pdf.

of these conditions, the people incarcerated at Rikers have long been subject to inhumane treatment;⁸ a 2014 report by then-U.S. Attorney for the Southern District of New York Preet Bharara described a “deep-seated culture of violence” at Rikers perpetrated by corrections officers, along with “systematic deficiencies, such as an inadequate staff discipline and widespread corruption.”⁹ And, horribly and unsurprisingly, the harms from these conditions disproportionately impact Black and Brown people, as discussed further below.

B. The Same Communities Harmed by Carceral Injustice Also Face Disproportionate Environmental Burdens

The same communities disproportionately harmed by the carceral system are also disproportionately subjected to negative environmental impacts—the Draft Permit must similarly account for this fact, rather than ignoring it. Across the United States, Black people are incarcerated at nearly 5 times the rate of white people, while Hispanic people are incarcerated at 1.3 times the rate of white people,¹⁰ and Rikers is no exception. Rikers Island currently holds the majority of New York City’s jail population. In 2021, Black and Hispanic people made up nearly 90% of New York City’s jail admissions despite representing only about 52% of the city’s population.¹¹

In 2023, pursuant to the Climate Leadership and Community Protection Act, New York state adopted a scoring system assessing 45 criteria to identify disadvantaged communities (DACs) that are disproportionately burdened by environmental harms. Using these criteria, New York City identified 49 percent of the city’s census tracts as DACs earlier this year.¹² These DACs are disproportionately Black and Hispanic compared to the rest of the city; Black and Hispanic residents make up 27% and 43% of these DACs’ populations respectively, while the overall share of Black residents in NYC is 21% and that of Hispanic residents in NYC is 29%.¹³ In particular, nearly every census tract in Bronx County has been designated a DAC, including the tract containing Rikers Island.¹⁴ The Bronx has the highest share of people of color residents of any borough, reflecting more than 90% of residents—more than half of whom identify as Hispanic or Latinx.¹⁵

⁸ See generally, Independent Comm’n on N.Y.C. Criminal Justice & Incarceration Reform, *A More Just New York City* (2017), <https://static1.squarespace.com/static/5b6de4731aef1de914f43628/t/5b96c6f81ae6cf5e9c5f186d/1536607993842/Li ppman%2BCommission%2BReport%2BFINAL%2BSingles.pdf>.

⁹ Marton, *supra* note 4, at 518; see also Letter from Preet Bharara, U.S. Attorney for the Southern District of N.Y., to Mayor Bill de Blasio et al., Re: CRIPA Investigation of the N.Y.C. Dep’t of Correction Jails on Rikers Island (Aug. 4, 2014), <https://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/SDNY%20Rikers%20Report.pdf>.

¹⁰ Monaghan et al., Racial Disparities in the Use of Jail Across New York City, 2016–2021, at 4 (Feb. 2023), <https://datacollaborativeforjustice.org/wp-content/uploads/2023/02/DisparitiesReport-27.pdf>.

¹¹ *Id.* at 6.

¹² N.Y.C. Mayor’s Office of Climate & Env’t Justice, *EJNYC: A Study of Environmental Justice Issues in New York City*, at 40 (2024), <https://climate.cityofnewyork.us/ejnyc-report/the-state-of-environmental-justice-in-nyc/>

¹³ *Id.*

¹⁴ See N.Y. State Energy Dev. & Research Auth., “Disadvantaged Communities” (last visited Aug. 16, 2024), <https://www.nyserda.ny.gov/ny/Disadvantaged-Communities>.

¹⁵ Office of the N.Y. State Comptroller, *Recent Trends & Impact of Covid-19 in the Bronx* [hereinafter *Covid-19 in the Bronx*], at 3 (June 2021), <https://www.osc.ny.gov/reports/osdc/recent-trends-and-impact-covid-19-bronx>.

These DACs are disproportionately impacted by environmental harms. Air pollution in these areas is a particular concern; the South Bronx, which is very close to Rikers Island, has some of the highest childhood asthma rates in the country.¹⁶ The emission of nitrogen dioxide (NO₂) from both mobile and stationary sources contributes to these health impacts.¹⁷ In Hunts Point and Mott Haven, some of the neighborhoods closest to Rikers Island, NO₂ levels are worse than most neighborhoods in New York City, with a mean level of 17.4 parts per billion (ppb).¹⁸

NO_x pollution can also lead to ground-level ozone contamination when the nitrogen oxides interact with volatile organic compounds, especially on hot days.¹⁹ Bronx County is in severe nonattainment for 8-hour ozone; in other words, the amount of ground-level ozone in this area per 8-hour period has failed to meet the Clean Air Act's National Ambient Air Quality Standard.²⁰ Ozone pollution can inflame and damage airways, aggravate lung conditions, and increase the frequency of asthma attacks—and people who already have lung problems are more susceptible to these effects.²¹

The Bronx was also hit hard by the COVID-19 pandemic, even more than New York City's other boroughs. Despite not having the city's highest case rates, the Bronx had the highest rates of hospitalization and death from COVID-19.²² Put another way, the city's most severe outcomes stemming from COVID-19 were in the Bronx. The Office of the State Comptroller found that Bronx residents were subject to more risk factors for COVID-19 compared to residents of the other boroughs.²³ Research shows that COVID-19 survivors can experience subsequent and recurring symptoms, including numerous respiratory problems—research suggests that 1 in 5 people between ages 18 and 64 has a long-term medical condition that could be due to COVID-19, and that share increases to 1 in 4 people above age 64.²⁴

Bronx residents are simultaneously disproportionately burdened by the impacts of air pollution and COVID-19, *and* more likely to face graver health outcomes stemming from these impacts. And the people jailed on Rikers face the additional environmental burdens unique to the island's history and operation, as

¹⁶ See N.Y.C. Dep't of Health, Epi Data Brief: Disparities Among Children with Asthma in New York City (Sept. 2021), <https://www.nyc.gov/assets/doh/downloads/pdf/epi/databrief126.pdf>; South Bronx Unite, "Air Pollution and Public Health in the South Bronx" (last visited Aug. 16, 2024), <https://www.southbronxunite.org/air-pollution-and-public-health>.

¹⁷ See South Bronx Unite, *supra* note 16; Gonzalez et al., *Air Pollutants and Childhood Asthma in the Bronx*, 20 J. Undergrad. Chem. Research 38 (2021), <https://www.westmont.edu/sites/default/files/2021-08/Jovan%20Gonzalez.pdf>.

¹⁸ N.Y.C. Env'tl Health & Data Portal, "Outdoor Air and Health in Hunts Point - Mott Haven" (last visited Aug. 16, 2024), https://a816-dohbsp.nyc.gov/IndicatorPublic/neighborhood-reports/hunts_point_mott_haven/outdoor_air_and_health/.

¹⁹ U.S. Env'tl Prot. Agency, "Ground-Level Ozone Basics" (last visited Aug. 16, 2024), <https://www.epa.gov/ground-level-ozone-pollution/ground-level-ozone-basics>.

²⁰ U.S. Env'tl Prot. Agency, "Green Book: New York Nonattainment/Maintenance Status for Each County by Year for All Criteria Pollutants" (last updated Jul. 31, 2024), https://www3.epa.gov/airquality/greenbook/anayo_ny.html.

²¹ U.S. Env'tl Prot. Agency, "Health Effects of Ozone Pollution" (last visited Aug. 16, 2024), <https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution>.

²² See *Covid-19 in the Bronx*, *supra* note 15.

²³ *Id.* (risk factors include prior heart and lung conditions, unemployment, and income-to-poverty ratio).

²⁴ Mayo Clinic, *Covid-19: Long-term effects* (June 22, 2023), <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-long-term-effects/art-20490351>.

described above. This power plant has been emitting harmful air pollution since it began operating in 2014. Because DOC failed to apply for a permit renewal prior to the previous Title V permit expiration, the power plant has been polluting under an expired permit for the last *six years*.²⁵ DOC's failure to follow the law, and DEC's failure to enforce it, demonstrates a disregard for the health and wellbeing of some of the most vulnerable New Yorkers. NYSDEC's analysis of how granting this Draft Permit will affect people who are incarcerated at Rikers and those who live nearby must account for the cumulative environmental and health issues that already burden these communities.

C. The Renewable Rikers Laws

Years of community organizing, coalition-building, policy advocacy, public actions, and social media campaigns successfully led to a mayoral announcement that all Rikers jails must close by 2027; this coalesced into the city's Borough-Based Jails plan, which aims to reduce Rikers' jail population to 3,300 or fewer incarcerated people who will be moved to four smaller jail sites in Manhattan, Brooklyn, Queens, and the Bronx when Rikers is finally shut down.²⁶ As the plan to close Rikers gained speed, a coalition of community activists and environmental groups began to advocate for a Renewable Rikers plan that would support future green infrastructure on the island for the benefit of the communities that were historically most harmed by both mass incarceration and environmental injustice. This plan contemplates the development of climate resilient renewable energy production and storage, wastewater treatment, and composting infrastructure on Rikers Island, all of which can supplement and replace older polluting facilities currently located in communities of color across the city.

The twin goals described above – ending carceral use of Rikers Island and implementing green infrastructure to replace it – were codified by New York City Local Laws 16, 17, and 31 in 2021. Local Law 16 requires the mayor to assess the current use of Rikers Island every six months, and transfer to the Department of Citywide Administrative Services (DCAS) those portions of the island not in active use for housing or providing direct services to people who are incarcerated, with a final deadline of August 31, 2027 for the transfer of all 413 acres of the island. The law also established a Rikers Island Advisory Committee that includes survivors and immediate family members of survivors of Rikers Island; the committee is charged with making recommendations on the future use of the island. Local Laws 17 and 31 prepare the way for environmentally beneficial use of Rikers Island. Local Law 17 directs New York City to assess what types of renewable energy may be generated and stored on Rikers Island, while Local Law 31 requires the city to study the potential for constructing a wastewater treatment facility on the island.

II. The Draft Permit Must Be Consistent With City Law Mandating Closure of Rikers Jails

A. The Renewable Rikers Laws Seek to Address Cumulative Carceral and Environmental Harm

The city's Renewable Rikers laws recognize the relationship between carceral and environmental injustice. The Renewable Rikers plan to close the jail complex and instead develop renewable energy and

²⁵ DOC, Rikers Island Title V Permit Renewal Application - DECID: 2-6007-00259/00033.

²⁶ City of New York, "Closing Rikers: NYC Borough-Based Jails" (last visited Aug. 16, 2024), <https://rikers.cityofnewyork.us/nyc-borough-based-jails/>.

wastewater treatment infrastructure on Rikers directly benefits the communities of color that have been disproportionately harmed by old, polluting power plants and wastewater treatment plants.

Developing new infrastructure on Rikers would allow for the closure of polluting facilities like this one, lifting the pollution burden they impose on surrounding residents. Highly polluting “peaker” power plants have a long legacy of harm across New York City.²⁷ For instance, Bronx community members and environmental activists have long been demanding a shut-down of four fossil-fuel powered “peaker” plants in the Mott Haven and Port Morris neighborhoods.²⁸

The increased vulnerability of the communities that will be impacted by this plant’s continued operation and the long history of these same communities being let down by government demand that NYSDEC take a closer look at this Draft Permit and its cumulative environmental, health, and policy impacts. Permitting decisions of the past have perpetuated decades of heavy air pollution burdens and related health outcomes on these communities; they deserve more than a business-as-usual permit renewal from DEC now.

B. Granting the Draft Permit Will Stymie Implementation of the Renewable Rikers Legislation

The road to closing Rikers has been long and difficult, with many obstacles; inconsistency of this Draft Permit with the city’s legal requirements should not be one of them. The City has already missed multiple deadlines legislatively set forth to maintain progress on closing Rikers.²⁹ City Council members remain supportive of the Renewable Rikers plan, but are at odds with a mayoral administration that is increasing the jail population and lagging behind on the required construction of alternative borough-based jails.³⁰ Allowing the Draft Permit to move forward without any attempt to harmonize its terms to this plan can only facilitate further delays and lead to confusion down the road, both for the City and for DEC.

The Draft Permit must at minimum reflect the changes in Rikers Island’s use compared to the previous permit period and contemplated by the Renewable Rikers laws. New York City’s jail population has declined steadily over the past five years. In January 2019, the average monthly population was 7,963; in January 2024, that average dropped to 6,049. The lowest average monthly population during this time period was 3,909 in May 2020.³¹ While the current number of people incarcerated on Rikers Island is not yet at the 3,300 targeted by the Renewable Rikers legislation, the legislative intent is for this number to decrease. The recent reduction of the Rikers population in 2020, while not maintained, shows that such decrease is possible. Additionally, as discussed above, city law mandates that Rikers Island must not be

²⁷ PEAK Coal., *Accelerate Now! The Fossil Fuel End-Game 2.0*, at 5, 8 (Jan. 2024), <https://www.cleangroup.org/wp-content/uploads/Accelerate-Now-Fossil-Fuel-End-Game.pdf>.

²⁸ Liz Donovan, “Bronx Residents Demand Closure of Polluting ‘Peaker Plants’ As State Ramps Up Renewable Energy,” *South Bronx Unite* (Mar. 9, 2022), <https://www.southbronxunite.org/press-and-media/qe8hsmwh47fcv3ln40cxnca7maoy3c>.

²⁹ Samantha Maldonado, “Rikers Island Group Skips Meetings, Jeopardizing ‘Renewable Rikers’ Timetable,” *The City* (Feb. 6, 2023), <https://www.thecity.nyc/2023/02/06/renewable-rikers-island-timetable-jeopardized/>.

³⁰ Jacob Kaye, “Mayor calls for new Rikers closure proposal as his administration fails to follow current plan,” *Queens Daily Eagle* (Aug. 30, 2023), <https://queenseagle.com/all/2023/8/30/mayor-calls-for-new-rikers-closure-proposal-as-his-administration-fails-to-follow-current-plan>.

³¹ Vera Inst. of Justice, “People in Jail in New York City: Daily Snapshot” (last visited Aug. 15, 2024), <https://greaterjusticenyc.vera.org/nycjail/>.

used by DOC to house incarcerated people after August 31, 2027, further shrinking the population and eliminating operations years before this Draft Permit would expire. While the jail complex must certainly receive enough power to support livable, humane conditions in DOC facilities while they are being used to house incarcerated people, the expected operations of this plant over the next permit period are not the same as the last, and the Draft Permit must reflect this change.

This is particularly important given the democratic power underlying the Renewable Rikers laws. These laws were voted into effect by 37 out of 47 City Council members representing nearly 6.5 million New York City constituents—this includes the City Council members representing the district containing Rikers, as well as several nearby Bronx and Queens neighborhoods.³²

III. The Draft Permit is Inconsistent with New York’s Climate & Environmental Laws

A. The Draft Permit is Inconsistent with New York’s Climate Law

In addition to not accounting for the expected change in use of Rikers Island, the Draft Permit is inconsistent with both the letter and spirit of the New York Climate Leadership and Community Protection Act (CLCPA). In June 2019, New York State entered a new era of climate law and regulation with the passage of the CLCPA. This nation-leading law includes significant greenhouse gas (GHG) emission reduction mandates, requiring the state to reduce its emissions by 40% below 1990 levels by 2030, and 85% below 1990 levels by 2050.³³ A recent report from the Department of Public Service and the New York State Research and Development Authority found that the State is not on track to meet its CLCPA goals,³⁴ showing the public that more ambitious action is needed at every level of government in order to achieve the CLCPA’s promise. The CLCPA also prohibits “all state agencies, offices, authorities, and divisions” from disproportionately burdening DACs in their decision-making. Together, these mandates seek to reverse the State’s dangerous course, away from burning fossil fuels that release climate change-causing GHGs into the atmosphere and disproportionately harming Black, Brown, and low-income communities, and toward a safer, healthier, sustainable future for all. Yet these mandates mean nothing if the entities charged with delivering them fail to do so.

CLCPA Sections 7(2) and 7(3) require, in broad, far-reaching terms, that state entities remain consistent with these mandates in their decision making. Under Section 7(2), state agencies and other entities must consider whether their decisions “are inconsistent with or will interfere with” the CLCPA’s GHG emission limits.³⁵ If a decision is inconsistent with those limits, the agency is required to “provide a detailed statement of justification” and to identify mitigation measures at the project location.³⁶ Section

³² N.Y.C. Council Legis. Research Ctr., “Transfer of land, buildings, and facilities of Rikers Island to Dept. of Citywide Administrative Services,” File No. Int. 1592-2019 A, Local Law 16 of 2021, <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3983008&GUID=33061BE9-BD8C-4F5A-8165-AD3DFD0BFDF0&Options=&Search=>; <https://www.nyc.gov/assets/districting/downloads/pdf/Final-Agency-Report.pdf>.

³³ N.Y. Env’t Conserv. Law § 75-0101(1)(a) (McKinney).

³⁴ Case 15-E-0302, Draft Clean Energy Standard Biennial Review, Department of Public Service and NYSERDA, July 1, 2024.

³⁵ CLCPA §7(2).

³⁶ *Id.*

7(3) likewise prohibits state agencies from disproportionately burdening DACs in their decisionmaking, and requires agencies to prioritize reductions of GHG and co-pollutant emissions in DACs.

The Draft Permit is inconsistent with the CLCPA's requirements, and cannot be permitted without running afoul of both Section 7(2) and 7(3). The DOC's Title V permit application must be denied. We have included a detailed section below regarding how the Title V permit could be modified to be consistent with the CLCPA and other relevant laws, to ensure that the DOC's facilities receive proper monitoring under a valid permit for the duration of their operation.

1. *The Permit Modification Allows an Increase in GHG Emissions and Must be Denied Under Section 7(2)*

Under DEC's Implementation Policy, DAR-21, CLCPA Section 7(2) applies to modifications and renewals of Title V permits, and thus applies here.³⁷ The plain language of the CLCPA requires that state agencies are consistent with the law's GHG emission limits in their decision making. Precedent shows that an approval which results in a net increase of GHG emissions is inconsistent with the CLCPA. For example, in DEC's 2021 denial of the NRG Astoria Project's Title V permit application, the agency concluded that:

[A]n increase of this amount due to this one new fossil fuel-fired power plant project is inconsistent with the achievement of the Statewide GHG emission limits for 2030, or at a minimum would interfere with the attainment of such limit, especially given that achieving the limit requires a substantial overall reduction in GHG emissions.³⁸

If DOC's permit application is approved, the DOC facility on Rikers Island will emit substantially more NOx. Under the new permit, the annual limit on NOx emissions for the Cogeneration unit's combustion turbines will increase from 42 tons per year (TPY) to 52 TPY, and the NOx emission and PM10 emission limits on eight boilers will be *removed entirely*.³⁹

NOx, which includes nitric oxide (NO) and NO₂, are "a family of poisonous, highly reactive gases," which have been regulated by federal law since the Clean Air Act Amendments of 1990.⁴⁰ NOx acts as an indirect GHG through its "influence on atmospheric chemistry,"⁴¹ and is a major contributor to ground-level ozone (smog), a GHG, on hot summer days.⁴² Both NOx and ground-level ozone constitute GHGs under the CLCPA's definition which includes "any other substance emitted into the air

³⁷ DEC, DAR-21, The Climate Leadership and Community Protection Act and Air Permit Applications, 2.

³⁸ *Id.* at 8.

³⁹ DEC, Permit Review Report, Permit ID: 2-6007-00259/00033, at 26.

⁴⁰ U.S. Env't Prot. Agency, "Nitrogen Oxides (NOx) Control Regulations" (last visited July 29, 2024), <https://www3.epa.gov/region1/airquality/nnox.html#:~:text=The%20EPA%20established%20the%20statewide,from%20sources%201990%20emissions%20rate>.

⁴¹ Intergovernmental Panel on Climate Change, *Atmospheric Chemistry and Greenhouse Gases*, at 241 (2018). <https://www.ipcc.ch/site/assets/uploads/2018/03/TAR-04.pdf>.

⁴² U.S. Env't Prot. Agency, "Nitrogen Oxides (NOx) Control Regulations" (last visited July 29, 2024), <https://www3.epa.gov/region1/airquality/nnox.html#:~:text=The%20EPA%20established%20the%20statewide,from%20sources%201990%20emissions%20rate>.

that may be reasonably anticipated to cause or contribute to anthropogenic climate change.”⁴³ Ground-level ozone is a major contributor to climate change⁴⁴ and poses significant threats to human health, as described in Section II above. Approving an increase in NO_x emissions means approving an increase in GHGs; it is thus plainly inconsistent with the CLCPA, and must be rejected under the law.⁴⁵

2. *The Permit Modification Disproportionately Burdens DACs and Must be Denied Under §7(3)*

Under the CLCPA’s implementation policy, DEP 24-1, Section 7(3) applies to permits under Article 19 Air Pollution Control, which includes Title V permits.⁴⁶ The program policy also states that projects which are subject to the policy include, “sources and activities of a continuing nature associated with any new emission sources, permit renewals, or permit modifications that would result in actual increases of GHG and co-pollutants.”⁴⁷ As discussed above, this project will lead to an increase in GHGs, and it will also lead to an increase in co-pollutants under the legislative definition, because the NO_x and PM₁₀ are both pollutants released from a facility that also releases GHGs, such as carbon dioxide.⁴⁸ Section 7(3) is thus inarguably applicable here. The program policy also clearly requires the preparation of a disproportionate burden analysis in scenarios such as this, where the project causes an increase in GHG or co-pollutant emissions resulting from any “new, modified, or renewed emission sources.”⁴⁹ The DOC has failed to prepare this disproportionate burden analysis, in violation of DEC’s own policy, which should result in an automatic denial until it is properly prepared, submitted, and approved.

The CLCPA prohibits state agencies from disproportionately burdening DACs in their decisionmaking, and requires that DACs be prioritized for reductions of GHGs and co-pollutants.⁵⁰ This legal mandate seeks to bring environmental justice to the Black, Brown, and low-income communities throughout New York that are disproportionately burdened by environmental hazards. One of the many reasons that environmental hazards exist in these communities, as acknowledged by DEC itself, is the “lack of meaningful public engagement” in these communities, as well as the “unavailability or inaccessibility of certain information to the public early in the permit process.”⁵¹

⁴³ N.Y. Env’t Conserv. Law § 75-0101 (McKinney).

⁴⁴ Xiaopu Lyu, et al. *A synergistic ozone-climate control to address emerging ozone pollution challenges*, One Earth by CellPress vol. 6, 965 (Aug. 18, 2023), <https://doi.org/10.1016/j.oneear.2023.07.004>.

⁴⁵ DOC has purchased 67.6 tpy NO_x Emission Reduction Credits (ERCs) to “offset the NO_x emissions,” but this does not constitute proper mitigation as defined by the CLCPA, which requires mitigation measures to be present “where such project is located.” (CLCPA §7(2)). DEC’s own guidance on implementing Section 7(2), DAR-21, further emphasizes this point by stating that “mitigation must be undertaken at the project site or in the surrounding community whenever possible.” The purchase of ERCs does not meet this requirement. DEC, DAR-21, The Climate Leadership and Community Protection Act and Air Permit Applications, 6.

⁴⁶ DEC, DEP 24-1, Permitting and Disadvantaged Communities, 2.

⁴⁷ *Id.* at 3.

⁴⁸ See DOC, Rikers Island Title V Permit Renewal Application - DECID: 2-6007-00259/00033

⁴⁹ DEC, DEP 24-1, Permitting and Disadvantaged Communities, 4.

⁵⁰ CLCPA §7(3). Under the CLCPA, “co-pollutants” refers to “hazardous air pollutants produced by greenhouse gas emissions sources.” N.Y. Env’t Conserv. Law § 75-0101 (McKinney).

⁵¹ Commissioner Policy 29, Environmental Justice and Permitting, <https://dec.ny.gov/regulatory/guidance-and-policy-documents/commissioner-policy-29-environmental-justice-and-permitting> (last visited Aug. 16, 2024).

Rikers Island is state-identified DAC, and the people detained on Rikers Island are the most impacted by the burning of fossil fuels at this power plant, and the many tons of pollutants which are subsequently produced.⁵² But the effects of unhealthy air pollution do not stop at neatly drawn lines. The increased NOx and PM10 emitted from the boilers at the Rikers power facility will also impact the surrounding areas of Western Queens and the South Bronx, and the tens of thousands of people who live there—and as noted *supra* in Section II, nearly all of these surrounding areas are also designated DACs.⁵³

Approving the Draft Permit will disproportionately burden these state-identified DACs by contributing to even worse air quality than these communities already face. The Draft Permit would entirely *remove* the limits on NOx and PM10 emissions for eight boilers.⁵⁴ Health impacts from NOx and PM10 exposure range from harmful to devastating. Exposure to NOx and PM10 has been linked to higher rates of cancer as well as cardiovascular, developmental mental, and neurological disorders.⁵⁵ Exposure to particulate matter, including PM10, is a leading cause of mortality across the globe, and many studies show a link between PM exposure and negative cardiovascular and respiratory health effects.⁵⁶ According to the Centers for Disease Control and Prevention, “[b]reathing high levels of nitrogen oxides can cause rapid burning, spasms, and swelling of tissues in the throat and upper respiratory tract” as well as “reduced oxygenation of body tissues, a build-up of fluid in your lungs, and death.”⁵⁷ And as discussed above, the release of NOx contributes to ground-level ozone, which can cause dire health effects among those exposed to it.⁵⁸ The Bronx is already in a state of “severe non-attainment” for ozone standards under the Clean Air Act.⁵⁹ Any increase of these pollutant emissions is a danger to human health, and to remove the limit altogether will further burden an area already dubbed “Asthma Alley” in a manner shockingly inconsistent with the CLCPA. Because this permit will disproportionately burden an already overburdened, state-designated DAC, it must be denied.

B. The Draft Permit Violates New Yorkers’ Constitutional Environmental Rights

The proposed changes to the Rikers Title V Permit are clearly inconsistent with the CLCPA, but this is not the only law that DEC need abide by when considering or issuing permits. When New Yorkers overwhelmingly voted in favor of the Environmental Rights Amendment in November 2021, each New Yorker gained, “a right to clean air and water, and a healthful environment.”⁶⁰ While the precise meaning

⁵² N.Y. State Energy Research & Dev. Auth., *Disadvantaged Communities Map*, GEOIDs 360050001000, 36005009300, 36005001900, 36081010500, 36081031700, 36081035700 (last visited Aug. 16, 2024), <https://www.nyserda.ny.gov/ny/disadvantaged-communities>.

⁵³ N.Y. State Energy Research & Dev. Auth., *Disadvantaged Communities Map*, GEOID 36005009300 (last visited Aug. 16, 2024), <https://www.nyserda.ny.gov/ny/disadvantaged-communities>.

⁵⁴ DEC; Permit Review Report, Permit ID: 2-6007-00259/00033, at 26.

⁵⁵ D.O. Carpenter & P.N. Russo, *Health Effects Associated with Stack Chemical Emissions from NYS Natural Gas Compressor Stations: 2008-2014*, Institute for Health and the Environment (2017), at 3.

⁵⁶ Dr. Yifang Zhu et al. *Effects of Residential Gas Appliances on Indoor and Outdoor Air Quality and Public Health in California*. (UCLA Fielding School of Public Health – Department of Environmental Health Sciences Apr. 2020).

⁵⁷ Agency for Toxic Substances and Disease Registry, *ToxFAQs for Nitrogen Oxides*. <https://wwwn.cdc.gov/TSP/ToxFAQs/ToxFAQsDetails.aspx?faqid=396&toxid=69>.

⁵⁸ U.S. Env’t Prot. Agency, “Health Effects of Ozone Pollution” (last visited Aug. 1, 2024), <https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution>.

⁵⁹ DEC; Permit Review Report, Permit ID: 2-6007-00259/00033, at 3.

⁶⁰ N.Y. Const. Art. 1, § 19.

of “clean” and “healthful” will continue to be litigated, state courts have already found that this constitutional provision is substantive, self-executing, and expands upon existing laws.⁶¹ It creates a constitutional floor below which state actors cannot dip in their decision-making, including agencies in their interpretation of statutes and regulations.⁶²

In deciding whether to approve the Draft Permit, DEC must ensure that it is respecting the environmental rights of New Yorkers in addition to complying with the State’s climate laws. Where an agency has difficulty applying a law or balancing environmental protection with economic benefit, system reliability, etc., the Environmental Rights Amendment now “puts a thumb on the scale for protecting the environment.”⁶³

Here, the increase in pollutants such as NOx and PM10, both of which are harmful to human health and contribute to climate change, violate the right to clean air and a healthful environment for those in and around Rikers Island who are directly impacted by the plant’s emissions. DEC need not reach this analysis because the permit as proposed is clearly inconsistent with the CLCPA, as discussed above. However, if DEC finds the application of the CLCPA’s mandates less than clear when applied here, DEC must err on the side of protecting the environment and human health. DEC must comply with both its statutory obligation to enforce the CLCPA *and* its constitutional obligation to uphold New Yorkers’ environmental rights.

IV. Any Permit for This Facility Must Contain Emissions Limits and Mitigation Measures That Sufficiently Protect People On and Around Rikers Island

There are several mechanisms DEC can consider including in a Title V permit for this facility to better account for the unique context in which that permit is being issued—both in terms of the expectation that the Rikers jail population and associated energy needs will decrease over time, and the known presence of disadvantaged communities on and near Rikers Island.

First, DEC should change the permit period to better align with the legislative timeline for closing the Rikers jail complex. NYC Local Law 16 sets the final deadline for transferring Rikers to DCAS on August 31, 2027. In other words, after that date, the legally required use of Rikers Island entails zero local need for power generation. The instant permit, which only serves and is based on the current use of Rikers, should not remain in effect longer than that use will by law. At the very least, it should account

⁶¹ See *Fresh Air for the Eastside, Inc. v. Town of Perinton*, E2021008617 at 8 (demonstrating that an application of preexisting laws does not necessarily abide by the Environmental Right, the Court suggests a two prong test: “First, did the government action comply with the applicable statute? Second, did the government action violate a person’s constitutional ‘right to clean air and water, and a healthful environment?’”

⁶² See *Fresh Air for the Eastside, Inc. v. State*, WL 18141022 at 12 n.18 (Sup. Ct. 2022) (“All State Agencies and local governments are obliged to respect Article 1, Section 19, and to interpret their duties in ways that ensure a person’s environmental rights will be respected. Interpretation of statutes and regulations will now apply these environmental norms. The fundamental rights serve as a guide to agencies in interpreting their duties.”) (quoting *The Impact of the Green Amendment – A New Era of Environmental Jurisprudence* by Nicholas A. Robinson.)

⁶³ Rebecca Bratspies, *This Changes Everything: New York’s Environmental Amendment, The Nature of Cities* (Feb. 25, 2022) <https://www.thenatureofcities.com/2022/02/25/this-changes-everything-new-yorks-environmental-amendment/>.

for this legally required change in use in two ways: (1) coinciding with the deadline to end carceral use of Rikers in its expiry; and (2) ensuring that the up-to-date incarcerated population and operations on Rikers are taken into account in any permit renewal process that may occur at that time.

Second, in recognition of the health and environmental harms associated with NO_x and PM₁₀, DEC must reinstate these emissions limits where the Draft Permit has removed them. The DACs on and surrounding Rikers Island are already disproportionately affected by damaging air pollution; removing these limits and allowing a potential increase in harm to these already vulnerable populations is both counter to the law, as described above, and irresponsible. DEC must restore the NO_x and PM₁₀ emissions limits to ensure that all boilers at this facility are operating in a manner sufficiently protective of those impacted by their operation.

Further, the permit emissions limits should be tailored to account for distinct operating scenarios, given the changes expected at Rikers over this permit period. Per DEC regulations, Title V permits may set forth approved alternate operating scenarios with distinct control requirements. 6 NYCRR § 201-6.4(f)(1). Thus, DEC should tailor the permit's emission limits to account for the reduction of population and operations over time on Rikers. To ensure the provision of sufficient power to maintain safe, healthy conditions for the people incarcerated at Rikers, the emissions limits should reflect a level of power generation tied to the actual population and building operations at Rikers. This may be accomplished by setting forth certain benchmarks for population size or number of buildings still operating within the jail complex and corresponding emissions limits commensurate to the power needed to support said population or building operations.

In addition, this permit should set forth emissions limits for alternate standard and emergency operating scenarios rather than simply imposing an overall higher emissions limit that is calculated based on emergency operation. DOC acknowledges that nearly half of the boilers on site will not be used except in emergency cases. To best protect surrounding vulnerable communities from air pollution, DEC should set separate emissions limits not only for the emergency scenario in which all 19 boilers are operating, but also for the expected non-emergency scenario in which only 10 boilers are operating.

Finally, to ensure that those incarcerated at Rikers and the residents of nearby communities are adequately protected from air pollution impacts, DEC should ensure that this permit is sufficiently protective. One suggestion for doing so is to reduce the amount of emissions eligible for credit offset, which would require more actual emissions reductions at this facility.

Conclusion

For the reasons described above, we urge DEC to deny the Draft Permit, to apply stronger scrutiny to how any permit for this facility reflects actual and expected operations on Rikers Island, and to incorporate strong enough emissions limits and mitigation measures in any such permit to sufficiently protect the vulnerable communities on and around Rikers Island.

Sincerely,

A Little Piece of Light
El Puente
Exodus Transitional Community
Freedom Agenda
Long Island Progressive Coalition
Mothers Out Front
Network for a Sustainable Tomorrow
New York City Environmental Justice Alliance
New York Lawyers for the Public Interest
NRDC
NY Climate Advocacy Project
Peoples Climate Movement - NY
Riverkeeper, Inc.
Save the Sound
Social Action Committee, Congregation Romemu
Urban Youth Alliance (BronxConnect)
Vote Solar
350Brooklyn