



American Water Works
Association

New York Section



May 27, 2022

Hon. Carl Heastie, Speaker
New York State Assembly
Legislative Office Building 932
Albany, New York 12248

Senator Andrea Stewart-Cousins,
President Pro Tempore and Majority Leader
New York Senate
172 State Street,
Capitol Building, Room 330
Albany, NY 12247

Re.: Disadvantaged Communities – Changes needed to proposed S-08830/A-02103-D

Dear Speaker Heastie and Senator Stewart-Cousins:

NYSAWWA, NYWEA, and NYRWA represent the drinking water, wastewater, and rural water interests of the New York water sector. Together, we work with our 7,000 plus members to ensure that all New York State residents have access to safe, clean, affordable, and reliable water and wastewater services. The members of our three professional associations are on the front line of protecting the health of all New Yorkers by providing safe drinking water and effective wastewater treatment. Many of the facilities our members design, build and operate are located in or near designated Disadvantaged Communities due to both geography and history. These facilities, and the entities that operate them, provide many positive impacts to Disadvantaged Communities and they cannot continue to protect New Yorker’s drinking water and receiving waters if their environmental permits are not thoughtfully issued or renewed.

Our three associations appreciate and support the intent of proposed S-08830/A-02103-D, namely to enhance the assessment of impacts on Disadvantaged Communities during the environmental permitting process, however we believe that the citizens of New York would be better served if this bill were more focused through some relatively straight forward modifications before it is sent to the Governor for signature. Our three organizations fully support the proposed changes recently sent to you by the Business Council of New York (BCNY) and endorsed by a wide range of New York municipal, educational and other organizations. A copy of the BCNY’s proposal is included as Attachment A.

In addition however, we also believe that this proposed legislation can be further improved while keeping its intention and focus intact. To this end, we suggest that the bill’s sponsors work with the Department of Environmental Conservation, us and other interested parties between now and the beginning of the 2023 Legislative session to review and perhaps improve some of the specific requirements of the bill. Examples of areas where improvement may facilitate implementation include, but are not limited to:

- Ensuring that both Environmental Burden Reports and all analyses done under the State Environmental Quality Review Act (SEQR) recognize any beneficial impacts that the permittee brings to Disadvantaged and all communities and objectively present a balanced summary of them.
- Requiring that the implementing regulations include clear and implementable definitions of what constitutes both a “significant, adverse and disproportionate pollution burden” and an “inequitable

pollution burden” (if the latter term is not eliminated) on Disadvantaged Communities and the difference between these two terms.

- Ensuring that there are no significant inconsistencies between the final bill and both New York’s ongoing efforts to implement its *Climate Leadership and Community Protection Act*, especially its Climate Justice initiatives and/or the Environmental Protection Agency’s ongoing Environmental Justice Initiatives.
- Better defining the contents of the “Existing Burden Report” which the Department must compile for each designated Disadvantage Community including (but not limited to) the extent older data can be included, when new data must be collected and how frequently these reports must be updated.

Water experts from our three organizations are ready to provide support, information and data as these important provisions are fine tuned to make them more efficient while still providing the intended enhanced protection for Disadvantaged Communities.

Lastly, we strongly support Attachment A’s call for the effective date of the bill which passes this Legislative session be increased from 180 days after the bill becomes law until 365 days after that date. The reason for this request is two-fold:

1. It will defer effectiveness until additional changes are discussed and perhaps passed during the 2023 Legislative session, and
2. It will allow the Governor and the Legislature to include specific funding to quickly implement the bill’s requirements in the State’s 2023 budget. Abiding by the new requirements will not only be expensive and time consuming for permittees, but it will also place a very significant burden on the Department and must be separately and specifically budgeted for.

In summary, our three organizations and our 7,000 members call upon both Chambers to (1) make immediate changes to proposed S-08830/A-02103-D consistent with Attachment A, and (2) commit to reviewing and perhaps finetuning other provisions of the bill before/during the 2023 Legislative session. As stated above, the water experts within our organizations stand ready to provide expert advice as this important bill is made more effective.

Respectfully submitted,

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Cc.: Hon. Kathy Hochul, Governor – New York State
Hon. Michelle Hinchey, Senator – NYS 46th Senate District

Attachment A
Proposed Immediate Changes to the Bill

COVER MEMO

The undersigned organizations^{^^} have significant concerns about the likely impact of S.8830/A.2103-D on existing facilities and the feasibility of meeting its proposed mandates. In response, we are supporting several amendments (see attached) intended to clarify the bill's permitting requirements for facilities that may impact disadvantaged communities. These amendments are intended to address concerns that are being raised regarding this bill's applicability to industrial, municipal, educational and health care facilities that are required to obtain and renew environmental permits. Most significant, as currently written, the bill would mandate the denial of permit renewals if a facility's impact on a disadvantaged community was "disproportionate," i.e., different than that in a comparison area, regardless of the absolute level of that impact, or whether the impact was significant or adverse. The bill also makes "disproportionate" impacts a factor in defining "significant" impacts for SEQRA purposes, again without regard to the absolute level or effect of such impacts. Our proposed language to address these concerns are compatible with the overall intent of S.8830, and other provisions of the Environmental Conservation Law addressing environmental justice concerns, in that it would require an enhanced assessment to determine whether new projects will result in any significant disproportionate or inequitable impacts on disadvantaged communities exist and/or would be exacerbated, and that mitigation will be required to address both the facility's absolute impact and its relative impact on disadvantaged communities. As always, we welcome the opportunity to discuss our concerns and proposals with the Administration and Legislature.

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These are listed in the original BCNY Memo and proposal. Our three organizations are among the listed organizations.

PROPOSED AMENDMENTS TO S.8830

3 § 5. Subparagraph (i) of paragraph (c) of subdivision 2 of section
4 8-0113 of the environmental conservation law, as added by chapter 612 of
5 the laws of 1975, is amended to read as follows:

6 (i) Actions or classes of actions that are likely to require prepara-
7 tion of environmental impact statements, including actions which may
8 cause or increase, either directly or indirectly, a significant, adverse and
disproportionate or
9 inequitable or both disproportionate and inequitable pollution burden on
10 a disadvantaged community;

§ 7. The environmental conservation law is amended by adding a new section 70-0118 to read as follows:

§ 70-0118. Disproportionate impacts on disadvantaged communities.

1. For the purposes of this section:

(a) "Disadvantaged communities" shall have the same meaning as subdivision five of section 75-0101 of this chapter.

(b) "Existing burden report" shall mean the report required by this section describing the existing pollution burden in a disadvantaged community.

2. The department shall prepare and update no less frequently than x years an existing burden report for all disadvantaged communities. When issuing a permit for any project that is not a minor project as defined in subdivision three of section 70-0105 of this article and that may directly or indirectly affect a disadvantaged community, the

department shall prepare or cause to be prepared an existing burden report and shall consider such report in determining whether such project may cause or contribute to, either directly or indirectly, a significant, adverse and disproportionate or inequitable or both disproportionate and inequitable pollution burden on a disadvantaged community.

3. No new permit shall be approved or renewed. Conditions may be added to a new or renewed permit by the department if it a project may cause or contribute to, either directly or indirectly, an unmitigated significant, adverse and disproportionate or inequitable or both disproportionate and inequitable pollution burden on a disadvantaged community, including consideration of any finding of significant impacts as determined by the department pursuant to section 8-0109 of this chapter.

§ 9. This act shall take effect on the three hundred and sixty fifth one hundred eightieth day after it shall have become a law; provided that section three of this act shall not apply to any person who has received an initial determination pursuant to subdivision 4 of section 8-0109 of the environmental conservation law prior to such date and provided further that section five of this act shall not apply to any determination of significance made prior to such date.

ANNOTATED BILL TEXT

STATE OF NEW YORK

8830

IN SENATE

April 22, 2022

Introduced by Sen. STEWART-COUSINS -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the environmental conservation law, in relation to the location of environmental facilities

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Legislative intent. The legislature finds and declares that
2 each community in the state should equitably share the responsibilities,
3 burdens, and benefits of managing and solving the state's environmental
4 problems and the facilities necessary to accomplish such ends. The
5 legislature further declares that there has been an inequitable pattern
6 in the siting of environmental facilities in minority and economically
7 distressed communities, which have borne a disproportionate and inequi-
8 table share of such facilities. Consistent with its commitment to
9 providing equal justice for its citizens, the state has a responsibility
10 to establish requirements for the consideration of such decisions by
11 state and local governments in order to insure equality of treatment for
12 all communities.

13 § 2. Section 8-0105 of the environmental conservation law is amended
14 by adding a new subdivision 9 to read as follows:

15 9. "Disadvantaged community" shall have the same meaning as subdivi-
16 sion five of section 75-0101 of this chapter.

NOTE: these designations are still proposed and subject to ongoing public comment. We are still looking at both he proposed criteria, the rating system, and the proposed designated communities.

17 § 3. Subdivision 2 of section 8-0109 of the environmental conservation
18 law, as amended by chapter 219 of the laws of 1990, paragraph (h) as
19 amended by chapter 519 of the laws of 1992, paragraph (i) as added by
20 chapter 182 of the laws of 1990, and paragraph (i) as amended by chapter
21 238 of the laws of 1991, is amended to read as follows:

22 2. All agencies (or applicant as hereinafter provided) shall prepare,
23 or cause to be prepared by contract or otherwise an environmental impact
24 statement on any action they propose or approve which may have a signif-
25 icant effect on the environment. Such a statement shall include a
26 detailed statement setting forth the following:

27 (a) a description of the proposed action and its environmental
28 setting;

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

1 (b) the environmental impact of the proposed action including short-
2 term and long-term effects;
3 (c) any adverse environmental effects which cannot be avoided should
4 the proposal be implemented;
5 (d) alternatives to the proposed action;
6 (e) any irreversible and irretrievable commitments of resources which
7 would be involved in the proposed action should it be implemented;
8 (f) mitigation measures proposed to minimize the environmental impact;
9 (g) the growth-inducing aspects of the proposed action, where applica-
10 ble and significant;
11 (h) effects of the proposed action on the use and conservation of
12 energy resources, where applicable and significant, provided that in the
13 case of an electric generating facility, the statement shall include a
14 demonstration that the facility will satisfy electric generating capaci-
15 ty needs or other electric systems needs in a manner reasonably consist-
16 ent with the most recent state energy plan;
17 (i) effects of proposed action on solid waste management where appli-
18 cable and significant; ~~and~~
19 ~~(i)~~ (j) effects of any proposed action on, and its consistency with,
20 the comprehensive management plan of the special groundwater protection
21 area program, as implemented by the commissioner pursuant to article
22 fifty-five of this chapter; ~~and~~
23 ~~(j)~~ (k) such other information consistent with the purposes of this
24 article as may be prescribed in guidelines issued by the commissioner
25 pursuant to section 8-0113 of this chapter~~[-]~~; and
26 (l) effects of any proposed action on disadvantaged communities,
27 including whether the action may cause or increase a disproportionate or
28 inequitable or both disproportionate and inequitable pollution burden on
29 a disadvantaged community.

NOTE - The above provision only applies to projects "which may have a significant effect on the environment." If an agency makes such a determination, it must as part of an EIS assess potential disproportionate or inequitable impacts on disadvantaged communities.

30 Such a statement shall also include copies or a summary of the
31 substantive comments received by the agency pursuant to subdivision four
32 of this section, and the agency response to such comments. The purpose
33 of an environmental impact statement is to provide detailed information
34 about the effect which a proposed action is likely to have on the envi-
35 ronment, to list ways in which any adverse effects of such an action
36 might be minimized, and to suggest alternatives to such an action so as
37 to form the basis for a decision whether or not to undertake or approve
38 such action. Such statement should be clearly written in a concise
39 manner capable of being read and understood by the public, should deal
40 with the specific significant environmental impacts which can be reason-
41 ably anticipated and should not contain more detail than is appropriate
42 considering the nature and magnitude of the proposed action and the
43 significance of its potential impacts.

44 § 4. The opening paragraph of subdivision 4 of section 8-0109 of the
45 environmental conservation law, as amended by chapter 219 of the laws of
46 1990, is amended to read as follows:

47 As early as possible in the formulation of a proposal for an action,
48 the responsible agency shall make an initial determination as to whether
49 or not an environmental impact statement need be prepared for the
50 action. In making such determination for any proposed action that is
51 not a minor project as defined in subdivision three of section 70-0105
52 of this chapter the responsible agency shall consider whether such
53 action may cause or increase a disproportionate or inequitable or both
54 disproportionate and inequitable burden on a disadvantaged community

55 that is directly or significantly indirectly affected by such action.

NOTE - this applies to "non-minor" projects as defined in UPA statute. UPA regulations (6 NYCRR Part 621) say that "Minor project means any action listed as minor in section 621.4 of this Part ... Actions identified as Type II in Parts 617 and 618 of this Title are minor except where such an action is listed as major by permit type in section 621.4 of this Part," and Part 617 further defines minor projects as including "license, lease and permit renewals . . . where there will be no material change in permit conditions or the scope of permitted activities." As a result, the above provision would not apply to most DEC permit renewals. This would be minor projects, and not meeting the threshold standard of significant impacts on the environment.

56 When an action is to be carried out or approved by two or more agencies,
1 such determination shall be made as early as possible after the design-
2 nation of the lead agency.

3 § 5. Subparagraph (i) of paragraph (c) of subdivision 2 of section
4 8-0113 of the environmental conservation law, as added by chapter 612 of
5 the laws of 1975, is amended to read as follows:

6 (i) Actions or classes of actions that are likely to require prepara-
7 tion of environmental impact statements, including actions which may
8 cause or increase, either directly or indirectly, a disproportionate or
9 inequitable or both disproportionate and inequitable pollution burden on
10 a disadvantaged community;

NOTE: 8-0113 requires that DEC rules include "criteria for determining whether or not a proposed action may have a significant effect on the environment . . .", while §8-0113(c)(3) being amended here specifically requires the identification, on the basis of such criteria, types of actions that would require an EIS, i.e., Type I actions that may have a significant impact on the environment. As a result of this amendment, DEC would have to consideration of types of actions that may have disproportionate or inequitable pollution burdens on disadvantaged communities and include them as Type 1 actions.

11 § 6. Paragraph (b) of subdivision 2 of section 8-0113 of the environ-
12 mental conservation law, as amended by chapter 252 of the laws of 1977,
13 is amended to read as follows:

14 (b) (i) Criteria for determining whether or not a proposed action may
15 have a significant effect on the environment, taking into account social
16 and economic factors to be considered in determining the significance of
17 an environmental effect;

18 (ii) Such criteria shall include consideration of the extent to which
19 a proposed action may reasonably be expected to cause or increase a
20 disproportionate or inequitable or both disproportionate and inequitable
21 burden on disadvantaged communities;

NOTE: The above provision amends 8-0113 to say that the criteria to be used in determining whether a project is likely to have a significant effect on the environment includes consideration of whether projects would cause or increase a disproportionate or inequitable burden on disadvantaged communities. These current criteria are set forth in 6 NYCRR Part 617.7(c) and include such factors as a substantial adverse change in existing air quality, ground or surface water quality or quantity, traffic or noise levels; a substantial increase in solid waste production; the creation of a hazard to human health; a substantial change in the use, or intensity of use, of land; and other tangible, absolute adverse impacts. As a result of this proposed amendment, a "disproportionate or inequitable impact" can itself be the basis for defining such impacts as "significant," regardless of its absolute, non-comparative environmental impact.

22 § 7. The environmental conservation law is amended by adding a new

23 section 70-0118 to read as follows:

24 § 70-0118. Disproportionate impacts on disadvantaged communities.

25 1. For the purposes of this section:

26 (a) "Disadvantaged communities" shall have the same meaning as subdivi-
27 vision five of section 75-0101 of this chapter.

28 (b) "Existing burden report" shall mean the report required by this
29 section describing the existing pollution burden in a disadvantaged
30 community.

31 2. When issuing a permit for any project that is not a minor project
32 as defined in subdivision three of section 70-0105 of this article and
33 that may directly or indirectly affect a disadvantaged community, the
34 department shall prepare or cause to be prepared an existing burden
35 report and shall consider such report in determining whether such
36 project may cause or contribute to, either directly or indirectly, a
37 disproportionate or inequitable or both disproportionate and inequitable
38 pollution burden on a disadvantaged community.

NOTE: This could be read as applying only to the issuance of new permits, not renewals, but it is unclear. As provided below, this burden report would require extensive data collection and analysis on a permit by permit basis. The factors to be considered in such report in part reflect factors considered in an EIS (air quality impacts, noise, odor, human health hazards), but includes other factors including the proximity to certain categories of facilities and an explicit consideration of cumulative health impacts. It applies to "non minor" projects, which under current law should exclude most permit renewals, as discussed above. But with the proposed amendments to ECL 8-0113, projects with a "disproportionate" but not otherwise significant or adverse impacts could suddenly be defined as Type 1 projects so no longer minor. Our two major recommendations here: permit renewals should be categorically exempt, and these environmental burden reports should be completed by DEC not applicants.

39 3. No permit shall be approved or renewed by the department if it may
40 cause or contribute to, either directly or indirectly, a dispropor-
41 tionate or inequitable or both disproportionate and inequitable
42 pollution burden on a disadvantaged community.

NOTE: This creates an unreasonable, unworkable standard, in that any disproportionate impact (i.e., greater than in some unspecified comparison area) would require the permit application or, as currently written, permit renewal, to be denied. It also applies this standard to permit renewals which typically have no significant environmental impact and would not require a new SEQRA analysis. This standard would apply to projects that provide direct benefits to the community and might be considered "equitable," if the impacts are also otherwise disproportionate. This would also create a near-impossible standard for existing facilities that require permit renewals. In effect this is also disallowing continued conforming use of properties.

43 § 8. Subdivision 1 of section 70-0107 of the environmental conserva-
44 tion law, as added by chapter 723 of the laws of 1977, is amended to
45 read as follows:

46 1. The department, after public hearing, shall adopt rules and regu-
47 lations to assure the efficient and expeditious administration of this
48 article. Such rules and regulations shall include but not be limited to
49 provisions regarding notice, review, public participation and public
50 hearings. Such rules and regulations shall also include the form and
51 content of an existing burden report which shall, at a minimum, include
52 baseline monitoring data collected in the affected disadvantaged commu-
53 nity within two years of the application for a permit or approval and
54 shall identify: (a) each existing pollution source or categories of
55 sources affecting a disadvantaged community and the potential routes of
56 human exposure to pollution from that source or categories of sources;

1 (b) ambient concentration of regulated air pollutants and regulated or
2 unregulated toxic air pollutants; (c) traffic volume; (d) noise and
3 odor levels; (e) exposure or potential exposure to lead paint; (f) expo-
4 sure or potential exposure to contaminated drinking water supplies; (g)
5 proximity to solid or hazardous waste management facilities, wastewater
6 treatment plants, hazardous waste sites, incinerators, recycling
7 facilities, waste transfer facilities and petroleum or chemical manufac-
8 turing, storage, treatment or disposal facilities; (h) the potential or
9 documented cumulative human health effects of the foregoing pollution
10 sources; (i) the potential or projected contribution of the proposed
11 action to existing pollution burdens in the community and potential
12 health effects of such contribution, taking into account existing
13 pollution burdens.

NOTE: This in some respects goes beyond an EIS to require a partial public health assessment and to include consideration of some impacts not subject to DEC or ECL control; it would also require the collection of ambient air quality data for unspecified categories of pollutants (i.e., it is unclear what constitutes an "unregulated toxic air pollutant.") It requires the identification of specific categories of facilities in "proximity" to the disadvantaged community, with no criteria to determine how "proximity" is to be determined nor any requirement that such facilities impact the disadvantaged communities.

14 § 9. This act shall take effect on the one hundred eightieth day after
15 it shall have become a law; provided that section three of this act
16 shall not apply to any person who has received an initial determination
17 pursuant to subdivision 4 of section 8-0109 of the environmental conser-
18 vation law prior to such date and provided further that section five of
19 this act shall not apply to any determination of significance made prior
20 to such date.

NOTE: Given the significant new obligations imposed by this