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Helping New Jersey State Agencies and Departments Align Their Actions with GHG Reduction Mandates and Environmental Justice Principles

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**HELPING NEW JERSEY STATE AGENCIES AND
DEPARTMENTS ALIGN THEIR ACTIONS WITH
GHG REDUCTION MANDATES AND
ENVIRONMENTAL JUSTICE PRINCIPLES**

By Jennifer Danis and Zoe Makoul

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EXECUTIVE SUMMARY

New Jersey has done significant work towards achieving greenhouse gas (“GHG”) emission reductions that will meet the requirements of the Global Warming Response Act (“GWRA”). Such work has included: producing an analysis that identifies “no regrets” low-cost pathways to achieve the best outcomes, recognizing that these pathways will evolve as technologies and costs change; issuing the Energy Master Plan (“EMP”), based on that analysis, describing initial strategies for Executive Branch agencies and departments to develop; continuing that work in the GWRA 2020 80x50 Report; and attempting to expedite it in Executive Order No. 274 (“EO-274”). The state has also invested significant time and resources into operationalizing Executive Order No. 23 (“EO-23”) to help Executive Branch agencies and departments navigate and incorporate environmental justice principles. But in each of these areas — meeting the GWRA’s GHG limits, addressing the urgency of our climate crisis, and fulfilling the promise of environmental justice — there is an implementation gap that threatens to impede the state’s progress. While orders like EO-274 and EO-23 clearly recognize the urgency in accelerating the state’s coordinated response, current law permits, but does not require, Executive Branch agencies and departments to act accordingly. Fortunately,

these implementation issues can be addressed with minor changes to the GWRA and the Environmental Justice Law.

Current Barriers to Achieving GHG Reductions and Systemic Environmental Justice in New Jersey

1. Executive Branch agencies and departments are not explicitly required to assess whether their actions are climate-aligned or will interfere with achieving required GHG reductions within established limits.

- While there are certain procedural safeguards in place for rulemaking under the state Administrative Procedure Act (“APA”), none require assessment or disclosure of whether the proposed rules are consistent with, or would interfere with, obtaining the GWRA’s GHG reduction requirements, the Department of Environmental Protection’s (“NJDEP”) 80x50 GHG limits, and the EO-274 interim target.
- Executive Branch agencies and departments engage in other significant actions, including making permitting and licensing decisions, issuing guidance documents, issuing orders, entering into contracts, and allocating grants and funds. Such actions are not covered by the APA’s procedural safeguards and may also be inconsistent with achieving the GWRA reductions. Agencies may be missing critical

opportunities to consider alternatives that would better align with the state's energy and climate laws.

- NJDEP and sister agencies do not currently believe they have solid authority to engage in such important considerations.

2. Aside from NJDEP, Executive Branch agencies and departments are not explicitly required to implement measures and adopt regulations to achieve the requisite GHG reductions.

- The GWRA tasks NJDEP alone with adopting rules, regulations, and measures to ensure that all identified interim benchmarks and GHG-limits are met.
- NJDEP produced a 2020 GWRA 80x50 Guidance Document setting forth sector-specific GHG-reduction limits and identifying pathways to an 80% reduction by 2050. The document recommends certain legislative, regulatory, and other measures that other Executive Branch agencies and departments should undertake to meet the GWRA's requirements.
- Critical sectors like emissions from buildings have not been tackled with the speed required to meet the limits, and governance over necessary changes are largely outside NJDEP's purview and within the grasp of other Executive Branch agencies and departments.

3. Executive Branch agencies and departments are not required to assess whether their actions disproportionately impact communities of concern, nor are they required to

produce and implement initial assessments, action plans or regulations ensuring action plans are operationalized.

- EO-23 contains broad promises of ensuring that all state agencies and departments engage meaningfully with environmental *injustice* legacies, practices, and equity barriers moving forward.
- NJDEP’s “Furthering the Promise” guidance proposes each agency and department create Initial Assessments followed by Action Plans but cannot provide a binding obligation to adopt the plans nor mandate development of measures or regulations operationalizing them.
- NJ’s EJ Law (N.J.S.A. 13:1D-157) targets the continued siting of burdensome facilities in already overburdened communities—*one* important part of its legacy of environmental *injustice*—by focusing attention on procedural and substantive environmental justice impacts of NJDEP permitting decisions for covered facilities. These requirements do not extend to other agencies or departments.

Recommendations to Remove Barriers to Achieving GHG Reductions and Systemic Environmental Justice in New Jersey:

1. GHG Reductions: Two changes to the GWRA would address all the GHG-related barriers discussed above, providing state agencies and departments with clear authority

and concrete obligations to advance its GHG reduction and climate goals. Ideally, the legislation would include at least the following components:

- **Declaration:** The legislation could include a declaration that the 80x50 Report clearly identified the crucial nature of having all Executive Branch agencies and departments participate in achieving the economy-wide GHG reductions required by the GWRA. It could also assert that there are two pieces to ensuring the reduction goals are addressed with the critical speed required by the impending crisis. First, all agencies and departments must consider whether their actions, decisions, rulemaking, etc. are consistent with achieving the GWRA reductions, 80x50 sector limits, and the EO-274 interim benchmark. Second, all agencies and departments must enact measures designed to help achieve those reductions.
- **Consistency Determination:** The legislation should require all Executive Branch agencies and departments to consider whether their actions are consistent with achieving the relevant and associated GHG reductions and limits; for actions that will be inconsistent, the legislation should require identification of alternatives and potential mitigation.

Impact: The addition of this section would ensure that significant actions, like decisions, permitting, and rulemaking, do not move the state away from achieving the GWRA-required emissions reductions without thorough exploration of alternatives and mitigation possibilities. It also provides

reluctant agencies or departments with clear authority to consider GHG impacts as factors in decision making.

- **Requirement to Affirmatively Assist in Achieving GHG reductions:** The legislation should enlist other Executive Branch agencies and departments in its existing mandate to assist in reaching interim benchmarks and GWRA reduction requirements.

Impact: This will provide other Executive Branch agencies and departments the unequivocal authority, which some believe they currently lack, to promulgate regulations that reduce GHG emissions and meet climate goals.

2. Achieving the Promise of Environmental Justice: Amending the EJ Law to require that Executive Branch agencies and departments adopt and implement the assessments and action plans set out in “Furthering the Promise,” as well as directing those bodies to consider whether their significant actions will disproportionately impact communities of concern (or documenting targeted benefits for such communities to address historical injustices), would ensure that EO-23’s vision is legally durable and operationalized immediately.

- **Declaration:** The legislation could contain declarations mirroring those in EO-23 regarding the importance of integrating equity concerns into all Executive Branch actions.

- **Impact Assessment:** Direct all Executive Branch agencies and departments to assess whether significant actions disproportionately impact communities of concern, as defined and mapped in the “Furthering the Promise” guidance.
- **Requirement to Conduct Initial Assessments, Adopt Action Plans, and Implement Measures:** Enshrine the work NJDEP has done in collaboration with environmental justice councils, sister agencies, and other important stakeholders into durable and actionable requirements to ensure that equity considerations, both procedural and substantive, become integral to all Executive Branch operations.

Conclusion

The provisions above are not exhaustive, but they represent impactful changes that will support the ongoing work of state agencies and departments on meeting GHG reduction goals and elevating and integrating environmental justice concerns. Legislative amendments could be modeled on recent laws adopted by New York, Maine, Washington, Rhode Island, Massachusetts, and other climate and justice leaders.

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1. INTRODUCTION

New Jersey is working hard towards ensuring that its state agencies, offices, authorities and departments consider climate change and greenhouse gas (“GHG”) emissions reductions, as well as environmental justice principles, in every aspect of their governance.¹ The 2019 Energy Master Plan (“EMP”)² was an enormous undertaking—one which recognized that, to meet the Global Warming Response Act (“GWRA”)³ limits, both the EMP and the GWRA 2020 80x50 Report⁴ must cover all aspects of New Jersey’s GHG emissions across every economic sector. New Jersey’s

¹ See e.g., N.J.S.A. 48:3-87.9 (directing the Board of Public Utilities (“NJBPU”) to “require each electric public utility and gas public utility to reduce the use of electricity, or natural gas, as appropriate, within its territory,” and consider peak demand reduction, energy efficiency, and other measures); N.J.S.A. 48:25-1 et seq. (setting out the Board’s administration of the Plug In Vehicle Act to achieve goals of GWRA, Energy Master Plan, etc.); N.J.S.A. 26:2C-37 et seq. (directing the Department of Environmental Protection (“NJDEP”) to achieve GHG reductions); N.J.S.A. 48:3-87 (directing NJBPU to establish and administer utilities’ renewable portfolio standards and to consider “reductions in air pollution, water pollution, land disturbance, and greenhouse gas emissions,” among other factors in its analysis); N.J.S.A. 48:3-87.6 (directing NJBPU to evaluate the Zero Emission Certificate program’s effect on “air quality and environment in the State, and its contribution to a more reliable energy supply by assuring fuel diversity.”).

² Pursuant to N.J.S.A. 52:27F-14, New Jersey is required to produce and update an Energy Master Plan every three years. New Jersey’s 2019 EMP “outlines a roadmap with seven main strategies to reach the goals of 100% clean energy and 80% emissions reductions from 2006 levels by 2050.” It is a cross-sector, economy-wide analysis of how to achieve those goals, with pathways mapped for each relevant state agency and division. NEW JERSEY ENERGY MASTER PLAN (2019), available at https://nj.gov/emp/docs/pdf/2020_NJBPU_EMP.pdf [hereinafter “EMP”].

³ Global Warming Response Act of 2007, N.J.S.A. 26:2C-37 [hereinafter GWRA].

⁴ Based on New Jersey’s GWRA mandate to reduce GHG emissions 80% below 2006 levels by 2050, the 2020 GWRA 80x50 Report establishes emission limits across seven sectors: transportation (5.4 MMT CO₂e by 2050); residential and commercial (2.7 MMT CO₂e by 2050); electric generation (zero emissions by 2050); industrial (6.7 MMT CO₂e by 2050); waste and agriculture (4.9 MMT CO₂e by 2050); and short-lived climate pollutants, i.e., methane (1.83 MMT CO₂e by 2045), halogenated gasses (5.1 MMT CO₂e by 2030), and black carbon (1.5 MMT CO₂e by 2030). The seventh sector, carbon sequestration, could provide between 2 to 3 MMT CO₂e per year in additional carbon sequestration. These reductions, if achieved, would also meet the “100% clean energy by 2050” target detailed in Executive Order 28. NEW JERSEY DEP’T OF ENV’T PROT., NEW JERSEY’S GLOBAL WARMING RESPONSE ACT 80X50 REPORT (Oct. 15, 2020), available at <https://www.nj.gov/dep/climatechange/docs/nj-gwra-80x50-report-2020.pdf> [hereinafter “80x50 Report”].

governing bodies are already trying to achieve those reductions through rulemaking,⁵ orders,⁶ and decisions.⁷ This paper will review the importance of providing Executive Branch agencies and departments⁸ with explicit legislative and executive support to robustly implement the GWRA reductions, consistent with EMP-designated pathways, throughout their operations. Doing so is crucial to ensuring that those limits are achieved effectively, prudently, and at a pace appropriately reflecting the critical nature of our climate crisis. Additionally, this paper will explore how to ensure that those same governing bodies take action to further New Jersey's promise of environmental justice.

There are two main mechanisms that states have adopted (or are considering) to accelerate and assist their agencies in this endeavor: (1) consistency analyses and disclosures for agency decisions and significant actions, for both GHG limits⁹ and

⁵ See, e.g., 53 N.J.R. 1945(a) (NJDEP's proposed rule N.J.A.C 7:27F, designed to reduce CO₂ emissions by setting emission limits for fossil fuel-fired electric generating units ("EGUs"), instituting additional permit requirements for commercial and industrial fossil fuel-fired boilers, and banning the sale and use of No. 4 and No. 6 fuel oil).

⁶ See, e.g., NJ Bd. of Pub. Util., Order Adopting The Minimum Filing Requirements For Light-Duty, Publicly Accessible Electric Vehicle Charging, Docket No. QO20050357, available at <https://www.nj.gov/bpu/pdf/boardorders/2020/20200923/8F%20%20ORDER%20Electric%20Vehicle%20MFRs.pdf> (order relying on the GWRA, EMP, and other authorities).

⁷ See, e.g., In the Matter of the Petition of New Jersey Natural Gas Company for a Determination Concerning the Southern Reliability Link Pursuant to N.J.S.A. 40:55D-19 and N.J.S.A. 48:9-25.4, Decision and Order, Docket No. GO15040403 at 118-119 (Mar. 18, 2016) (NJBPUB has previously found, the "actions, decisions, determinations and rulings of State government entities with respect to energy 'shall to the maximum extent practicable and reasonable and feasible conform' with the provisions of the EMP.") (citing N.J.S.A. 52:27F-15(b)).

⁸ This paper adopts the definition of "Executive Branch agencies and departments" set forth in EO-23: "Executive Branch departments and agencies' shall mean any of the principal departments in the Executive Branch of State government and any agency, authority, board, bureau, commission, division, institution, office, or other instrumentality within or created by any such department, and any independent State authority, commission, instrumentality, or agency over which the Governor exercises executive authority, as determined by the Attorney General." EO No. 23 (2018).

⁹ GHG-reduction consistency analyses are discussed in detail in Part 2, below.

environmental justice goals;¹⁰ and (2) directives to adopt and implement regulations that will help achieve the GHG reduction goals within the respective agency's jurisdiction,¹¹ ensuring it is done in a just manner.¹² Mandating consistency analyses ensures that agencies remain accountable to the state's GHG and environmental justice goals. While such a mandate is necessary, it is, on its own, insufficient to fully implement the GWRA and meet the promise of environmental justice embodied in Governor Murphy's Executive Order No. 23. Legislation must also require agencies to take affirmative action to adopt rules, regulations, and measures to implement the GWRA and incorporate environmental justice principles. The combination of both mechanisms would provide agencies with the direct authority necessary to accomplish New Jersey's climate change goals and fulfill its promise of environmental justice in an expeditious and economic manner.¹³

2. MANDATE TO CONSIDER ALIGNMENT WITH THE GWRA

New Jersey would benefit from a legislative mandate requiring all Executive Branch agencies and departments to consider whether they are acting in accordance

¹⁰ The importance of ensuring that governmental actions are consistent with environmental justice principles is discussed in Part 4.

¹¹ Part 3 examines the necessity of ensuring all governing bodies regulate to meet their respective GHG-reduction targets.

¹² Mechanisms for achieving New Jersey's promise of environmental justice are discussed in Part 4.

¹³ Part 5 briefly examines why these mechanisms would yield better planning and lower cost pathways to achieving these goals.

with the GWRA. New Jersey has, through executive orders and legislation,¹⁴ established itself among our national leaders with strong climate and clean energy goals. And it has done significant, data-driven studies that identify “no regrets” low-cost pathways to achieve the best outcomes, recognizing that these initial pathways will evolve as technologies and costs change.¹⁵ Currently, however, there is a gap between GHG emissions goals and Executive Branch agencies’ rulemakings, permit decisions, and orders, into which New Jersey’s climate mandates may fall flat. Furthermore, agencies in the process of taking significant, climate-aligned actions are potentially vulnerable to attacks suggesting that they are overreaching their authority.¹⁶ An unambiguous legislative mandate directing these governing bodies to consider whether their actions are consistent with achieving GWRA limits and EMP goals can bridge this gap, prevent costly delays, and align agency action with existing law.¹⁷

¹⁴ GWRA, N.J. Stat. Ann. 26:2C-37 et seq.; Env’tl. Justice Law, N.J. Stat. Ann. § 13:1D-157, et seq.; EO No. 100 (2020); EO No. 23 (2018); EO No. 92 (2019); EO No. 89 (2019); EO No. 28 (2018); EO No. 7 (2018); EO No. 8 (2018); EO 274 (2021); EO No. 221 (2021); AO No. 2021-25 (2021); AO No. 2020-02 (2020); N.J.S.A. § 52:27F-11, 14 et seq.; N.J.A.C. Title 7:27.

¹⁵ See 80x50 Report, *supra* note 4; EMP, *supra* note 2; NJ Bd. Of Pub. Util. et al., *Integrated Energy Plan* (2019); NJ Dep’t of Env’t. Prot., *Furthering the Promise* (Sep. 2020); London Econ. Int’l LLC, *Analysis of Natural Gas Capacity to Serve New Jersey Firm Customers* (Nov. 2021).

¹⁶ Conversely, absent transparent and substantive consistency determinations, these same governing bodies may be vulnerable to criticism that they are underperforming their roles. See, e.g., Empower NJ’s Comments Regarding Dep’t’s Rules for Reducing Carbon Emissions in NJ, *available at* <https://www.nj.gov/dep/njpact/docs/comments/empowernj.pdf>.

¹⁷ While the legislature has stated its intent to ensure that “the actions, decisions, determinations and rulings of the State Government with respect to energy shall to the maximum extent practicable and feasible conform with the energy master plan,” it has not explicitly directed each governing body to accomplish this objective by considering whether their actions align with the GWRA limits and EMP goals. N.J. Stat. Ann. § 52:27F-15. Achieving such an alignment requires detailed legislative guidance on how to engage in this consideration in a formal, open and transparent manner, and a mandate to regulate towards GHG reductions goals (*see infra*, Part 3).

2.1. Other States Require Agency Actions to Consider Alignment with State Climate and GHG Reduction Goals

Several states have either enacted or proposed legislation mandating that state agencies determine whether their actions are consistent with state climate and GHG reduction goals. Massachusetts requires that “[a]ll agencies, departments, boards, commissions and authorities of the commonwealth shall review, evaluate, and determine the impact on the natural environment of all works, projects or activities...In considering and issuing permits, licenses and other administrative approvals and decisions, the respective agency...shall also consider reasonably foreseeable climate change impacts, including additional greenhouse gas emissions....”¹⁸ Likewise, the Rhode Island’s 2021 Act on Climate, codified at 42 R.I. Gen. Laws Ann.§§ 42-6.2-1 et seq., provides the following charge, “[a]ddressing the impacts on climate change shall be deemed to be within the powers, duties, and obligations of all state departments, agencies, commissions, councils, and instrumentalities, including quasi-public agencies, and each shall exercise among its purposes in the exercise of its existing authority, the purposes set forth in this chapter pertaining to climate change mitigation, adaptation, and resilience in so far as climate change affects its mission, duties, responsibilities,

¹⁸ M.G.L. c. 30, § 61.

projects, or programs.”¹⁹ And more states are moving towards climate-alignment mandates, such as Maryland’s recently passed Climate Solutions Now Act of 2022, which orders each state agency to consider: “(1) the likely climate impact of the agency’s decisions relative to Maryland’s greenhouse gas emissions reduction goals....”²⁰ Companion bills in Minnesota, introduced in the current legislative session, would require that “[g]overnmental actions must be consistent with the statewide greenhouse gas emissions reductions targets under subdivision 1.”²¹

New York was among the first states to enact a broad mandate applicable to all Executive Branch agencies and departments requiring that their operations and decisions align with the state’s GHG reduction and environmental justice goals.²²

¹⁹ 42 R.I. Gen. Laws Ann. § 42-6.2-8. As discussed more fully in Part 3 below, this same law empowers all governing bodies “to promulgate rules and regulations necessary to meet the greenhouse gas emission reduction mandate established by § 42-6.2-9.”

²⁰ SB 528, 2022 Reg. Sess. (Md. 2022), amending MD. Environment Code Ann. § 2–1305.5(d). The Maryland Climate Solutions Now Act of 2022 was enacted on April 9, 2022, and will be effective as of June 1, 2022. See Jeff St. John, *Maryland just passed one of the most aggressive climate laws in the US*, CANARY MEDIA (Apr. 12, 2022), available at <https://www.canarymedia.com/articles/policy-regulation/maryland-just-passed-one-of-the-most-aggressive-climate-laws-in-the-us> (detailing the bill’s trajectory and the Governor declining to veto it).

²¹ HF 1428 Sec. 6, 92nd Leg., Reg. Sess. (Minn. 2021); SF 1630 Sec. 6, 92nd Leg., Reg. Sess. (Minn. 2021). Some states have implemented a more targeted approach, either in concert with a broader mandate, or requiring in the first instance that state agencies reduce their own respective GHG emissions. See, e.g., California’s Global Warming Solutions Act (“[a]ll state agencies shall consider and implement strategies to reduce their greenhouse gas emissions.”) (Cal. Health & Safety Code § 38592; Stats. 2006, Ch. 488, Sec. 1); Washington’s Title 70A.45 (“State agencies shall meet the statewide greenhouse gas emission limits established in RCW 70A.45.020.”) (WA Rev Code § 70A.45.050 (2021)); Vermont’s Global Warming Solutions Act of 2020 (“[i]n order to facilitate the State’s compliance with the goals established in...[the Vermont Climate Action Plan]... all State agencies shall consider any increase or decrease in greenhouse gas emissions in their decision making procedures with respect to the purchase and use of equipment and goods; the siting, construction, and maintenance of buildings; the assignment of personnel; and the planning, design, and operation of programs, services, and infrastructure.”) (Sec. 3. 10 V.S.A. § 578; HB 688, 2019-2020 Reg. Sess. (Vt. 2020)); CLCPA § 7(1) (“All state agencies shall assess and implement strategies to reduce their greenhouse gas emissions.”).

²² As discussed in Part 4, the New York law also requires that environmental justice be considered throughout agency actions and operations, and that those actions “shall not disproportionately burden disadvantaged

Below, we briefly review how New York’s law has already assisted its governing bodies in ensuring that their decisions are climate-aligned.

2.1.1. New York’s Climate Leadership and Community Protection Act in Practice

New York’s Climate Leadership and Community Protection Act (“CLCPA”), enacted in 2019, codifies state goals to reduce GHG emissions as statutory requirements. The CLCPA is one of the most ambitious climate laws in the world,²³ requiring a 40% reduction in statewide GHG emissions from 1990 levels by 2030 and an 85% reduction by 2050.²⁴ It also establishes a goal of net zero emissions across all sectors of the economy by 2050.²⁵ To comply with the CLCPA, all state agencies must consider the statewide GHG emissions reduction goals in their decision making.²⁶ If an agency’s action is not aligned with the GHG emissions limits established by the DEC, pursuant

communities as identified pursuant to subdivision 5 of section 75-0101 of the environmental conservation law.” CLCPA § 7(3).

²³ Currently, the most ambitious climate law in the United States is Maryland’s Climate Solutions Now Act of 2022, which mandates GHG emission reductions of 60% by 2030 and net-zero by 2045. [SB 528](#), amending MD. Environment Code Ann. § 2-1205.

²⁴ ECL § 75-0107(1). Like New Jersey’s GWRA, the CLCPA’s statewide GHG emissions include all emissions of GHGs from sources within the state, as well as GHGs imported into the state associated with either the generation of electricity or the extraction and transmission of fossil fuels. ECL § 75-0101(13) (“‘Statewide greenhouse gas emissions’ means the total annual emissions of greenhouse gases produced within the state from anthropogenic sources and greenhouse gases produced outside of the state that are associated with the generation of electricity imported into the state and the extraction and transmission of fossil fuels imported into the state.”); *see* N.J. Stat. Ann. § 26:2C-39 (“‘Statewide greenhouse gas emissions’ means the sum of calendar year emissions of greenhouse gases from all sources within the State, and from electricity generated outside the State but consumed in the State.”).

²⁵ ECL § 75-0103(11).

²⁶ CLCPA § 7(2).

to the CLCPA, it must provide a detailed justification for why it will act inconsistently with those limits, and identify alternative methods or GHG mitigation.²⁷

The CLCPA has demonstrably impacted the permitting, licensing, and other administrative decisions of New York state agencies like the New York State Department of Environmental Conservation and Public Service Commission.²⁸ For example, DEC recently denied a Clean Air Act Title V air permit modification application submitted by Danskammer Energy, LLC.²⁹ Danskammer was seeking authorization to construct and operate a new natural gas-fired combined-cycle power generation facility in the Town of Newburgh, Orange County, New York,³⁰ but DEC determined that the project would be inconsistent with or would interfere with the attainment of the statewide GHG emission limits established in Article 75 of the Environmental Conservation Law.³¹ Inconsistencies arose because the project would be a new source generating substantial GHG emissions, including both direct and upstream GHG emissions, and would constitute a new and long-term utilization of

²⁷ CLCPA §7(2).

²⁸ The CLCPA applies across all agencies, including to the New York Public Service Commission, as “Commission orders in rate cases fall within the ambit of Section 7(2)’s application to ‘other administrative approvals.’” NYPSC is also subject to CLCPA’s environmental justice mandates under Section 7(3), as indicated in Part 4, below.” State of New York Pub. Serv. Comm’n, Order Approving Joint Proposal, as Modified, and Imposing Additional Requirements, issued and effective August 12, 2021 (Cases 19-G-0309, 19-G-0310, and 18-M-00270) [hereinafter “Order Approving Joint Proposal”].

²⁹ New York State Dep’t of Env’t Conservation, *Letter Re. Notice of Denial of Title V Air Permit*, October 27, 2021 (mailed to Danskammer Energy, LLC), available at https://www.dec.ny.gov/docs/administration_pdf/danskammer10272021.pdf.

³⁰ *Id.* at 1.

³¹ *Id.*, referencing ECL § 75-0107(1).

fossil fuels to produce electricity without a specific plan in place to comply with the CLCPA requirements.³² Since Danskammer did not demonstrate that its project was justified despite the inconsistency, and since it failed to identify adequate alternatives or GHG mitigation measures, DEC was “...unable to satisfy these elements required by Section 7(2) of the Climate Leadership and Community Protection Act (CLCPA or Climate Act)” and denied the application.³³ Similarly, DEC denied a Title V air permit application from Astoria Gas Turbine Power, LLC,³⁴ for construction of a new simple-cycle, dual fuel fossil fuel-fired peaking combustion turbine generator located in Astoria, Queens County.³⁵ Mirroring the Danskammer decision, DEC found the proposed construction inconsistent with the attainment of the statewide GHG emission limits established in the CLCPA,³⁶ and not justifiable on other grounds.³⁷

Beyond evaluating whether proposed new fossil fuel peaker facilities are consistent with the state’s GHG limits and climate goals, DEC is also using the CLCPA

³² *Id.* at 7.

³³ *Id.* at 2. *See also* 6 NYCRR § 621.10(f) (“An application for a permit may be denied for failure to meet any of the standards or criteria applicable under any statute or regulation pursuant to which the permit is sought.”).

³⁴ New York State Department of Environmental Conservation, *Letter Re. Notice of Denial of Title V Air Permit*, October 27, 2021 (mailed Astoria Gas Turbine Power, LLC), available at https://www.dec.ny.gov/docs/permits_ej_operations_pdf/nrgastoriadecision102721.pdf. Astoria is a wholly owned subsidiary of NRG Energy.

³⁵ *Id.* at 1.

³⁶ *Id.* at 1.

³⁷ *See id.* at 15-17 (Examining data and analyses refuting Astoria’s assertion that the project was needed to address reliability shortfalls, and finding that, “based upon publicly available studies and reports by the New York Independent System Operator (NYISO), as well as other recent actions by PSC and the State, any previous reliability deficiency has been resolved. Therefore, at least through 2030, there is no demonstrated reliability need or justification for the Project.”).

to ensure that permit renewals are climate-aligned. On June 30, 2022, DEC expects to issue a decision regarding the renewal of an existing Title V air quality permit requested by the Greenidge Generation plant; CLCPA consistency has been a major question.³⁸ Greenidge operates a Bitcoin mining facility at its natural gas power plant in Yates County, using a method of verification called “proof of work,” which requires significant energy consumption and leaves a large carbon footprint.³⁹ After the public comment period on the draft permit ended, DEC reiterated that it “has the legal authority to approve or deny applications for environmental permits based on whether they meet applicable requirements, including under the Climate Leadership and Community Protection Act (CLCPA)” and stated that “Greenidge has ‘not shown compliance’ [with the CLCPA] because the air application...has not to date shown that it is consistent or would not interfere with the attainment of statewide greenhouse gas emission limits; nor has it provided sufficient justification or identified alternatives or sufficient mitigation.”⁴⁰ After DEC advised Greenidge to propose further GHG mitigation measures in order to meet CLCPA requirements, Greenidge added two

³⁸ *Permit Renewal Application, Greenidge Station*, March 5, 2021, available at https://www.dec.ny.gov/docs/permits_ej_operations_pdf/greenidgeprmtrenewapp.pdf.

³⁹ Jacob Elkin, *A Pause on Proof-of-Work: The New York State Executive Branch's Authority to Enact a Moratorium on the Permitting of Consolidated Proof-of-Work Cryptocurrency Mining Facilities* 2-3 (Sabin Center for Climate Change Law, 2022).

⁴⁰ *Greenidge Station - NYS Dept. of Env't Conservation*, available at <https://www.dec.ny.gov/permits/123728.html#:~:text=Prior%20to%20issuing%20any%20permit,emissions%20associated%20with%20the%20project>.

supplemental limits to its final permit application.⁴¹ DEC has not yet made a determination regarding the sufficiency of the proposed measures. Regardless of the outcome, DEC will make its decision after assessing consistency with the state’s GHG reduction mandate, in an open and transparent manner that bolsters its administrative record by carefully elucidating the basis for its determination.

While Section 7(2) of the CLCPA instructs agencies to act in alignment with the state’s GHG emission reduction goals, the statute does not oblige agencies to deny permits indiscriminately.⁴² As demonstrated in the New York Public Service Commission’s (“PSC”) *Order Approving Joint Proposal* for National Grid’s rate plans “CLCPA review is not performed in a vacuum.”⁴³ For example, the Greenidge Generation decision is contentious because the DEC must justify the project’s apparent noncompliance with the CLCPA,⁴⁴ and opponents to the project assert that, despite Greenidge’s claims, there is no need for additional capacity generation near the power plant, which already “. . . has high renewable energy for grid service.”⁴⁵ In contrast,

⁴¹ Letter from Dale Irwin, Pres., Greenidge Generation LLC, to Chris Hogan, Division of Env’t. Permits (Mar. 25, 2022) (available at https://www.dec.ny.gov/docs/permits_ej_operations_pdf/greenidge32522letter.pdf) (regarding Draft Major Source Air Operating Permit (Title V) Renewal and Draft Permit Acid Rain (Title IV) for Greenidge Generating Station, DEC Permit ID No. 8-5736-00004/00017).

⁴² CLCPA §7(2).

⁴³ Order Approving Joint Proposal, *supra* note 28, at 71.

⁴⁴ On March 25, 2022, Greenidge released new suggestions for GHG mitigation, delaying the decision until June 30. See *Letter to NYSDEC from Greenidge Generation, LLC, re. Draft Major Source Air Operating Permit (Title V) and Renewal and Draft Permit Acid Rain (Title IV) for Greenidge Generating Station* (Mar. 25, 2022).

⁴⁵ Comments from Seneca Lake Guardian et al. in Opposition to the Draft Title V Air Permit for Greenidge Generating Station (Nov. 19, 2021).

when the need for reliability justifies inconsistency with the CLCPA, agencies have granted permits even when they do not promote the state’s GHG reduction goals. For example, the PSC recently considered a Joint Proposal from several utility companies that “call[ed] for certain capital projects to serve capacity needs⁴⁶ in the Companies’ service territories, including compressed and liquified natural gas (CNG/LNG) projects.”⁴⁷ The PSC determined that, “[b]oth have the potential to increase greenhouse gas emissions.”⁴⁸

Still, the PSC recognized that “the evaluation under CLCPA §7(2) and (3) is made in the context of the Commission’s core responsibility to ensure that ‘[e]very gas corporation, every electric corporation and every municipality . . . furnish[es] and provide[s] such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable.”⁴⁹ Since the PSC viewed its statutory mandate under N.Y. Pub. Serv. Law § 65(1) as fundamental to protecting the public health and welfare, it decided that, while “certain capital projects authorized under the Joint Proposal may be considered inconsistent with the CLCPA’s greenhouse gas emissions limits, those projects would be justified based on the need to ensure safe and reliable

⁴⁶ NJBPU has done foundational work with respect to ascertaining gas capacity in BPU Docket Nos. GO20010033 and GO19070846, London Econ. Int’l LLC, *Analysis of Natural Gas Capacity to Serve New Jersey Firm Customers* (Nov. 2021).

⁴⁷ Order Approving Joint Proposal, *supra* note 28, at 60.

⁴⁸ *Id.*

⁴⁹ Order Approving Joint Proposal, *supra* note 28, at 71 (quoting N.Y. Pub. Serv. Law § 65(1)).

service and otherwise mitigated based on, among other things, the extensive energy efficiency and demand response programs required under the proposal.”⁵⁰ The CLCPA is not a mandate to deny; rather, it is a grant of responsible authority to state agencies.

2.1.2. Rhode Island’s 2021 Act on Climate in Practice

Enacted two years after New York’s CLCPA, Rhode Island’s 2021 Act on Climate is just beginning to operationalize its mandate. But the Act already appears to carry a similar practical impact to the CLCPA—ensuring that all government agencies and departments consider whether their actions are consistent with achieving Rhode Island’s climate targets. In May of 2021, PPL Corp, National Grid, and the Narragansett Electric Company jointly petitioned the Division of Public Utilities and Carriers (the “Division”) to approve PPL’s purchase of Narragansett Electric from National Grid.⁵¹ This sale was part of a larger corporate transaction, with system-wide implications. The Rhode Island Attorney General’s office described this significant portion of the transaction as, “hand[ing] over the keys to a functional monopoly over Rhode Island’s electric and natural gas distribution systems.”⁵²

Because petitioners used a “cramped interpretation of the statutory standard which ignores the 2021 Act on Climate,” the Rhode Island Attorney General, alongside

⁵⁰ *Id.*

⁵¹ See The Office of The Attorney General of The State of Rhode Island’s Post-Hearing Brief at 3-4, Rhode Island Division of Public Utilities and Carriers, Docket No. D-21-09.

⁵² *Id.* at 2.

other key stakeholders, intervened in the docket to oppose the proposed purchase.⁵³ The Division circumscribed the intervention roles of the Attorney General and other advocates, warning that, “certain topics would not be permitted at all, including ‘interconnection costs, infrastructure costs, competition, climate change policy and natural gas sales.’”⁵⁴ Nonetheless, the intervenors filed briefs asking the Division to deny the petition because, “PPL has not offered any concrete benefit to ratepayers or the public that might offset such risk [of increased rates or service degradation], and it has eschewed any obligation to set forth concrete plans about how the transaction will further Rhode Island’s climate goals—a statutory consideration the General Assembly has mandated be part of agency decision making.”⁵⁵ Following a series of analytical missteps regarding its duty to serve the public interest,⁵⁶ the Division approved PPL Corp.’s petition. Such missteps included finding that it should wait to consider climate alignment until the Executive Climate Change Coordinating Council, the body formed

⁵³ *Id.* at 7. The Attorney General also took issue with the short shrift given to ratepayer impacts. *Id.* at 2.

⁵⁴ *Id.* at 4. These same restrictions are often levied by public utility commissions in other states, including New Jersey, which has the practical effect of limiting both the transparency and robustness of such proceedings. *See, e.g.,* In the Matter of the Petition of New Jersey Nat. Gas Co. for a Determination Concerning the S. Reliability Link Pursuant to N.J.S.A. 40:55d-19 & N.J.S.A. 48:9-25.4, No. GO15040403, 2016 WL 1159116 (Mar. 18, 2016) (“Only parties, including those who have been granted intervenor status under N.J.A.C. 1:1-16.1, have the right to present testimony at an evidentiary hearing on the issues to be determined through the hearing. As a participant, PPA does not have the right to introduce testimony into the record . . . the Board will consider [the Skipping Stone study] as public comments but afford them no evidentiary value.”) This highlights the importance of ensuring that durable legal mechanisms are in place to require climate-aligned decisions and enable stakeholders’ participation in this process.

⁵⁵ The Office of The Attorney General of The State of Rhode Island, Post-Hearing Brief, *supra* note 51, at 2.

⁵⁶ R.I. Gen. Laws § 39-3-25.

by the Act on Climate to coordinate implementation,⁵⁷ completed some unspecified “additional process.”⁵⁸

On the Attorney General’s petition for an emergency stay of the Division’s Order, the reviewing court found:

Section 42-6.2-9 of the Act sets out specific decarbonization goals for the State, including a forty-five percent reduction in greenhouse gas emissions from 1990 levels by 2030. *Importantly, § 42-6.2-8 requires all state agencies, including quasi-public agencies, to conduct their regular business with achievement of these goals in mind. Thus, in accordance with the Act, the Division is required to consider the climate impacts of the Transaction. . .*⁵⁹

The court noted that this failure would constitute an independent basis to challenge the Division’s Order on its merits.⁶⁰ It also found significant errors in the Division’s unduly narrow consideration of the public interest, including the failure to

⁵⁷ R.I. Gen. Laws § 42-6.2-2.

⁵⁸ See Report and Order on In Re: Petition of PPL Corporation, PPL Rhode Island et al. for Authority to Transfer Ownership of The Narragansett Electric Company to PPL Rhode Island Holdings, LLC, and Related Approvals at 330, Docket No. D-21-09. Note that the unavailability of specific guidelines from the Council did not preclude the Division from considering climate alignment. In NYPSC’s Order Approving Joint Proposal, the PSC acknowledged that “[t]he CLCPA is still a nascent law whose implementation remains a work in-progress in the State” and that “the [Climate Action] Council has yet to define the path New York will take with respect to CLCPA implementation.” Order Approving Joint Proposal at 72-3. However, instead of refusing to consider GHG reduction goals, the PSC “provide[d] [its] required CLCPA §§7(2) and (3) analysis in these matters in the absence of specific planning and direction from the Climate Action Council and the fact that DEC has yet to adopt regulations specific to the utility sector.” *Id.* Luckily, New Jersey is in a strong position to mandate agency alignment with GHG reduction goals. The GWRA was established in 2007, and the state’s climate action plan (the 80x50 Report) was finalized in 2020. The guidelines already exist, but they are inadequately implemented.

⁵⁹ *Neronha v. R.I. Div. of Pub. Utils. & Carriers*, C. A. PC-2022-01095 (R.I. Super. Apr. 1, 2022) (emphasis added).

⁶⁰ See *id.*

appropriately consider ratepayer impacts, and stayed the Division approval pending appeal.⁶¹

Another recent proceeding before the Rhode Island Energy Facility Siting Board (the “Board”) provides a compelling example of how Rhode Island governing bodies are producing reasoned decisions based on the state’s GHG consistency mandate.⁶² In 2021, Narragansett Electric Company (“Narragansett”) petitioned for a waiver extension to allow it to continue “to mobilize and operate the [LNG vaporization] facility without a license for the winter season of 2021 to 2022.”⁶³ The Board had granted a series of prior waivers while Narragansett debated its long-term plan for providing adequate capacity and, in this proceeding, Narragansett requested a one-year extension to the Board’s 2020 waiver of the licensing requirement.⁶⁴ Over Narragansett’s objections, the Board allowed environmental advocacy groups to intervene and assist the Board in making its determination.⁶⁵ Following a series of hearings, the Board issued an order granting the waiver, conditioning its grant on Narragansett’s compliance with Rhode Island’s 2021

⁶¹ *See id.*

⁶² *See* Order Granting Conditional Waiver And Staying Licensing Proceedings, In Re The Narragansett Electric Company D/B/A National Grid Petition For Waiver Extension, Docket SB-2021-04 (September 17, 2021) [hereinafter “Board Order 150”].

⁶³ *Id.* at 29.

⁶⁴ *Id.* at 1 (referencing SB-2019-04 Order No. 142 (Jan. 8, 2020)).

⁶⁵ *Id.* at 8 (“...the Board’s rules reserve to the Board – in Rule 1.10(b)(3) – the right to exercise its discretion to allow a party to intervene in cases where the Board determines that the party has an interest of such nature that the participation of the party seeking intervention ‘may be in the public interest.’”).

Act on Climate in its long-term plan for increasing capacity.⁶⁶ The Board, intending to build a record with substantial evidence upon which it could rule, also ordered Narragansett to produce supplemental analyses, reports, and data bearing on the nexus between the its ability to assess need and the requisite GHG-consistency analysis, noting, “the Board is requiring the Company, as a condition of the waiver, to file a comprehensive evaluation and analysis that determines what would be necessary to address the long-term capacity constraint issue with non-infrastructure initiatives, including energy efficiency, demand response, and electrification conversions.”⁶⁷ Declining intervenors’ further request for a new gas connection moratorium as a waiver condition, the Board found that, “[l]imiting gas growth may be a desirable objective, but that is an argument that should be made in the licensing proceeding for the long-term solution, based upon an evidentiary record in support of the request and not here as a condition for a waiver that will apply only to one winter.”⁶⁸ The Rhode Island 2021 Act on Climate guided the Board’s measured decision making throughout this proceeding.

⁶⁶ *Id.* at 30 (“Given the passage of the Act on Climate, the Board is directing the Company to include a comparison of the greenhouse gas emissions impacts of the final proposed solution against the greenhouse gas emissions impacts of all the alternatives considered.”). *See also* RI Attorney General, Memorandum of Law in Objection to Sea 3 Providence, LLC Petition for Declaratory Order Regarding the Rail Service Incorporation Project, Docket SB-2021-03 (May 7, 2021) (describing why the Act on Climate requires the Energy Facility Siting Board to exercise its authority over “alterations” per R.I. Gen. Laws § 42-98-3(b) with significant GHG and environmental justice consequences), *available at* http://www.ripuc.ri.gov/efsb/2021_SB_03/RI%20Attorney%20General%20050721%20Objection%20SB_2021_03.pdf.

⁶⁷ Board Order 150, *supra* note 62, at 31.

⁶⁸ *Id.* at 17. Notably, “[n]o party had objected to the Waiver being granted for the winter of 2021-2022, as limited to that one winter.” *Id.* at 18.

As detailed above, state laws requiring all governing bodies to consider whether they are helping to achieve state GHG reduction targets – or hindering their state’s ability to reach them – are essential to rational decision making. Ensuring that decision making transparently and proactively grapples with the GHG consequences flowing from those actions often serves multiple purposes, like protecting against uneconomic investments and inequitable energy burdens.⁶⁹ And while states like New York and Rhode Island have enacted GHG reduction consistency determination mandates, New Jersey has no such mechanism. In order to meet state GHG reduction goals, New Jersey can implement similar legislation requiring all Executive Branch agencies to align their actions with the GWRA limits.

2.2. Explicit Legislative Requirement to Analyze Alignment with Existing State GHG Limits

New Jersey’s governing bodies lack an explicit legislative requirement to analyze whether their regulations, administrative decisions, and orders are aligned with existing state GHG limits. This creates a fundamental *implementation* gap between the GWRA limits and current Executive Branch agency action, which may imperil New Jersey’s ability to achieve its crucial greenhouse gas reduction, climate, and

⁶⁹ See, e.g., Green Energy Alliance’s Post-Hearing Brief at 9-11, Rhode Island Division of Public Utilities and Carriers, Docket No. D-21-09 (raising questions about PPL’s ability to participate in required clean energy programs and grid modernization in a manner as “cost-effective for Rhode Island ratepayers than National Grid’s planned synergistic deployment across Rhode Island, New York, and Massachusetts”); The Office of The Attorney General of The State of Rhode Island’s Post-Hearing Brief, *supra* note 51, at 11-13 (discussing the critical importance of considering reliability, cost, and climate consequences in conjunction).

environmental justice goals. And while much has been set in motion by a rough patchwork composed of existing statutes, the 2019 Energy Master Plan, Executive Orders, agency orders, and proposed regulations, New Jersey still lacks a robust, overarching framework designed to ensure each governing body's ongoing work and operations align with the state's greenhouse gas reduction targets and environmental justice⁷⁰ goals.

2.2.1. Alignment with GWRA reductions and NJDEP-determined GHG limits

This administrative gap is at least partially a result of the GWRA's primary reliance on, and directive to, NJDEP to steward economy-wide GHG reductions. Yet by their very nature, these GHG reductions will require multiple agencies and commissions to independently ensure that their rulemakings, decisions, orders, and other significant actions are consistent with the GWRA limits and state environmental justice goals. While the GWRA directs *NJDEP* to "adopt rules and regulations establishing interim benchmarks necessary to achieve the 2050 limit, and measures necessary to achieve the 2050 limit and the established interim benchmarks," it levies no such directive on other Executive Branch agencies or departments.⁷¹ Consequently,

⁷⁰ See *infra* Part 4.

⁷¹ N.J. Stat. Ann. § 26:2C-41. And although NJDEP is required to *adopt* such implementing measures no later than April 2022, currently NJDEP is lagging behind this requirement for all sectors besides transportation. See N.J. Stat. Ann. § 26:2C-41 (requiring such regulatory adoption within 18 months of transmitting its 80x50 Report); N.J. Stat. Ann. § 26:2C-42 (80x50 Report due "[n]o later than one year after the effective date of P.L.2019," which was July 23, 2019); N.J.A.C. 7:27-31 (Advanced Clean Trucks Program); N.J.A.C. 7:27-33 (Fleet Reporting

NJDEP has produced an excellent roadmap with suggested measures, yet those measures must be internalized and acted upon by New Jersey's Board of Public Utilities ("NJBPU"), Department of Community Affairs ("NJDCA"), and others in order to comply with the GWRA's mandate.⁷² The comprehensive nature of the transformations required across all sectors, to be implemented by all Executive Branch agencies and departments, strongly suggests that these bodies should be given both the unambiguous authority and the unequivocal mandate to ensure that their actions will not be inconsistent with GWRA-required reductions and NJDEP-established limits, without appropriate justification, alternatives analysis, and mitigation.

Explicit new legislation is necessary, as the status quo has been inconsistent with achieving GWRA reductions and the EMP goals. A brief review of *In re Centex Homes* (2009)⁷³ illuminates this point. In that case, a New Jersey court deployed questionable reasoning to preclude NJBPU from aligning its regulations with the State Plan and the smart growth principles delineated therein. The court framed the issue as follows, "[a]t the heart of the present appeal is whether the authority of the BPU to incorporate smart growth principles must be found in the statutory provisions enabling it to act in the

Requirements). *See also* N.J. Admin. Code § 7:27D et. seq. (regulations governing Global Warming Solutions Fund administration).

⁷² *See infra* note 83.

⁷³ *In re Centex Homes, LLC*, 411 N.J. Super. 244 (App. Div. 2009).

field or whether such authority is properly derived from the general provisions of the State Planning Act.”⁷⁴

First, the court found that the “State Plan carries no regulatory effect”⁷⁵ and found no specific mention of NJBPU in the State Planning Act, or in the EOs intended to guide agency action thereunder. Then, the court ignored the legislature’s use of the permissive term, “may,” in the Board’s Main Extension statute originating in 1911,⁷⁶ to find that NJBPU *was required* to order extensions into areas inconsistent with the State Plan smart growth regions.⁷⁷ The court proceeded to reject NJBPU’s assertion that it had a statutory mandate under N.J.S.A. 48:2-23 to “conserve and preserve” the environment, and ignored the plain text of that statute as well.⁷⁸ It ultimately ruled that, “[w]e hold the authority must be stated in the Board’s enabling statute or, if expressed in a general statutory provision, the authority must identify its intent to delegate additional or incidental powers to the administrative agency granted such authority.”⁷⁹

Thus while the GWRA provides that “the actions, decisions, determinations and rulings of the State Government with respect to energy shall to the maximum extent

⁷⁴ *Id.* at 654.

⁷⁵ *Id.* at 656.

⁷⁶ N.J.S.A. 48:2-27 (governing Board approval of requests to extend utility service).

⁷⁷ *Id.* at 655 (“Despite the Legislature’s use of the word “may,” we have held that N.J.S.A. 48:2–27 is mandatory, and that the BPU must order an extension. . .”).

⁷⁸ *Id.* at 654 (finding that since “the BPU was not vested with the authority to consider environmental concerns...at the time of the enactment of N.J.S.A. 48:2-27, the Legislature could not have intended N.J.S.A. 48:2-27 to apply to environmental and land use concerns.”).

⁷⁹ *Id.*

practicable and feasible conform with the energy master plan,”⁸⁰ analogous language in the State Planning Act calling upon “several levels of government [to] cooperate in the preparation of and adherence to sound and integrated plans[,]”⁸¹ was insufficient to persuade the court that NJBPU could take affirmative regulatory action to implement the State Plan. Of course, there are distinguishing factors between the two scenarios, but having explicit legislative authority extending to each Executive Branch agency and department ensures that New Jersey’s governing bodies can expeditiously take the economy-wide actions essential to meeting New Jersey’s decarbonization targets.

2.3. Proposed GHG-Reduction Consistency Analysis Amendments to GWRA

To assist New Jersey’s Executive Branch agencies and departments in achieving climate alignment and ensuring that their actions are well-grounded in transparent records supporting their decision making, New Jersey can look to other states’ laws designed to achieve these same goals. New Jersey can draw heavily from the CLCPA’s provisions requiring all Executive Branch agencies and departments to articulate whether their actions are consistent with GHG-reduction goals, and, if the resulting analysis determines inconsistency, to discuss why the agency or department will pursue

⁸⁰ N.J. Stat. Ann. § 52:27F-15.

⁸¹ N.J.S.A. 52:18A-196(b).

the action nonetheless. A ready way to do this would be to amend the existing GWRA to include the following language:

In considering and issuing permits, licenses, renewals of such, and other administrative approvals and decisions, including, but not limited to, the execution of grants, loans, and contracts, all Executive Branch agencies and departments shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions reduction mandates and decarbonization goals established by the GWRA and Energy Master Plan, and resulting GHG emissions limits produced by NJDEP in its 2020 GWRA 80x50 Report. Where such decisions are deemed to be inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits and decarbonization goals, each agency and department shall provide a detailed statement of justification as to why such limits/criteria may not be met, and identify alternatives or greenhouse gas mitigation measures to be required where such project is located.⁸²

This three-step analytical framework would help ensure that Executive Branch agencies and departments consider EMP goals and GWRA limits in their decision making as follows: (1) the body must consider whether its decision would be inconsistent with or interfere with the attainment of the statewide GHG emission limits; (2) if the issuance would be inconsistent with or interfere with the statewide GHG emissions limits, the body must provide a statement of justification for the project notwithstanding the inconsistency; (3) if there is sufficient justification, the body would also have to identify

⁸² To ensure universal compliance, GWRA 26:2C-39 (Definitions) could be amended to include the language of EO-23: “Executive Branch departments and agencies’ shall mean any of the principal departments in the Executive Branch of State government and any agency, authority, board, bureau, commission, division, institution, office, or other instrumentality within or created by any such department, and any independent State authority, commission, instrumentality, or agency over which the Governor exercises executive authority, as determined by the Attorney General.”

alternatives or GHG mitigation measures to be required for the project.⁸³ This simple analytical pathway provides a critical tether between the work that governing bodies are doing and the underlying rationale for doing that work—meeting the GWRA limits and following the EMP pathways.

Including this provision does not expand the authority of New Jersey Executive Branch agencies or departments. They already have the authority to consider the GWRA limits in their decision making where their decisions are required to be consistent with other state laws⁸⁴ or they are obliged to ensure parties they regulate operate consistently with other state laws.⁸⁵ And the GWRA itself commands that, “the actions, decisions, determinations and rulings of the State Government with respect to energy shall to the maximum extent practicable and feasible conform with the energy

⁸³ This dovetails with analytical pathways that experts have recommended to NJBPU to ensure that gas utilities are making climate aligned decisions that protect ratepayers. *See, e.g.*, Comments of Environmental Defense Fund, New Jersey Conservation Foundation, And Columbia Law School’s Sabin Center For Climate Change Law, Exhibit C, Verified Statement of Gregory Lander of Skipping Stone in Response to London Economics International Report, at 6 (February 7, 2022), BPU Docket Nos. GO20010033 and GO19070846 (“Based on the data and information submitted to date in this proceeding, Board Staff should recommend that the Commissioners establish a robust gas planning process to ensure that GDCs are not seeking to build or contracting to support yet-to-be built, capacity that is: (1) unneeded based on existing data showing available capacity in excess of 1 Bcfd [billion cubic feet per day] beyond evidenced demand and more than 2.4 Bcfd beyond current GDC pipeline capacity; (2) likely to be more expensive for ratepayers than securing supply in one of the forms discussed herein; and (3) in direct conflict with Board orders defining gas energy efficiency targets, the state’s clean energy laws, the Energy Master Plan, and greenhouse gas goals and mandates.”).

⁸⁴ *See, e.g.*, N.J.S.A. 13:9B (NJDEP authority to deny wetlands permits where issuing would be inconsistent with the public interest or other state laws).

⁸⁵ *See, e.g.*, N.J.S.A. 48:2-16 (empowering NJBPU to require utilities to comply with state laws); N.J. Stat. Ann. § 48:2-23 (empowering NJBPU to require utilities to “furnish safe, adequate and proper service, *including furnishing and performance of service in a manner that tends to conserve and preserve the quality of the environment and prevent the pollution of the waters, land and air of this State. . .*”) (emphasis added).

master plan,”⁸⁶ but does not provide a ready analytical framework for such decisions. The GWRA mandate is articulated more narrowly than helpful, explicitly applicable “with respect to energy” but not with respect to all actions, decisions, determinations, and rulings with GHG impacts. In various forms, agencies typically have the obligation to ensure that their decisions serve the public interest, under their relevant organic statutes and later delegations of legislative powers. Explicitly including GHG-reduction consistency analysis and disclosure would clarify these obligations.⁸⁷

3. MANDATE TO ADOPT RULES, REGULATIONS, AND MEASURES TO IMPLEMENT THE GWRA

New Jersey would also benefit from a legislative mandate requiring all Executive Branch agencies and departments to adopt rules, regulations, and measures to *implement* the GWRA. This Part will present the second critical mechanism for helping New Jersey to achieve GHG-reduction goals within each agency’s jurisdiction and purview: extending the GWRA’s directive to “adopt rules and regulations...to achieve

⁸⁶ N.J. Stat. Ann. § 52:27F-15.

⁸⁷ Directives requiring each state agency to consider state climate goals can sharpen existing statutory authorizations that mandate consideration of the public interest, environment, health and welfare. *See, e.g.*, Conservation Law Foundation, Response to Questions of Law Regarding Sea 3 Providence, LLC Petition for Declaratory Order Regarding the Rail Service Incorporation Project, Docket SB-2021-03 at 11-12 (May 7, 2021) (“The ability of the State to meet its climate goals is important to the general welfare of the State...Section 42-98-3(b) of the Energy Facility Siting Act states that an alteration means a ‘significant modification’ that ‘will result in a significant impact’ on the environment, or the public health, safety, and welfare. If a project threatens to frustrate implementation of state environmental laws or jeopardize the achievement of state environmental policy goals, that is strong evidence that the project will have a ‘significant impact on the environment.’”), *available at* http://www.ripuc.ri.gov/efsb/2021_SB_03/SB-2021-03%20-%20Brief%20of%20CLF.pdf.

the 2050 limit and the established interim benchmarks”⁸⁸ to cover all Executive Branch agencies and departments. New Jersey’s Executive Branch agencies would benefit from an explicit directive to promulgate rules and regulations aligned with NJDEP’s 2020 GWRA 80x50 Report recommendations, designed to meet the NJDEP-established limits, and implement the GWRA’s mandate.⁸⁹ Together with the requirement that these bodies undertake an explicit and transparent climate-alignment analysis, such amendments to the GWRA would galvanize the state’s work on building electrification, accelerate the pace of other critical 80x50 and EMP-designated pathways to GWRA compliance, and ensure that each governing body understands it has both the authority and the obligation to do its part in the economy-wide transformation that must happen to achieve the existing legally-mandated reductions.⁹⁰

⁸⁸ N.J. Stat. Ann. § 26:2C-41.

⁸⁹ NJDEP itself recognizes that, “[a]s explained in the 80x50 Report, these measures require action by other State agencies, including the BPU, the Department of Transportation (DOT), the Motor Vehicle Commission (MVC), and the Department of Community Affairs (DCA). Recognizing that the Department, through its regulatory authorities and programs, could not alone facilitate the cross-sector transformation necessary to limit the worsening adverse impacts of climate change that continued emissions will generate, the 80x50 Report recommended a number of initiatives for both Executive Branch agency and legislative action.” 2022 NJ REG TEXT 604177 (NS) (January 18, 2022) (internal citations omitted).

⁹⁰ Absent a durable mandate requiring each governing body act to meet the legally required GHG-reductions, New Jersey will continue to be vulnerable to attacks on the pace of its GWRA implementation. *See, e.g.*, 2022 NJ REG TEXT 604177 (NS) (January 18, 2022); *EmpowerNJ v. Department of Environmental Protection*, No. 001461-21 (N.J. Super. Ct. App. Div. Jan. 19, 2022); The Philadelphia Inquirer, “N.J. environmentalists increasingly at odds with Gov. Murphy, sue administration over what they say is inaction on climate change,” *available at* <https://www.inquirer.com/news/new-jersey-murphy-lawsuit-climate-change-20220121.html> (reporting litigation filed challenging NJDEP’s denial of petition asking for regulation to achieve a 50% reduction in climate pollutants by 2030, because meeting the GHG reduction goals “requires deliberate and coordinated action by all levels of government, economic sectors, communities, and individuals’ that will impact buildings, transportation, and electricity generation systems. No one state agency can issue a set of regulations that will address all that’s needed to be done by other departments.”).

3.1. Proposed Amendments to GWRA Aligning All Executive Branch Agencies' Directives with Existing GWRA NJDEP Directive

As noted in Part 2.2 above, while the GWRA specifically tasks NJDEP with adopting “measures necessary to achieve the 2050 limit and the established interim benchmarks,”⁹¹ it does not explicitly place the same requirement on its sister agencies. NJDEP recognizes that, “the Department alone cannot mandate all of the measures necessary to achieve the 50x30 or 80x50 goals. . . .”⁹² Directly charging those additional agencies with implementing all relevant measures necessary to achieve the 2050 limit and the established interim benchmarks would ensure that all Executive Branch agencies and departments have unambiguous grounding and authority to delve into their essential work, including ensuring that any entities they regulate affirmatively assist in accomplishing that mandate. As with the GHG-reduction consistency determinations, there are ample sister state laws from which to draw to assist New Jersey’s rapid progress towards meeting its existing GHG limits by affirmatively engaging *all* Executive Branch agencies and departments. The GWRA could be amended to achieve this result by including the following provision:

⁹¹ N.J. Stat. Ann. § 26:2C-41.

⁹² 2022 NJ REG TEXT 604177 (NS) (January 18, 2022).

No later than 18 months after the department adopts rules and regulations establishing the interim benchmarks necessary to achieve the 2050 limit, and measures necessary to achieve the 2050 limit and the established interim benchmarks, all Executive Branch agencies and departments shall adopt rules, regulations, and measures necessary to achieve the 2050 limit and the established interim benchmarks.⁹³

Such language would enable NJDCA, NJBPU, and others to implement NJDEP's 2020 GWRA 80x50 Report recommendations and EO-274's goals expeditiously, with unequivocal authority and unambiguous directives commensurate with the critical nature of our climate crisis.

Other states have issued explicit directives mandating all state agencies to affirmatively regulate to achieve their legally-required GHG reduction targets and limits. For example, New York's CLCPA § 8 mandates that *all* state agencies "shall promulgate regulations to contribute to achieving the statewide greenhouse gas emissions limits established in article 75 of the environmental conservation law."^{94, 95} As detailed in Part 2.1.2, Rhode Island's 2021 Act on Climate similarly provides that "[a]ddressing the impacts on climate change shall be deemed to be within the...obligations of all state departments, agencies, commissions, councils, and

⁹³ See *supra* note 83.

⁹⁴ CLCPA § 8.

⁹⁵ Some states have used Executive Orders to put forth this directive. For example, California's Governor Brown issued Executive Order No. B-30-15, providing that "[a]ll state agencies with jurisdiction over sources of greenhouse gas emissions shall implement measures, pursuant to statutory authority, to achieve reductions of greenhouse gas emissions to meet the 2030 and 2050 greenhouse gas emissions reductions targets." Cal. Exec. Order No. B-30-15 (Apr. 29, 2015).

instrumentalities,” not only “in the exercise of [their] existing authority,” as it also explicitly grants all governing bodies statutory “authority to promulgate rules and regulations necessary to meet the greenhouse gas emission reduction mandate established by § 42-6.2-9.”⁹⁶ Targeting the state public utilities commission, Maine enacted a law requiring the commission to, “[i]n executing its duties, powers and regulatory functions...facilitate the achievement by the State of the greenhouse gas emissions reduction levels set forth in Title 38 section 576-A.”⁹⁷ And targeting the Transportation Commission and Office of Transportation Safety, Colorado passed a bill directing it to promulgate rules that “help[] the state meet its statewide greenhouse gas pollution reduction targets established in section 25-7-102 (2)(g).”⁹⁸ To assist New Jersey in meeting its legally

⁹⁶ 42 R.I. Gen. Laws Ann. § 42-6.2-8, referencing § 42-6.2-9 (“It is hereby established that the state shall reduce its statewide greenhouse gas emissions to the targets set forth in § 42-6.2-2(a)(2)(i), as those targets may from time to time be revised, and that achieving those targets shall be mandatory under the provisions of this chapter.”) This same Act commands all state agencies to address climate change impacts. Other states have included similar directives with respect to adaptation and resilience. *See, e.g.*, ORS 468A.205 (Oregon’s Legislative Assembly “...declares that it is the policy of this state to reduce greenhouse gas emissions in Oregon pursuant to the [state’s] greenhouse gas emissions reduction goals [and]...declares that it is the policy of this state for state and local governments, businesses, nonprofit organizations and individual residents to prepare for the effects of global warming and by doing so, prevent and reduce the social, economic and environmental effects of global warming.”).

⁹⁷ H.P. 1251 - L.D. 1682, An Act to Require Consideration of Climate Impacts by the Public Utilities Commission and To Incorporate Equity Considerations in Decision Making by State Agencies (2021) Section 2, amending 35-A MRSA §103-A.

⁹⁸ SB 21-260. The bill includes a new § 43-1-128, C.R.S., which directs the agencies to “engage in an enhanced level of planning, modeling, and other analysis to minimize the adverse environmental and health impacts of planned transportation capacity projects.” Demonstrating the power of such a mandate, the agencies revised the rules governing statewide transportation planning process and transportation planning regions. 2 CCR 601-22. The amendments, effective as of January 30, 2022, established GHG transportation planning reduction levels, “initiated at the direction of SB 21-260, which directed the Transportation Commission to take steps in the planning process to account for and reduce the impacts of Greenhouse gases resulting from transportation projects.” Code of Colorado Regulations Official Publication of the State Administrative Rules (24-4-103(11) C.R.S.). The amendments also “address the Colorado General Assembly’s directive to reduce statewide GHG pollution in § 25-7-102(2)(g), C.R.S., and the directive for transportation planning to consider environmental stewardship and reducing GHG emissions, § 43-1-1103(5), C.R.S.” *Id.*

required GHG-reduction goals, and achieving its broader climate protection goals, New Jersey should expand its GWRA mandate to explicitly require an all-of-government effort in this task. Absent action across all agencies, state action on climate alignment will likely be delayed, cost more, and become increasingly difficult.

4. MANDATE TO CONSIDER NEW JERSEY'S PROMISE OF ENVIRONMENTAL JUSTICE AND ADOPT ACTION PLANS

New Jersey would benefit from a legislative mandate requiring all Executive Branch agencies to consider whether they are acting in accordance with New Jersey's promise of environmental justice and adopt action plans to ensure consistent practices. Like its strong climate goals, New Jersey's environmental justice policies have distinguished the state as a leader. New Jersey has officially acknowledged the universal need for a healthy and clean environment since Governor McGreevy signed Executive Order No. 96 in 2004, and called for "[a]ll Executive Branch departments, agencies, boards, commissions and other bodies involved in decisions that may affect environmental quality and public health" to consider the "needs of low-income and communities of color, and [to] seek to address disproportionate exposure to environmental hazards."⁹⁹ Since 2004, the state has continued to prioritize fair decision making when government action could impact the environment, communities, homes,

⁹⁹ EO No. 96 (2004).

and health of residents of the State of New Jersey, “regardless of race, ethnicity, color, national origin, or income.”¹⁰⁰

In 2018, Governor Murphy signed Executive Order No. 23 (“EO-23”) which reiterated the call to protect overburdened communities from the disproportionate impact of environmental degradation.¹⁰¹ The 2020 Environmental Justice Law¹⁰² requires NJDEP to evaluate the impacts of some facilities on overburdened communities, but there must be a clear legislative mandate directing *all* agencies to consider whether their actions are consistent with the state’s environmental justice goals.¹⁰³ To fulfill New Jersey’s promise of environmental justice, New Jersey can institute the same two mechanisms, consistency determinations and mandates, to implement the state’s already-identified pathways to justice, for all of its governing bodies.

4.1. Other States Require Agency Actions to Align with State Environmental Justice Goals

Several states have enacted legislative mandates directing agencies to consider the environmental justice impacts of their actions and center justice principles. For example, New York’s CLCPA requires that, “all state agencies, offices, authorities, and divisions shall...prioritize reductions of greenhouse gas emissions and co-pollutants in

¹⁰⁰ EO No. 131 (2009).

¹⁰¹ EO No. 23 (2018).

¹⁰² N.J.S.A. § 13:1D-157 et seq.

¹⁰³ The gap between EO-23’s vision and the EJ Law’s mandate is examined below, at Part 4.2.

disadvantaged communities.”¹⁰⁴ Analogously, the Virginia Environmental Justice Act makes it “the policy of the Commonwealth to promote environmental justice and ensure that it is carried out throughout the Commonwealth,”¹⁰⁵ where environmental justice includes “the equitable consideration of all people whereby no group of people bears a disproportionate share of any negative environmental consequence resulting from an industrial, governmental, or commercial operation, program, or policy.”¹⁰⁶

In the past year alone, multiple states have enacted laws adopting environmental justice principles, practices, and priorities. Colorado passed its Environmental Justice Act, asserting that “State action to correct environmental injustice is imperative, and state policy can and should improve public health and the environment and improve the overall well-being of all communities.”¹⁰⁷ Similarly, in Massachusetts, “[t]o further the environmental justice principles the secretary [of energy and environmental affairs] shall direct its agencies, including the departments, divisions, boards and offices under

¹⁰⁴ CLCPA § 7(3). *See* ECL § 75-0101(5) (defining “disadvantaged communities” as “communities that bear burdens of negative public health effects, environmental pollution, impacts of climate change, and possess certain socioeconomic criteria, or comprise high-concentrations of low- and moderate- income households, as identified pursuant to section 75-0111 of this article.”). For New Jersey, which is part of PJM’s wholesale electric market, it may be more effective to analyze and address GHG reductions separately from co-pollutants.

¹⁰⁵ Va. Code Ann. § 2.2-235 (2020).

¹⁰⁶ Va. Code Ann. § 2.2-234 (“‘Environmental justice’ means the fair treatment and meaningful involvement of every person, regardless of race, color, national origin, income, faith, or disability, regarding the development, implementation, or enforcement of any environmental law, regulation, or policy” and “‘Fair treatment’ means the equitable consideration of all people whereby no group of people bears a disproportionate share of any negative environmental consequence resulting from an industrial, governmental, or commercial operation, program, or policy.”).

¹⁰⁷ HB 21-1266, 2021 reg. sess. (Co. 2021).

the secretary's control and authority,¹⁰⁸ to consider the environmental justice principles in making any policy...."¹⁰⁹ Codifying the recommendations of its environmental justice task force,¹¹⁰ Washington State's 2021 Healthy Environmental for All Act mandates agencies to seek "to reduce or eliminate the environmental harms and maximize the environmental benefits created by the significant agency action on overburdened communities and vulnerable populations" to the extent "feasible and consistent with the underlying statute being implemented."¹¹¹ And, per Rhode Island's 2021 Act on Climate, any GHG reduction plan "shall include equitable transition to climate compliance for environmental justice populations, redress past environmental and public health inequities, and include a process where the interests of and people from populations most vulnerable to the effects of climate change and at risk of pollution, displacement, energy burden, and cost influence such plan."¹¹²

As recently as April 2022, Maryland's legislature passed the Climate Solutions Now Act of 2022, which mandates agencies to consider "the likely impact of the

¹⁰⁸ The office of energy and environmental affairs directs the Department of Agricultural Resources, Department of Conservation and Recreation, Department of Energy Resources, Department of Environmental Protection, Department of Fish and Game, and Department of Public Utilities.

¹⁰⁹ M.G.L. c. 30, § 62(k).

¹¹⁰ SB 5141, 67th leg., reg. sess. (Wa. 2021) ("This chapter implements the recommendations of the environmental justice task force established in section 221(48), chapter 415, Laws of 2019 entitled "Report to the Washington state governor and legislature, Environmental Justice Task Force: Recommendations for Prioritizing EJ in Washington State Government (October 2020).").

¹¹¹ *Id.*

¹¹² R.I. Gen. Laws § 42-6.2-2(a)(2)(v).

agency’s decisions on disproportionately affected communities. . . .”¹¹³ New Jersey can use the directives passed by other states to inform new legislative mandates that explicitly authorize its agencies to accord with environmental justice goals.

4.2. Explicit Legislative Requirement to Analyze Alignment with New Jersey’s Promise of Environmental Justice

New Jersey governing bodies lack an explicit legislative requirement to analyze whether their regulations, administrative decisions, and orders align with the state’s promise of environmental justice. New Jersey’s administrative gap in considering environmental justice impacts arises primarily from the mismatch between the broad scope of EO-23’s directive that “all Executive Branch departments and agencies [consider] Environmental Justice in implementing their statutory and regulatory responsibilities,” and the more limited legislative commandment of N.J.S.A. § 13:1D-157 et seq. (“EJ Law”), which specifically tasks NJDEP with considering impacts to overburdened communities¹¹⁴ when exercising its permitting authority with respect to any of eight covered types of facilities, under enumerated statutory schemes.¹¹⁵ NJDEP

¹¹³ See SB 528, amendment to MD. Environment Code Ann. § 2–1305.5(d).

¹¹⁴ N.J. Stat. Ann. § 13:1D-158 (“‘Overburdened community’ means any census block group, as determined in accordance with the most recent United States Census, in which: (1) at least 35 percent of the households qualify as low-income households; (2) at least 40 percent of the residents identify as minority or as members of a State recognized tribal community; or (3) at least 40 percent of the households have limited English proficiency.”); see <https://www.nj.gov/dep/ej/communities.html> for the overburdened communities lists and mapping in accordance with the EJ law, as well as GIS and other relevant data.

¹¹⁵ N.J. Stat. Ann. § 13:1D-158 circumscribes its requirement for environmental justice assessments and procedural safeguards to NJDEP, when considering certain facilities (major source of air pollution; resource recovery facility or incinerator; sludge processing facility, combustor, or incinerator; sewage treatment plant with a

has not yet issued its proposed regulations. But even when proposed, such regulations will be designed to implement the specific bounds of the EJ Law,¹¹⁶ rather than fulfill the spirit of the Executive Order by delineating the process by which NJDEP will consider the impact of its regulations, orders, and non-covered decisions on overburdened communities. New Jersey's overburdened communities would benefit from legislation that enshrines EO-23's directive and NJDEP's *Furthering the Promise*¹¹⁷ roadmap into statute and elucidates how all Executive Branch agencies and departments must both consider and, if relevant, center, overburdened communities in their work. New Jersey

capacity of more than 50 million gallons per day; transfer station or other solid waste facility, or recycling facility intending to receive at least 100 tons of recyclable material per day; scrap metal facility; landfill, including, but not limited to, a landfill that accepts ash, construction or demolition debris, or solid waste; or medical waste incinerator) and certain permits (those issued by the department for a regulated activity under the following State laws: R.S.12:5-1 et seq.; P.L.1975, c.232 (C.13:1D-29 et al.); the "Solid Waste Management Act"; section 17 of P.L.1975, c.326 (C.13:1E-26); the "Comprehensive Regulated Medical Waste Management Act"; P.L.1989, c.151 (C.13:1E-99.21a et al.); the "New Jersey Statewide Mandatory Source Separation and Recycling Act"; the "Pesticide Control Act of 1971"; "The Wetlands Act of 1970"; the "Freshwater Wetlands Protection Act"; the "Coastal Area Facility Review Act"; the "Highlands Water Protection and Planning Act"; the "Air Pollution Control Act (1954)"; the "Water Supply Management Act"; P.L. 1947, c.377 (C.58:4A-5 et seq.); the "Water Pollution Control Act"; P.L.1986, c.102 (C.58:10A-21 et seq.); or the "Flood Hazard Area Control Act.").

¹¹⁶ For example, the impact of the EJ Law is diminished by its differentiation between permits for new facilities and permits for renewals or expansions. N.J. Stat. Ann. § 13:1D-160. Under the EJ Law, NJDEP must deny permits for a new facility if approval would, "together with other environmental or public health stressors affecting the overburdened community, cause or contribute to adverse cumulative environmental or public health stressors that are higher than those borne by other communities." § 13:1D-160(c). But if NJDEP determines that a new facility will serve a compelling public interest, it may grant a modified permit. *Id.* However, even if the same consequences of approval will occur, the EJ Law allows NJDEP to issue renewals or modifications and "apply conditions to a permit for the expansion of an existing facility or the renewal of an existing facility's major source permit." § 13:1D-160(d). In contrast to these provisions of New Jersey's EJ Law, a bill recently passed by the New York legislature states, in part: "No permit shall be approved or *renewed* by the department if it may cause or contribute to, either directly or indirectly, a disproportionate or inequitable or both disproportionate and inequitable pollution burden on a disadvantaged community." S8830, 2021-2022 reg. sess. (N.Y. 2022) (emphasis added). The New York law is a template for a robust permitting system that not only stops new burdens but can help remedy past disproportionate impacts as well.

¹¹⁷ See New Jersey Dep't of Env't Prot, *Furthering the Promise: A Guidance Document for Advancing Environmental Justice Across State Government* (Sep. 2020) [hereinafter *Furthering the Promise*], available at <https://www.nj.gov/dep/ej/docs/furthering-the-promise.pdf>. See also N.J. Stat. Ann. § 52:14B-3a (articulating limits on regulatory guidance documents that have not been adopted as a rule).

would be joining the ranks of other states that have addressed this gap by enacting statutory directives requiring their Executive Branch agencies and departments to consider the environmental justice impacts of their decisions, proposed regulations, and other significant actions, and to actively center justice principles.¹¹⁸

4.3. Proposed Environmental Justice Consistency Analysis and Incorporation of Action Plan Amendments to the EJ Law

NJDEP has, together with the Environmental Justice Interagency Council (“EJIC”) and the Environmental Justice Advisory Council (“EJAC”), done significant work towards implementing Governor Murphy’s EO-23. This substantial investment of time and resources can be given additional durability and force by incorporating NJDEP’s guidance and action plan, “Furthering the Promise,” into New Jersey’s Environmental Justice Act, N.J. Stat. § 13:1D-157 et seq. Doing so would ensure that all Executive Branch agencies and departments are considering the impacts of their operations and decisions on communities of concern.¹¹⁹ While there are many paths to

¹¹⁸ At the federal level, a sweeping and inclusive bill, the “Environmental Justice for All Act,” was introduced in 2021, which contemplates an all-of-government approach to centering justice principles. *See* Environmental Justice For All Act, H.R. 2021, 117th Cong., § 7 (2021) (requiring agencies to assess environmental justice impacts of their programs, prohibiting disparate impacts of federal laws and programs).

¹¹⁹ The environmental injustices that overburdened communities in New Jersey face cannot be solved without the implementation of plans like “Furthering the Promise.” Climate related impacts will continue to weigh most heavily on vulnerable populations. JAMES SHOPE ET AL., STATE OF THE CLIMATE: NEW JERSEY 2021. Rutgers (2022) available at <https://njclimateresourcecenter.rutgers.edu/wp-content/uploads/2022/04/State-of-the-Climate-Report-NJ-2021-4-18.pdf>. In New Jersey, “15% of census tracts are classified as having high social vulnerability populations. Of these areas, almost 70% lie within the current 100-year floodplain, a population of more than 675,000 persons with an average density of approximately 9,500 persons per square mile.” *Id.*

ensure that such consideration remains a strong, durable legal requirement binding all Executive Branch agencies and departments, below is one suggested approach towards ensuring that such considerations are embedded in all new agency actions, as well as requiring that each body has both procedural and substantive plans in place to fulfill New Jersey's promise of environmental justice:

In considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, all state agencies, offices, authorities, and departments shall assess whether those actions may disproportionately impact communities of concern as identified pursuant to N.J. Stat. § 13:1D-158. If the proposed action may have such an impact on a community of concern, the agency, office, authority, or department will identify feasible alternatives to such actions that do not have such impacts, along with proposed measures to mitigate any such potential impacts.

All state agencies, offices, authorities, and departments shall complete their Executive Branch Initial Assessments, as defined, delineated, and described in *Furthering the Promise: A Guidance Document for Advancing Environmental Justice Across State Government*, no later than ___ days after the effective date of P.L. ____.¹²⁰ All state agencies, offices, authorities, and departments shall complete their Executive Branch Action Plan as defined, delineated and directed in *Furthering the Promise: A Guidance Document for Advancing Environmental Justice Across State Government*, no later than ___ days¹²¹ after their Initial Assessments, and adopt rules,

¹²⁰ *Furthering the Promise* provided that Executive Branch Initial Assessments are supposed to be adopted no later than 60 days after March 4, 2022. See *Furthering the Promise*, *supra* note 117, at 16 (setting out a timeline triggered by Governor Murphy's termination of the COVID-19 public health emergency); EO No. 292 (2022) (lifting the public health emergency). As discussed above, the timetable encapsulated in this guidance document is not enshrined in law. If these are completed in compliance with the proposed timeline, this language of this provision can likewise be updated.

¹²¹ *Furthering the Promise* also provided that Executive Branch Action Plans are supposed to be finalized no later than 240 days after March 4, 2022. See *Furthering the Promise*, *supra* note 117, at 16; EO No. 292 (2022). If these are completed in compliance with the proposed timeline, and prior to passage of this proposed statutory amendment, this language of this provision can likewise be updated.

regulations, and measures to implement their respective Action Plans within ____ days of their finalization.¹²²

In practice, these provisions would ensure that when an agency proposes new regulations, for example, it will assess, disclose, consider alternative actions, and mitigate potential environmental justice impacts of its proposal on communities of concern.¹²³ They would also ensure that there is significant and meaningful opportunity for community participation, feedback, and input across all Executive Branch agencies and departments, in accordance with well-developed Action Plans operationalized by both procedural and substantive regulations.

As detailed in Parts 2, 3, and 4, consistency analyses, disclosures, and alignment requirements for agency decisions and actions, for both GHG-limits and environmental justice goals, are critical mechanisms that other states have adopted to accelerate climate-alignment and assist their agencies in ensuring the promise of environmental justice. New Jersey would be well-served to create similar analytical overlays, which provide a durable legal framework that will help inform and guide new actions and strategies with which its governing bodies are now independently grappling.

¹²² *Furthering the Promise* does not propose legally durable mechanisms for operationalizing these action plans and, as discussed above, it does not bear the force of law.

¹²³ See, e.g., NGO Comments on Rule Proposal: Control and Prohibition of Carbon Dioxide Emissions, DEP Docket No. 07-21-11, at 3-5 (submitted Mar. 7, 2022) (copy available upon request) (detailing the kinds of equity assessments that NJDEP should have conducted when proposing its rule governing fossil-fuel boilers in order to fulfill the promise of justice embodied in EO-23).

5. THE COST OF ACHIEVING THE GWRA-MANDATED GHG REDUCTIONS WITHOUT A REQUIREMENT TO MAKE CLIMATE-ALIGNED AND EQUITY-ALIGNED DECISIONS

Achieving the GWRA-mandated GHG reductions will be more costly and exacerbate existing inequities without a requirement for consistent, climate-aligned and equity-aligned decision making. Continuing to take actions that are inconsistent with the GWRA today will entrench the uses, practices, infrastructure, and socioeconomic disparities that make achieving the GHG reductions mandated by the GWRA more costly. The world is suffering the increasing costs of climate impacts, adaptation, and resilience, and New Jersey is not an exception.¹²⁴ New Jersey cannot afford the future of the status quo, and the longer the delay, “the greater the adjustments we’ll have to make to get to zero [emissions] — and the more likely we are to face irreversible

¹²⁴ See IPCC, *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (P.R. Shukla et al. eds., Cambridge Univ. Press 2022), available at <https://www.ipcc.ch/report/ar6/wg3/> (Delaying a peak past 2025 means unavoidable and unnecessary economic losses); *The turning point: A new economic climate in the United States*, Deloitte (2022), available at <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/about-deloitte/us-the-turning-point-a-new-economic-climate-in-the-united-states-january-2022.pdf> (“The research demonstrates that invested in an accelerated decarbonization timeline now will cost far less than if the investments are made later – in terms of the economic impact, the potential climate damage, and the shared gains of transition for all regions, industries, and workers across the US.”); Energy Innovation, *The Costs of Delay* (Jan. 2021), available at https://energyinnovation.org/wp-content/uploads/2021/01/Cost_of_Delay.pdf; EMP, *supra* note 2, at Appendix A, *Integrated Energy Plan: Scenario results and Cost Estimates* (It is most cost effective to electrify new buildings by 2025).

impacts. The steeper the decline, and the greater the reductions required, the more expensive the changes will be.”¹²⁵

If New Jersey is to meet its GHG reduction goals, its “governmental agencies must work in lockstep with the utilities, businesses, non-profits, communities, and educational institutions.”¹²⁶ The absence of GHG-reduction consistency determinations and environmental justice consistency determinations creates an analytical gap that threatens to disproportionately impact low and moderate income households and make it more costly for the state to achieve its legally required GHG reductions.¹²⁷ Failing to align agency action with GHG and environmental justice goals can lead to the authorization of expensive projects that contradict state policy. In the realm of oil and gas, increased ratepayer costs for these stranded assets are inextricably intertwined with utility commission action that continues to eschew affirmative climate consistency analyses, which would ensure that utilities plan for and make climate-aligned decisions.¹²⁸ Recognizing that protecting ratepayers necessarily requires utility

¹²⁵ Matthew Kahn et al., *Long-Term Macroeconomic Effects of Climate Change: A Cross-Country Analysis* (2019), available at <https://www.imf.org/en/Publications/WP/Issues/2019/10/11/Long-Term-Macroeconomic-Effects-of-Climate-Change-A-Cross-Country-Analysis-48691>.

¹²⁶ EMP, *supra* note 2, at 57.

¹²⁷ See Arjun Makhijani and Boris Lukanov, *Aligning climate and affordability goals can save states billions*, (Mar. 30, 2022), available at <https://www.utilitydive.com/news/aligning-climate-and-affordability-goals-can-save-states-billions/621233/>.

¹²⁸ See, e.g., London Econ. Int’l LLC, *Analysis of Natural Gas Capacity to Serve New Jersey Firm Customers* (Nov. 2021); Andy Bilich et al., Env’tl. Def. Fund, *Managing the Transition: Proactive Solutions for Stranded Gas Asset Risk in California* (2019), available at https://www.edf.org/sites/default/files/documents/Managing_the_Transition_new.pdf.

planning to align with state GHG reduction goals, many jurisdictions have commenced proceedings addressing this issue.¹²⁹ New Jersey has not, and requiring a GHG-reduction consistency determination alongside an environmental justice consistency determination would help support such action.

Ensuring that New Jersey’s Executive Branch agencies and departments are required to: (1) assess consistency of their actions with relevant GHG limits, together with considering alternatives to and mitigation for non-aligned actions that are otherwise justified; (2) assess consistency of their actions with New Jersey’s promise of environmental justice, together with creating and operationalizing justice Action Plans; and (3) do their part towards achieving GHG limits within their respective purviews will save New Jersey citizens from paying the steep price of delay. As EO-274 recognized,¹³⁰ “reduc[ing] greenhouse gas emissions to 50 percent below 2006 levels by the year 2030” is critical and will require all Executive Branch agencies and departments

¹²⁹ See, e.g., Investigation by the Department of Public Utilities on its own Motion into the role of gas local distribution companies as the Commonwealth achieves its target 2050 climate goals, Mass. D.P.U. 20-80, Vote and Order Opening Investigation at 7 (Oct. 29, 2020) (Massachusetts gas planning docket); Order Instituting Rulemaking to Establish Policies, Processes, and Rules to Ensure Safe and Reliable Gas Systems in California, and Perform Long-Term Gas System Planning, CPUC Rulemaking 20-01-007 (Jan. 27, 2020) (California gas planning proceeding); General Investigation into Retail Natural Gas Industry Greenhouse Gas Emissions in Light of Statewide Emission Reduction Goals Adopted in House Bill 19-1261, Colorado PUC proceeding 20M-0439G (Oct. 29, 2020) (Colorado gas planning proceeding); Order No. 38189 Instituting a Proceeding to Investigate Integrated Resource Planning For Hawaii Gas, Hawaii PUC (Jan. 19, 2022) (including directive to “address and further State policies including emissions reductions and decarbonization goals”); D.C. PSC Order No. 20754, F.C.1167, In the Matter of the Implementation of Electric and Natural Gas Climate Change Proposals (June 4, 2021) (directing each utility to file detailed climate plans and analyses and establishing stakeholder engagement opportunities); D.C. PSC Order No. 20662, F.C.1167, In the Matter of the Implementation of Electric and Natural Gas Climate Change Proposals (Nov. 18, 2020) (opening a new climate proceeding to determine utility consistency with D.C. energy and climate goals).

¹³⁰ See EO No. 274, available at <https://www.nj.gov/infobank/eo/056murphy/pdf/EO-274.pdf>.

to immediately do their share towards achieving these reductions. Such coordinated efforts will reduce New Jerseyans' overall costs of achieving GWRA compliance and help avoid costly measures that are insufficiently climate- and justice-aligned.¹³¹

6. CONCLUSION

The state already has GHG reduction targets, a plan, and mapped pathways. While more aggressive tactics and targets may be required to meet evolving scientific knowledge, and cost-effective technology and markets will evolve over time, New Jersey's climate-alignment tools and pathways are clear. The EMP, the 2020 GWRA 80x50 Report, and EO-274, among other strong state initiatives, together demonstrate unequivocally that an all agency, systematic approach to GHG reductions is essential.¹³² Likewise, New Jersey already has done the work to "Further the Promise" of environmental justice. Enacting an all agency, systematic approach to addressing past inequities and ensuring current operations are consistent with environmental justice principles will ensure that this effort yields legally durable results.

¹³¹ Prioritizing GHG emission reductions can also save the state from a credit downgrade. Vermont has recognized the trend of climate-related downgrades and even acknowledged it in the Global Warming Solutions Act of 2020 ("The credit rating industry is now analyzing the adaptation and resilience strategies of issuers of state and municipal bonds and may apply a negative credit factor for issuers with insufficient strategies. Establishing robust adaptation and resilience strategies for Vermont will help protect the State from a climate crisis-related credit downgrade.") HB 688 Sec. 2. (8); *see also* S&P Global, *Report Looks at Weighing Environmental Risk In U.S. States Ratings* (Mar. 22, 2022), available at <https://www.prnewswire.com/news-releases/report-looks-at-weighing-environmental-risk-in-us-states-ratings-301508300.html> (discussing report on accounting for climate transition in U.S. states' credit ratings, with a credit analyst noting, "We also consider how states are attracting sectors that are more insulated from transition risk, how states incorporate transition risk into long-term financial and capital planning, and how they enable cross-agency and regional coordination to reduce greenhouse gas emission.").

¹³² EMP, *supra* note 2, at 231.