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Before the  
United States House Committee on Oversight and Reform

Building Back with Justice: Environmental Justice Is Central to the American Jobs Plan.

July 21, 2021

## *Introduction*

Dear Chairwoman Maloney, Ranking Member Comer and distinguished Members,

Thank you for this opportunity to testify today about the whole-of-government solutions needed to ensure that environmental justice, and the Biden-Harris “Justice 40 Initiative,” is the centerpiece of the American Jobs Plan. My name is Raya Salter. I am an energy attorney and energy justice advocate based in New Rochelle, NY, and I am testifying today on my own behalf. I am a Member of the New York State Climate Action Council (as appointed by Senate Majority Leader Andrea Stewart-Cousins). The Climate Action Council is developing the scoping plan for New York to achieve its statewide greenhouse gas (GHG) emissions goal of 85% from 1990 levels by 2050.

I am also the Policy Organizer for NY Renews, a coalition of over 280 environmental justice, labor, environmental and community groups, and the force behind the 2019 New York Climate Leadership and Community Protection Act, or CLCPA. The CLCPA is the nation’s most progressive climate law, and is the state precedent for the federal “Justice 40.” Since the passage of the CLCPA, I have been working at the Climate Action Council and with NY Renews to ensure the implementation of New York’s “Justice 40.”

I started my legal career as an energy associate with the law firm of Dewey & LeBoeuf in New York City. In prior roles I was a Regulatory Attorney for the Environmental Defense Fund and a Senior Attorney with the Natural Resources Defense Council. I have worked with utilities, community stakeholders, activists and other thought leaders in multiple jurisdictions, including New York and Hawaii, to promote the just and equitable integration of clean and renewable energy onto the electric grid. I am an adjunct professor of law at Cardozo Law School and my book, “Energy Justice, Domestic and International Perspectives” was published in 2018. In addition, I sit on the Board of Directors of EESI and the advisory board of Evergreen Action. Before becoming a lawyer, I worked for community based organizations in both Yonkers and Brooklyn, NY, providing direct social services to youth and adults.

First, I want to thank you again for this important investigation into the need for the American Jobs Plan to comprehensively address climate and environmental justice. This means

that as we build energy and related infrastructure at the scale needed to address the climate crisis, we must also change the trajectory of harm that many infrastructure projects have historically caused communities of color. For example, people of color, and Black people in particular, are exposed to more air pollution from all sources of pollution than other races, including industry, agriculture, vehicles, construction and residential sources.<sup>1</sup> This is just one aspect of how infrastructure, and the climate crisis, put people of color at risk. Put simply, we must invest in sustainable, resilient, just and equitable infrastructure for frontline communities.

The Justice 40 Initiative seeks to do just that. The Justice 40 Initiative is the Biden-Harris commitment that 40 percent of the benefits of climate and clean infrastructure investments must be realized by disadvantaged communities. The Justice 40 Initiative is an important step towards climate justice. As discussed further here, it is also demonstrative of the power of local grassroots activism and state climate action. In particular, the Justice 40 Initiative was derived from New York's CLCPA, as driven into law by the NY Renews coalition.

It is important for lawmakers and policymakers to know about the Justice 40 Initiative's state corollary and the original purpose of the concept in the context of New York's climate law. In New York, the "40%" investment mandate sits within a broader justice framework that is critical for its successful implementation. Lessons from New York's experience also illustrate the need to put strong environmental justice protections and directives into the American Jobs Plan in order to achieve the goals of the Justice 40 Initiative. What follows is an overview of the CLCPA's justice framework, critiques and reflections on the law's implementation, and additional recommendations for whole-of-government solutions to achieve the goals of the Justice 40 Initiative.<sup>2</sup>

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<sup>1</sup> Tessum, C. W., Paoletta, D. A., Chambliss, S. E., Apte, J. S., Hill, J. D., & Marshall, J. D. (2021). PM2.5 polluters disproportionately and systemically affect people of color in the United States. *Science Advances*, 7(18), eabf4491. <https://doi.org/10.1126/sciadv.abf4491>.

<sup>2</sup> For more about the CLCPA, its justice framework and implementation, see Raya Salter, "Frameworks for Energy Justice in Action: The New York Climate Leadership and Community Protection Act," forthcoming in the forthcoming *Energy Justice Handbook*, Edited by Stefan Bouzarovski (University of Manchester) and Sara Fuller (Macquarie University), publication expected late 2021, currently on file with the author (Salter Energy Justice Frameworks).

## *The Justice Framework of the CLCPA*

The CLCPA is unique among state renewable portfolio standard-style climate laws in that the law's primary focus is both GHG emissions reductions and climate justice. To achieve this, the justice framework of the CLCPA, among other things, provides express direction to state agencies with regards to "disadvantaged communities." One example is the requirement that no less than 35%, and a goal of 40%, of the benefits from state climate investments must be realized by disadvantaged communities.<sup>3</sup> This is the CLCPA provision that ultimately became the heart of the Justice 40 Initiative. The phrase "disadvantaged communities" was borrowed by New York from California law,<sup>4</sup> and is also used to describe the intended beneficiaries of the Justice 40 Initiative.

The CLCPA, however, goes further. To ensure that New York's climate goals are achieved fairly and in time to avoid the worst climate impacts, **the CLCPA requires that state agencies make additional considerations regarding disadvantaged communities as infrastructure decisions are made.** In addition to the 40% mandate, The CLCPA requires, among other things, that:

1. all state agencies, in considering and issuing permits, licenses and other approvals, must not "disproportionately burden disadvantaged communities";<sup>5</sup>
2. projects requiring major permits must demonstrate that future climate risk has been considered, including impacts on disadvantaged communities, and mitigate those risks as required;<sup>6</sup> and
3. early action must be taken to prioritize reductions of co-pollutants and greenhouse gases in disadvantaged communities.<sup>7</sup>

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<sup>3</sup> CLCPA Section 2 amending New York Environmental Conservation Law (ECL) Section 75-0117, establishing a "requirement for all State agencies that 35% of the benefits from clean energy and energy efficiency investments be realized by disadvantaged communities, with a goal that 40% of the benefits from investments, including energy, transportation, workforce development, housing, low-income energy assistance, economic development, and pollution reduction, accrue to these communities."

<sup>4</sup> California Assembly Bill (AB) 1550 (Gomez, Statutes of 2016) required at least 25% of funds from the state's cap and trade program go to projects within and benefitting "disadvantaged communities." Note that the term "disadvantaged communities" itself is not favored by many advocates who find that it enforces a negative or stereotypical archetype of marginalized frontline communities.

<sup>5</sup> CLCPA Section 7(3).

<sup>6</sup> CLCPA Section 9, amending ECL Section 70-0107.

<sup>7</sup> CLCPA Section 7(3).

These provisions provide “guardrails” for environmental justice communities. In other words, they are designed to both prioritize the health and safety of disadvantaged communities now, as infrastructure is built, while ensuring that future climate change mitigation and adaptation policies do not cause harm. The American Jobs Plan should also incorporate these express types of controls into agency decision making to ensure that the Justice 40 Initiative does not fall behind the initial rush to fund shovel ready projects.

In addition to overarching state decision making, spending mandates and programmatic mandates, the CLCPA utilizes participatory processes and public input to ensure that the law’s justice objectives are reached. This includes establishing the criteria for “who is a disadvantaged community.” To provide inclusive participation and self-determination in decision making, the CLCPA provides only initial criteria to identify disadvantaged communities.<sup>8</sup> The final criteria are to be determined by a participatory body called the Climate Justice Working Group, which by law is composed of environmental justice advocates, in addition to other state agency officials.<sup>9</sup>

Procedural justice and mechanisms to ensure community participation, and leadership, in planning and spending is critical to the development of just and equitable infrastructure.<sup>10</sup> It is critical that the American Jobs Plan fund procedural justice, with robust community participation, education and public input, into its implementation framework. Funds should also be provided to enable communities to engage expert technical assistance, including for environmental impact studies, energy audits and assessments, engineering, surveying and other analyses.

### *Implementation Lessons From New York*

Since the passage of the CLCPA in 2019, several of the law’s mandates have roared to life, while others have been incomplete.<sup>11</sup> The Climate Action Council process to develop the

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<sup>8</sup> The CLCPA provides that the criteria for identifying disadvantaged communities shall include, but not be limited to areas: (1) burdened by cumulative environmental pollution and other hazards that can lead to negative public health effects, (2) with concentrations of people that are of low income, high unemployment, high rent burden, low levels of home ownership, low levels of educational attainment, or members of groups that have historically experienced discrimination on the basis of race or ethnicity, and (3) vulnerable to the impacts of climate change such as flooding, storm surges, and urban heat island effects.

<sup>9</sup> CLCPA § 2 adds new ECL § 75-0111(1)(a).

<sup>10</sup> See Raya Salter, Carmen Gonzales and Elizabeth Kronk Warner, “Energy Justice, Domestic and International Perspectives,” Edward Elgar (2018) at Chapter 1.

<sup>11</sup> See Salter Energy Justice Frameworks.

scoping plan is in full swing, including the Climate Justice Working Group. Many advocates are concerned that the process has been less than transparent, and it remains to be seen if the Climate Justice Working Group recommendations will be fully incorporated.<sup>12</sup> The body is, however, on track to develop its scoping plan by the end of 2021. The agency decision-making directives and spending mandate discussed above have been codified into the State Energy Plan, which, pursuant to New York law, sets the direction of energy policy for the State.<sup>13</sup> This is seen as positive progress.

Implementation of the 40% investment mandate and the environmental justice guardrails, however, has been uneven. On the one hand, the state has included the spending mandate into some major spending programs, including the Regional Greenhouse Gas Initiative<sup>14</sup> and the New York Clean Energy Fund.<sup>15</sup> Both of these examples have utilized dollars spent to determine benefit to disadvantaged communities in order to comply with the CLCPA. This has resulted in significant investments being redirected to disadvantaged communities, even as the state waits for the final identification criteria from the Climate Justice Working Group. Of great concern to advocates, however, is a lack of rigorous and across the board benefit standards. In addition to rigorous standards, as exemplified in the above examples of successful CLCPA implementation, **the best threshold metric for “benefit” is dollars spent, which is easier to implement and track than abstract concepts of benefit.** Further, **the 40% investment mandate should be seen as a floor and not a ceiling.** It may be necessary to spend more than 40% of investments to achieve just and equitable benefits to frontline communities, and the American Jobs Plan should explicitly allow for increases in the standard as required.

Further, the state has not executed an accounting of its current climate spending, a requisite step to redirecting funds to disadvantaged communities. Nor, despite requests from

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<sup>12</sup> Advocates, however, have expressed concern about the CAC transparency of the CAC process. Furthermore, important bodies required by the Act, including an Environmental Justice Advisory Group, have not yet been established by the state. For more information about the CAC process, visit the New York State Climate website, available at: <https://climate.ny.gov/> (last visited June 2021).

<sup>13</sup> See the 2015 New York State Energy Plan at Vol. 1, p. 110, as amended on Apr. 8, 2020 (the “New York State Energy Plan,”) amendment available at <https://energyplan.ny.gov> (last accessed on Apr. 10, 2020).

<sup>14</sup> See revised 21 NYCRR Part 507.

<sup>15</sup> See New York Public Service Commission Case 14-M-0094, “Proceeding on Motion of the Commission to Consider a Clean Energy Fund, New York State Energy Research and Development Authority Petition Regarding Clean Energy Fund Triennial Review,” filed December 29, 2020, adopting the investment mandate for the Clean Energy Fund and the New York Green Bank.

advocates, has the state developed an interagency compliance plan to administer it. This means that the overall benefit of state climate spending is not well understood and has not been universally applied. This includes, for instance, the development of the New York Renewable Energy Program. The CLCPA tasked the New York Public Service Commission with establishing the Renewable Energy Program in order to achieve the law’s goals for the energy sector. The Commission was unable to articulate how significant investments, including billions of dollars in clean energy procurements, would benefit disadvantaged communities.<sup>16</sup> The Commission did, however, direct the implementing agency to move forward on developing and implementing disadvantaged communities benefit frameworks into its solicitations.<sup>17</sup>

New York’s failure to articulate justice methodologies is also a problem for the environmental justice guardrails and the mandate to take early action on emissions and co-pollutant reductions in disadvantaged communities. The state has not developed a framework to determine where a “disproportionate burden” has occurred in state decision-making or clean energy projects. It has also failed to place metrics in place to measure how emissions and co-pollutant reductions will be tracked or evaluated. It is of great concern that programs will move forward without a mechanism to measure or enforce when a disproportionate burden has been placed on disadvantaged communities, or if early action is being taken to prioritize co-pollutant and emissions reductions in these communities as required by law.

In addition, while the CLCPA is the first of its kind in state climate legislation, implementation has revealed that it is far from perfect. The law, for instance, did not include provisions related to Indigenous Nations, and it appears that work to implement the CLCPA between the state and Indigenous Nations is not happening according to protocol. In another example, advocates, who originally fought the law’s “net zero” approach, are concerned that the fossil fuel industry will succeed in forwarding harmful biofuels and “renewable natural gas” into the Climate Action Council’s scoping plan.

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<sup>16</sup> See Case 15-E-0302, Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard, Order Adopting Modifications to the Clean Energy Standard, Oct. 15, 2020.

<sup>17</sup> *Id.* at 120.

*Recommendations for “Whole-of-Government” Solutions to  
Achieve the Goals of the Justice 40 Initiative*

The goals of the Justice 40 Initiative cannot be realized without a robust interagency implementation framework, including express legal directives, evaluation metrics and enforcement mechanisms. The Initiative, which emanated from the CLCPA, can benefit from adopting aspects of the CLCPA’s unique justice framework. The Justice 40 Initiative can also benefit from the implementation lessons learned in New York. The following non-inclusive list of whole-of-government solutions are recommended for inclusion into the American Jobs Plan in order to facilitate the successful implementation of the Justice 40 Initiative:

1. The American Jobs Plan **must expressly provide for implementation, coordination and enforcement of the Justice 40 Initiative at all government agencies and on all levels, including requiring the development of implementation plans.** These plans should include, among other things, audits of current agency climate spending to develop a baseline for future spending, evaluation metrics and enforcement criteria. Express funding should also be provided for the development of Justice 40 agency guidance, training, staffing, computer systems, analyses and other functional requirements necessary to implement the spending mandate.
2. The American Jobs Plan **must include a requirement, as exemplified by the CLCPA, that infrastructure investments do not create harm or disproportional burdens to disadvantaged communities, including future climate risk.** A corresponding methodology to evaluate harm should be developed at the outset of the program in a form that can be understood and implemented by agencies and their agents and vendors.
3. The American Jobs Plan **must expressly prioritize early action designed to prioritize reductions of co-pollutants and GHGs in disadvantaged communities as exemplified in the CLCPA.** This includes the development of methodologies to value and measure **GHGs, co-pollutants and cumulative impacts**, and inclusion of those metrics in agency planning and research in addition to solicitations and procurements. It also requires the development of criteria that will enable projects to track, measure, and demonstrate



success. Projects that can show early action in these areas should be front loaded and prioritized.

4. In the first instance, **“benefits” to disadvantaged communities should be measured in dollars spent**. In all instances, rigorous standards should be developed to ensure actual benefits accrue to disadvantaged communities. Further, the 40% investment level should expressly be acknowledged as a floor and not a ceiling, and increases in spending levels should be authorized as necessary.
5. The American Jobs Plan **must include funded mechanisms for procedural and participatory justice designed to include frontline communities in all aspects of infrastructure investment decisions, as exemplified in the CLCPA**. These mechanisms can include, but are not limited to, participatory budgeting, robust public comment, advisory councils as mandated by the CLCPA. In all cases, funding should be provided for community leadership, planning, coordination, communications and education, including funds for intervenor compensation and technical assistance.
6. The American Jobs Plan should **incorporate the White House Environmental Justice Advisory Council recommendations for the Justice 40 Initiative**.<sup>18</sup> They include several of the recommendations discussed above, in addition to critical advice on the development of environmental justice screens, identification of disadvantaged communities and protocol designed to optimize benefits to Indigenous Nations and communities.

Thank you again for this opportunity to testify before this Committee, and for your commitment to ensuring that environmental and climate justice is central to the American Jobs Plan.

Best Regards,



Raya Salter, Esq.

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<sup>18</sup> See, for example, the White House Environmental Justice Advisory Council Justice40, Climate and Economic Justice Screening Tool & Executive Order 12898 Revisions Interim Final Recommendations, May 13, 2021, available at: [https://www.epa.gov/sites/default/files/2021-05/documents/whejac\\_interim\\_final\\_recommendations\\_0.pdf](https://www.epa.gov/sites/default/files/2021-05/documents/whejac_interim_final_recommendations_0.pdf) (last visited July, 2021).