**SUPREME COURT OF THE STATE OF NEW YORK**
**ALBANY COUNTY**

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| THE PEOPLE OF THE STATE OF NEW YORK, and NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,<br><br>Plaintiffs,<br><br>-against-<br><br>NORLITE, LLC.<br><br>Defendant. | Index No. 907689-22 |

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**MEMORADUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE**

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## PRELIMINARY STATEMENT

Lights Out Norlite ("LON"), Green Education and Legal Fund ("GELF"), Bradford Blauhut, Deborah Lindley, Karen Robinson, and Mark Belokopitsky (each a proposed intervenor plaintiff and cross-plaintiff in this matter; for simplicity, hereinafter referred to collectively as "Plaintiffs") respectfully submit this memorandum of law in support of its motion to intervene. LON is an organization created to raise awareness about the Norlite facility located at 628 Saratoga St, Cohoes, NY 12047 ("Norlite") and its associated danger to the surrounding community. LON is an organization within GELF, a 501(c)(3) non-profit organization. Individually named Plaintiffs are members of LON and are directly impacted by Norlite's harmful air contaminants, as described in the proposed complaint in intervention – attached hereto as Exhibit A. As detailed below, Plaintiffs are directly impacted by Norlite's continued operations and amply satisfy the requirements of permissive intervention under CPLR 1013.

## BACKGROUND

A. The State's Complaint

As the Court is aware, this case was filed on October 11, 2022, by the State of New York and the New York State Department of Environmental Conservation ("the State") against Norlite, LLC ("Norlite"). *See* Summons and Complaint, ECF No. 1 ("State Compl."). The facts and circumstances underlying the Complaint have a direct and substantial impact on Plaintiffs here, and Plaintiffs will be directly affected by the outcome of this matter.

The enforcement case alleges that Norlite's emissions of fugitive dust from its facility in Albany County, New York ("Facility") violate the Environmental Conservation Law Article 19 ("ECL") and its Air Title V Permit ("Air Permit"). More specifically, the State brought the

action to protect the public health, welfare and environment of New York, to enforce ECL Article 19, and to compel compliance with ECL Article 19. State Compl. ¶ 1.

Count One of the State's Complaint alleges that Norlite's emissions of air contaminants are injurious to human life – including the lives of Plaintiffs – in violation of 6 NYCRR § 211.1. State Compl. ¶¶ 135-147. Specifically, the State alleges that Norlite's crystalline silica emissions between March 17, 2021 and May 17, 2022 were well above the DEC Annual Guideline Concentration. State Compl. ¶ 137. Additionally, the State alleges that Norlite's PM10 emissions between August 1, 2021 and July 10, 2022 were significantly above safe levels for the health of the public. State Compl. ¶¶ 140-144. Inhalation of crystalline silica emitted by Norlite, the State alleges, can affect lung structure and irreversible lung damage, and can lead to lung disease, COPD, kidney disease, autoimmune disorders, cardiovascular impairment, and lung cancer. State Compl. ¶ 101. The State alleges that exposure to PM, both chronic and in isolated incidents, are associated with severe adverse health effects, including cerebrovascular incidents, cardiac disorders, asthma exacerbation, bronchitis, increased risk of diabetes, and increased rate of mortality. State Compl. ¶¶ 118-120. Further, the State alleges that exposure to the air contaminants has a disproportionate effect on the elderly, children, and infants, as well as individuals with underlying health issues and pregnant women. State Compl. ¶¶ 121-124. The State alleges that such emissions have been and continue to be injurious to human life in violation of 6 NYCRR 211.1, the Air Permit and ECL Article 19. State Compl. ¶¶ 139, 144-145. Due to Norlite's alleged repeated and persistent illegal conduct, the State alleges that Norlite is in violation of Executive Law § 63(12). State Compl. ¶ 146.

Count Two of the State's complaint alleges that Norlite's emissions of air contaminants unreasonably interfere with the comfortable enjoyment of life or property in violation of 6

NYCRR § 211.1. State Compl. ¶¶ 148-154. The State alleges that Norlite has caused or allowed emissions of air contaminants to migrate from the Facility in such quantity, characteristic or duration that such emissions have unreasonably interfered, and continued to unreasonably interfere, with the comfortable enjoyment of life or property – including the lives and properties of Plaintiffs – in violation of 6 NYCRR 211.1 and Condition 24 of the Air Permit. State Compl. ¶¶ 150-151. Due to Norlite's alleged repeated and persistent illegal conduct, the State alleges that Norlite is in violation of Executive Law § 63(12). State Compl. ¶ 152.

Count Three of the State's Complaint alleges that Norlite's emissions of air contaminants endanger health, safety or comfort, and constitute a substantial interference with rights of the public, creating a public nuisance at common law. State Compl. ¶¶ 155-164. The State alleges that by causing or allowing emissions of air contaminants to migrate from the Facility of such quantity, characteristic or duration, Norlite's emissions have endangered, and continue to endanger, the health safety, or comfort of the public (including Plaintiffs). State Compl. ¶ 157. In doing so, the State alleges, Norlite has operated and continues to operate the Facility in a manner that offends, interferes with, and causes damage to the public in the exercise of common rights and that injures the property, comfort, health, safety, and environment of a substantial number of persons through its noxious odors, fumes, smoke, noise and vibration. State Compl. ¶ 158. Thus, the State alleges that Norlite's act, omissions and violations of law constitute a public nuisance *per se*. State Compl. ¶ 159. Further, the State alleges that even Norlite's lawful operations are done so in an unreasonable or negligent manner, and that Norlite has failed to abate the public nuisance, despite having actual knowledge of the conditions creating the nuisance. State Compl. ¶¶ 160-161.

Finally, Count Four of the State's Complaint alleges that Norlite has repeatedly violated NYDEC regulations and the Air Permit. State Compl. ¶¶ 165-169. Due to Norlite's alleged repeated and persistent illegal conduct, the State alleges that Norlite is in violation of Executive Law § 63(12). State Compl. ¶ 169.

B. Intervenor's Proposed Complaint in Intervention

Like the State's Complaint, Plaintiffs' proposed complaint in intervention challenges Norlite's emission of harmful air contaminants. Proposed Complaint-in-Intervention of Plaintiff-Intervenor Lights Out Norlite, submitted herewith ("LON Compl."). Based on the same facts and circumstances at issue in the State's Complaint, Plaintiffs' proposed complaint in intervention alleges that Norlite's repeated and continued emissions of harmful air contaminants constitutes a substantial interference with Plaintiffs' right to use and enjoy their land, creating a private nuisance. LON Compl. ¶¶ 114-121. Plaintiffs' proposed complaint also alleges that Norlite acted negligently in their operation of the Facility. LON Compl. ¶¶ 122-128.

Further, Plaintiffs' proposed complaint in intervention states a cross-claim against the New York Department of Environmental Conservation ("DEC"), the co-Plaintiff in the current case, for a declaratory judgment that permitting operation of the Facility violates Article I, § 19 of the New York Constitution. LON Compl. ¶¶ 129-142. While Plaintiffs support DEC's current effort in this matter enforcing Environmental Conservation Law Article 19 ("ECL") against Norlite, anything short of stopping the Facility's emission of harmful air contaminants will infringe on our constitutional rights. If DEC's efforts in this matter serve to shut the Facility down, our claim against DEC will be moot and we will withdraw it. As of today, the Facility is still operating, and our constitutional rights continue to be violated. Thus, the resolution of the instant matter will have a direct and substantial impact on Plaintiffs.

Count One of Plaintiffs' proposed complaint alleges that Norlite's actions constitute a private nuisance. LON Compl. ¶¶ 114-121. Specifically, Norlite's emissions of air contaminants, including crystalline silica and particulate matter, constitute a substantial interference with Plaintiffs' right to use and enjoy their land. LON Compl. ¶ 115. Plaintiffs allege that Norlite was and continues to be negligent, reckless, unreasonable and/or intentional in causing fugitive dust emissions to be deposited offsite. LON Compl. ¶ 116. Plaintiffs' proposed complaint requests an injunction against Norlite to stop all harmful air pollution, even if that means the facility must shut down. LON Compl. ¶ 121.

Count Two of Plaintiffs' proposed complaint alleges that Norlite's actions constitute negligence. LON Compl. ¶¶ 122-128 . Norlite knew or should have known that its emissions of harmful air contaminants would result in harm to LON members. LON Compl. ¶ 124. Further, Norlite has a duty to take adequate safety precautions and all reasonable measure to mitigate such emissions. LON Compl. ¶ 125. Yet, Norlite repeatedly breaches this duty by negligently, recklessly, carelessly, and unreasonably operating the Facility in a manner that causes the emissions to encroach on LON members' residences. LON Compl. ¶¶ 126-128. The remedies sought by Plaintiffs are compatible with the relief sought by the State for its public nuisance claim, which requests an order from this Court "Permanently enjoining Norlite from operating the Facility in a manner that endangers health, safety or comfort and constitutes a substantial interference with rights of the public and thereby creating a public nuisance." State Compl. ¶ D.

Count Three of Plaintiffs' proposed complaint alleges that the DEC has failed to protect Plaintiffs' right to "clean air and water, and to a healthful environment" guaranteed by the New York Constitution ("The Green Amendment"). N.Y. Const., Art 1, §19; LON Compl. ¶¶ 129-142. The newly enacted Green Amendment guarantees, as of January 1, 2022, "[e]ach person

shall have a right to clean air and water, and a healthful environment." The Green Amendment received overwhelming support by New York State voters despite already existing comprehensive laws, regulations, and policies aimed at environmental regulation, including the Environmental Conservation Law ("ECL") which serves to "conserve, improve and protect [New York's] natural resources and environment." ECL §§ 1-0101, 3-0101.

While the Green Amendment poses novel legal issues as a newly enacted constitutional right, the New York Supreme Court has considered its enforcement effect. *See Fresh Air for the Eastside, Inc. v. The State of NY, et al.*, No. E2022000699 (Sup. Ct. Cnty. of Monroe, Dec. 7, 2022) (annexed hereto as Exhibit B for the Court's reference). The Green Amendment has been found to be self-executing. *Id.* at 11; *see People v. Carroll*, 3 N.Y.2d 686 (1958) (finding that "[t]he general rule is that constitutional provisions are presumptively self-executing.") Further, the State has a nondiscretionary obligation to comply with the New York Constitution and, thus, the State must ensure that its citizens have the right to clean air and a healthful environment. *Id.* at 15 (finding that "[c]omplying with the Constitution is not optional for a state agency and is thus nondiscretionary and ministerial" and that the "State must ensure that its citizens have the right to clean air and a healthful environment.") Similarly, a state agency must comply with the Constitution as a mandatory, nondiscretionary duty. *See D.J.C.V. v. United States*, 2022 WL 1912254, at 16 (S.D.N.Y., June 3, 2022); *Finn's Liquor Shop v. State Liquor Authority*, 24 N.Y.2d 647, 655 (1969).

Approximately thirty years of enforcement actions and settlements brought against Norlite by DEC have failed to bring Norlite into compliance and, thus, DEC has failed to protect the surrounding community. On June 21, 1990, DEC issued an Order on Consent, requiring Norlite to submit a Fugitive Dust Plan and best management practices plan ("BMP") to prevent

or minimize the potential for the release of fugitive dust. LON Compl. ¶ 60. Four years later, on December 28, 1994, DEC issued a $200,000 penalty against the Facility for its failure to adhere to the Fugitive Dust Plan, BMP, and its Air Permit. LON Compl. ¶ 61. DEC issued another penalty of $7,500 on September 18, 1997 for improper baghouse operation and other violations. LON Compl. ¶ 62. On July 13, 2000, Norlite was assessed a penalty of $3,000 and was required to submit an engineering plan to prevent off-site dust migration. LON Compl. ¶ 63. Yet again, on July 24, 2001, DEC issued a $7,500 penalty for Norlite's failure to submit an approvable Fugitive Dust Plan. LON Compl. ¶ 64. DEC issued another penalty of $90,000 against Norlite on May 17, 2010. LON Compl. ¶ 65. After an inspection of the Facility in 2012, DEC issued a Notice of Violation on May 9, 2013, identifying inadequacies in the Facility's Fugitive Dust Plan. LON Compl. ¶ 66. Norlite, having failed to update its Fugitive Dust Control Plan among other violations, was assessed a penalty of $29,600 and required to contribute $64,000 to an environmental benefit project on September 2, 2014. LON Compl. ¶ 67. Yet another penalty was issued against Norlite on November 14, 2016, for $17,500 based on violations of the Air Permit. LON Compl. ¶ 68. Three years later, DEC issued a $65,000 penalty against the Facility on November 22, 2019. LON Compl. ¶ 69. DEC took three separate enforcement actions against Norlite in 2021 for violations of the Air Permit, ECL, and the Fugitive Dust Plan. LON Compl. ¶¶ 70-72. Finally, and most recently, DEC took three separate enforcement actions in 2022, including the most recent Notice of Violation issued on October 11, 2022 for allowing emissions of air contaminants into the outdoor atmosphere of such quantity, characteristic, or duration that are in violation of 6 NYCRR Part 211.1 and the Air Permit. LON Compl. ¶¶ 73-75.

Norlite's compliance history evidences that DEC has been aware that the Facility's emissions are harmful, excessive, and illegal for decades. Yet, DEC has continued to allow the

Facility to operate. Despite these repeated enforcement attempts, DEC has failed to effectively stop or even significantly curtail the Facility's fugitive dust emissions. LON Compl. ¶ 76. No action nor any penalty imposed has stopped the negligent and hazardous operation of the Facility. LON Compl. ¶ 81. While DEC appears to be seeking, in part, the proper remedy in the underlying action, the Facility continues to operate in a hazardous and harmful manner, and Plaintiffs seek to compel DEC to shut the Facility down rather than impose another fine or ineffective enforcement action. LON Compl. ¶ 82. Thus, Plaintiffs seek a declaratory judgment that DEC ongoing permitting and allowing the Facility to operate is unconstitutional and violates Plaintiffs' constitutional rights and an injunction directing the proper closure of the Facility. It is established law that a declaratory action is the proper avenue for a declaration of constitutional rights. *See Fresh Air for the Eastside, Inc*.; *Bunis v. Conway*, 17 A.D.2d. 207, 208 (4th Dep't 1962); *Parry v. County of Onondaga*, 51 A.D.3d 1385, 1387 (4th Dep't 2008); *Levenson v. Lippman*, 4 N.Y.3d 280, 287 (2005). While DEC has taken enforcement action against the Facility, its repeated failures to remedy the on-going violations is evidence that it has failed to protect our constitutional rights to clean air and a healthful environment. The Court should compel DEC to comply with the Constitution and grant the relief requested. Thus, this Court should issue an injunction directing the immediate proper closure of the Facility.

This claim would be moot, and we would respectfully withdraw it, if DEC and the State's efforts in this litigation were to serve to shut the Facility down. However, anything less than shutting the Facility down would continue to violate our rights under the Green Amendment. Therefore, Plaintiffs request a declaratory judgment that DEC's permitting continued operation of the facility is contrary a violation of Plaintiffs' constitutional rights.

## LEGAL STANDARD

Pursuant to CPLR 1013, "upon timely motion, any person may be permitted to intervene in any action … when the person's claim or defense and the main action have a common question of law or fact." NY CPLR § 1013. "In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party." NY CPLR § 1013. Considerations of delay are "more likely to be outweighed, and intervention therefore warranted, when the intervenor has a direct and substantial interest in the outcome of the proceeding." *Matter of Pier v. Board of Assessment Review of Town of Niskayuna*, 617 N.Y.S.2d 1004, 1005-1006 (1994).

## ARGUMENT

Plaintiffs' motion easily satisfies the standards for permissive intervention. Plaintiffs timely move to intervene and Plaintiffs' claims share common questions with the main action.

First, Plaintiffs move to intervene at an early stage of this Action. Plaintiffs' proposed complaint is filed well before substantive motions by the original parties have been heard, including before Norlite is ordered to show cause before the Court on January 11, 2023. Further, Plaintiffs are filing this proposed complaint before Norlite's answer papers are due on December 23, 2022, and before the State's reply papers are due on January 6, 2023. Plaintiffs would not ask for any extension of the briefing schedule and thus would not create any undue delay.

Second, Plaintiffs' claims share common questions of law and fact with the main action. Plaintiffs challenge the same impermissible fugitive dust emissions of Norlite and raise the same significant health-related concerns associated therewith. Both the State and Plaintiffs allege the harmful effects of Norlite's emission of air contaminants. Plaintiffs even seek similar relief as the State in the form of an injunction enjoining Norlite from operating the Facility in a manner

that endangers health, safety or comfort and constitutes a substantial interference with rights of the public. This is more than sufficient to satisfy the requirement of permissive intervention. *See Global Cos. LLC v. New York State Dept. of Envtl. Conservation*, 64 N.Y.S.3d 133, 136 (2017) (finding on appeal that respondents established common questions of law and fact when they challenged the same permit application, raised significant environmental and health-related concerns associated with it and focused on the same actions of DEC.)

Third, Plaintiffs have a "direct and substantial interest in the outcome of the proceeding." *Matter of Pier*, 617 N.Y.S.2d at 1005-1006. LON's members include those that have lived within one mile of Norlite and have been directly impacted by its emission of air contaminants. LON's members are in the class of persons who would be most affected by the outcome of this action as nearby residents facing significant health effects or who have a heightened risk of adverse health effects due to Norlite's emission of air contaminants. In fact, the State in its complaint directly references this class of persons in its motion for a preliminary injunction as a "particularly sensitive population", stating that:

> The Saratoga Sites residents are particularly vulnerable to suffering negative effects from Norlite's air pollution, as people of lower socioeconomic status more often have more prevalent underlying health conditions of concern, and more often lack adequate access to medical care.

*See* Memorandum of Law in Support of Motion for Preliminary Injunction, ECF No. 15 ("PI Mot."), at 18-19. LON's members include those who live within one mile of the Facility and are thus subjected to the adverse health risks described in detail in both the State's complaint and LON's proposed complaint in intervention. Thus, they have a direct and substantial interest in the outcome of this proceeding.

Finally, Plaintiffs' intervention would not prejudice any party or unduly delay the determination of this proceeding. *See* NY CPLR § 1013 (providing that "the court shall consider

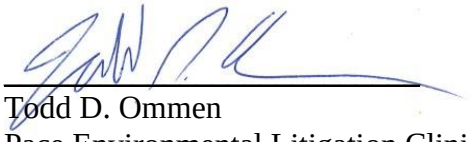
whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party"). This case is at its earliest stages, with substantive motions still pending before the Court and replies to such motions not yet filed. Plaintiffs do not anticipate that its intervention will delay or otherwise interfere with adjudication of the State's claims. Further, any potential delay caused by Plaintiffs' intervention is outweighed in importance by Plaintiffs' direct and substantial interest in the outcome of this proceeding. *See Matter of Pier,* 617 N.Y.S.2d at 1005-1006 (finding that considerations of delay are "more likely to be outweighed, and intervention therefore warranted, when the intervenor has a direct and substantial interest in the outcome of the proceeding"); *see also Rent Stabilization Ass'n of N.Y. City v. New York State Div. of Hous. & Community Renewal*, 681 N.Y.S.2d 679, 683 (1998) (finding that the Supreme Court should have granted the motion to intervene when the proposed intervenors had a "direct and substantial interest" in the outcome of the litigation and opposing party did not demonstrate that their intervention would substantially prejudice them or cause delay.)

## CONCLUSION

For the foregoing reasons, Plaintiffs' motion to intervene should be granted.

Dated: December 20, 2022
Dobbs Ferry, NY

Respectfully submitted,



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