

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

Western New York Youth Climate Council, et al.,

Petitioners,

v.

Index No. 808662/2024

New York State Department of Transportation, et al.,

Respondents.

East Side Parkways Coalition, et al.,

Petitioners,

v.

Index No. 808702/2024

New York State Department of Transportation, et al.

Respondents.

Gwendolyn Harris and James Ragland,

Petitioners,

v.

Index No. 808703/2024

Marie Therese Dominguez, in her official capacity as
Commissioner of the New York State Department of
Transportation, et al.,

Respondents,

**RESPONDENTS' MEMORANDUM OF LAW
IN OPPOSITION TO THE VERIFIED PETITIONS**

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PRELIMINARY STATEMENT

Greenspace and community connections are essential to vibrant, healthy communities. The goals of the proposed Kensington Expressway Project (project) are to reconnect an urban community that was severed by a major highway more than half a century ago; restore at-grade street connections and acres of greenspace where they previously existed; and improve pedestrian, bicycle, and vehicle traffic within the Humboldt Parkway neighborhoods, all while maintaining a vital transportation corridor. Despite the objections of these petitioners, the project has been thoroughly reviewed and analyzed by the State, the federal government, and the City of Buffalo and, despite these petitions, it has broad support within the community it aims to serve.

The New York State Department of Transportation (DOT), in conjunction with the Federal Highway Administration (FHWA), has fully complied with its legal obligations. DOT took the requisite hard look at potential environmental issues and rationally determined that the project would impose no significant environmental impacts on the community during or after construction. DOT thoroughly analyzed the potential issues in collaboration with numerous other agencies with experience and expertise in the relevant areas. Moreover, DOT engaged in extensive public involvement throughout the project development and environmental assessment phases.

Contrary to petitioners' allegations, DOT carefully, comprehensively, and methodically identified and analyzed all potential environmental impacts in an

environmental assessment of 35,000 pages, and appropriately concluded none would be significant. In so doing, DOT met its obligations under the State Environmental Quality Review Act (SEQRA) and its negative declaration should be affirmed.

Further, contrary to petitioners' assertions, DOT fully complied with the requirements imposed by the Climate Leadership and Community Protection Act (Climate Law), specifically that it consider greenhouse gas emissions and impacts on disadvantaged communities. Finally, the record plainly shows that DOT is not violating the Green Amendment, as Western New York Youth Climate Council, Coalition for Economic Justice and Citizens for Regional Transit allege. The Department's determination to proceed with the Project should be affirmed and the petitions dismissed.

FACTUAL BACKGROUND

I. HISTORY OF THE KENSINGTON EXPRESSWAY

The original Humboldt Parkway in Buffalo, New York, designed by Frederick Law Olmsted and Calvert Vaux in the 1800s, was a boulevard with a wide tree-lined median that connected Humboldt Park (now Martin Luther King, Jr. Park) with Delaware Park. The leafy greenspace served as a focal point for adjacent neighborhoods, linking residential streets and nearby recreational attractions, cultural and religious institutions, and local businesses (R. 8836).

In the late 1950s and 1960s, NYS Route 33, also known as the Kensington Expressway (Expressway), was built through the landscaped median, destroying it and severing several local east-west streets. The east and west portions of the

neighborhood were thereafter divided by a six-lane highway. The remaining section of the Humboldt Parkway was replaced between 1968 and 1970 with a below-grade expressway configuration, with intermittent bridge crossings, which is still in place (*id.*).

II. THE PROJECT

In the early 2000s, DOT began assessing a revised design concept for the Expressway that would eliminate many negative effects that the depressed Expressway was having on the surrounding community (*see generally* R. 25733-65). As early as 2007, DOT began engaging with the community, stakeholders, and other relevant local, state and federal agencies (R. 25759). Such was the genesis of the Kensington Expressway project. During the scoping process, DOT undertook a comprehensive and objective evaluation of ten alternative concepts, in consideration of public, agency, and community stakeholder input received (R. 8867-88). Of these ten alternative concepts, two were combined to form the Build Alternative and advanced for detailed study in the Environmental Assessment (EA). The other eight alternative concepts were dismissed from further consideration, as they did not meet the project objectives and associated screening criteria. Both the Build Alternative and No Build Alternative were studied in the EA. The Build Alternative was selected for the project after a comprehensive environmental review process.

The project will cap the depressed section of the Expressway, creating 11 acres of new greenspace on top of a 4,150-foot-long tunnel between Sidney and Dodge Streets (R. 25735, 25739). The cap will support trees up to 50 feet tall at

maturity that will be planted in diagonal rows, mimicking the original Olmsted-designed Humboldt Parkway.

The existing bridges over the Expressway at East Ferry, East Utica, Northampton, and Dodge Streets will be removed; the new cap over the tunnel will reconnect these streets at-grade and will provide additional new connections at Sidney Street/Butler Avenue, Winslow Avenue, and Riley Street (R. 25735-6). The bridge at Best Street will be replaced with a wider bridge structure to accommodate newly installed roundabouts. The Best Street interchange ramps will also be modified, providing two lanes on the Expressway's eastbound and westbound off-ramps. Existing signalized intersections will be updated along the reconstructed portion of Humboldt Parkway (R. 25736).

Humboldt Parkway will be reconfigured to include a sidewalk, parking lane, bicycle lane protected by a 2-foot-wide striped buffer area and one travel lane in each direction. Humboldt Parkway will also include curb bump outs for traffic near intersections. The realignment of the Humboldt Parkway will add nine feet of additional front yard for residents along the Parkway, as well as five feet of additional width for snow storage (R. 25735).

The project also includes milling and paving, driveway apron replacement (as needed), and Americans with Disabilities Act-compliant curb ramp upgrades on local streets around the project. It also includes these enhancements, developed in collaboration with community members: new traffic signals with pedestrian indicators; curb, sidewalk and streetlight replacements (as needed); and

landscaping between curbs and sidewalks, including new topsoil, grass, and trees (R. 25736).

The project also includes a local-hire program commitment to encourage the training and hiring of nearby residents for construction-related employment opportunities. DOT will partner with local community organizations, unions and political leaders to develop a program for local hiring (R. 25736; Vaidya Aff. ¶ 33).

No additional roadway will be built nor will the existing roadway be significantly relocated. Rather, the project improves an existing highway along with existing roads, intersections, and related infrastructure in the Humboldt Parkway neighborhood.

III. DOT'S ENVIRONMENTAL ASSESSMENT OF THE PROJECT.

DOT began the environmental assessment process, as required by Environmental Conservation Law article 8 and 17 NYCRR part 15 (State Environmental Quality Review Act [SEQRA]), and as further required by the National Environmental Policy Act (NEPA), the federal analog to SEQRA, in December 2022.

That month, DOT published the joint NEPA/SEQRA project scoping report, (R. 8827) which announced, among other things, that DOT was preparing a Draft Design Report/Environmental Assessment (DDR/EA). “Scoping” is “an early and open process” to determine what issues should be analyzed and which are “non-significant” and can be eliminated from further study” (40 CFR §1501.9). Although scoping is not required for an environmental assessment (as opposed to an

environmental impact statement (EIS), the process is helpful in identifying and honing “key social, economic, and environmental topics of concern for the Project” (Leslie Aff. ¶ 20). Scoping also includes public comment.

Issues identified during project scoping for analysis included: air quality; greenhouse gas emissions; traffic noise; disadvantaged communities; impacts on persons with disabilities, elderly populations, and transit-dependent populations; schools and places of worship; regional and local economy; state and national heritage areas; parks and recreational areas; and others (R. 8851-65).

The methodologies used to evaluate the potential environmental effects of the project followed required federal and state guidance for conducting environmental reviews. These included the FHWA Technical Advisory T6640.8A, Guidance for Preparing and Processing Environmental and Section 4(f) Documents (October 30, 1987), the procedures in the DOT’s Project Development Manual and the Environmental Manual, and other applicable guidance and regulations (*id.* at 8851).

DOT classified the project as a non-Type II (EA) action under SEQRA (R. 8831 and 25735) and issued the DDR/EA on September 11, 2023 (R. 34358). DOT issued the Final Design Report/Environmental Assessment (FDR/EA) on February 16, 2024 (R. 16217).

Following preparation of the FDR/EA, DOT, as lead agency for the project, determined that the project, “will not have a significant effect on the environment”

(R. 25735). On February 16, 2024, DOT signed and subsequently published its negative declaration for the purposes of ECL Article 8.

IV. PUBLIC PARTICIPATION

Recognizing that “[p]ublic involvement is an integral part of the environmental review and decision-making processes,” DOT provided extensive opportunities for public engagement starting early in project development (R. 25758). DOT’s coordination with the community and interested local, state, and federal agencies began in 2007 (R. 25759 and 16565). Public meetings discussing issues associated with potential impacts took place in 2009 and 2010, when the community largely supported full enclosure of the Expressway (*id.*). From 2012 to 2024, DOT hosted occasional stakeholder meetings in the community (R. 16565-16569). DOT staff also attended over 70 community events in 2022 and 2023 (R. 25759-60). These interactions have provided two-way dialogue about the project’s status, design, and environmental review process (*id.*).

DOT also held public meetings at various phases of environmental assessment (June 30, 2022, June 20, 2023, and September 27, 2023) to provide information to, and obtain input from, the public (R. 25758). Each were attended by more than 200 people (*id.*).

DOT also sought public input in written form. Throughout the process, DOT solicited, received, and considered public comments (R. 25758). The official public comment period for the DDR/EA began on September 12, 2023 and was extended through November 10, 2023; in addition, DOT continued to accept and consider

comments received through January 10, 2024. DOT received 1,599 comments during this four-month period (R. 16571). DOT responded to comments received during this four-month period in the FDR/EA (R. 16571 and 23251-66).

DOT also convened an interagency air quality working group that included DOT, NYS Department of Environmental Conservation (DEC), US Environmental Protection Agency (EPA), and FHWA (the air quality group) (R. 25760). This group met at least every other month throughout the course of the analysis to discuss EA methodology, models, inputs, results, and mitigation measures (*id.*).

Further, in November 2022, DOT opened a community outreach office in the Humboldt Parkway neighborhood (R. 25759). The office allows members of the public to continue to learn about the project, ask questions, and provide additional feedback to DOT and will remain open throughout project construction (R. 16571).

V. PETITIONERS' CLAIMS

In June 2024, three groups of petitioners filed petitions challenging DOT's environmental review of the project and determination to proceed. The East Side Parkways Coalition and 51 individuals (together, the Coalition) filed a petition asserting claims against DOT under SEQRA and the Climate Law. The NYCLU filed a petition on behalf of Gwendolyn Harris and James Ragland (together, Harris). The Western New York Youth Climate Council and two other non-profit groups (collectively the Council) also filed a petition.

While the petitions assert overlapping claims, each also challenges DOT's environmental assessment process and conclusions. Generally, the petitioners

allege that DOT violated SEQRA, failing to take a hard look at, or properly evaluate, several alleged potential environmental impacts of the project, including noise, vibration, traffic, and air quality (including PM2.5, fugitive emissions, and GHG emissions). Petitioners challenge: 1) DOT's analysis of short- and long-term environmental impacts arising from the project, and 2) the process by which DOT conducted its SEQRA and Climate Law reviews.

Together, petitioners also allege that DOT violated the Climate Law by failing to consider and mitigate environmental impacts on a disadvantaged community and that, by issuing a negative declaration and failing to provide a statement of justification, DOT made a determination affected by an error of law which is arbitrary and capricious (all petitions). The Council's petition asserts that DOT violated the Climate Law with respect to its analysis of GHG and also claims that DOT violated Section 19 of Article 1 of the New York State Constitution (the Green Amendment) in relation to the project.

All petitioners seek an order annulling DOT's SEQRA negative declaration and directing that DOT complete an EIS and comply with the Climate Law by ordering the identification of greenhouse gas and co-pollutant mitigation measures (all petitions). DOT now answers each petition; asserts that the Council has failed to state a Green Amendment claim and that, if it had, it is meritless; and further shows that none of the claims raised in the petitions has merit, and accordingly DOT seeks dismissal of all petitions.

LEGAL BACKGROUND

I. SEQRA

Although most agency environmental reviews in New York are conducted pursuant to DEC's general SEQRA regulations, agencies may establish their own SEQRA regulations, so long as they are no less protective than DEC's regulations (ECL 8-0113[3]; *see* 6 NYCRR § 617.14[b]). DOT has done just that, promulgating 17 NYCRR part 15, which is "designed to be no less protective of the environment than 6 NYCRR [p]art 617" (17 NYCRR § 15.1[d]).¹ DOT's SEQRA regulations expressly address the procedures required for cooperative projects with the federal government where DOT and its federal partner must also satisfy NEPA (*see* ECL 8-0113[3]; 17 NYCRR part 15).

Under SEQRA, "[d]irect action means a project or physical activity which results in the creation, alteration or new use of a structure, facility or land which will, upon completion or operation, be under the jurisdiction of the department" (17 NYCRR § 15.2). DOT's regulations require it to determine whether a "direct" action is type II or excluded, which would end any environmental review (17 NYCRR § 15.4[c], [d]). In all other cases, including this one, DOT then follows the process set forth in its regulations (*id.* § 15.4[d][1]). Where a proposed direct action is neither Type II nor excluded, DOT will either prepare an EA or begin steps toward an EIS

¹ Because DOT's regulations were promulgated in 1979 and amended in 1988, the time to challenge them is long past.

(17 NYCRR § 15.6). No matter which course it charts, DOT must take a hard look at potential environmental impacts.

An EIS for a proposed action is required under SEQRA if, after preparing an environmental assessment for the proposed action, DOT determines that the action will have a significant effect on the environment (17 NYCRR § 15.6[b]). Where DOT determines that the action will not have a significant effect on the environment, such a finding is deemed a “negative declaration” and SEQRA review ends (17 NYCRR § 15.10[a][1][i]).

II. THE CLIMATE LAW

In 2019, the Legislature enacted the Climate Leadership and Community Protection Act (Climate Law) (*see* L 2019, ch 106). Recognizing that “[t]he severity of current climate change and the threat of additional and more severe change will be affected by [New York’s] actions . . . to reduce greenhouse gas emissions,” the Legislature amended the Environmental Conservation Law (ECL) to limit statewide greenhouse gas emissions to 60 percent of 1990 emissions by 2030 and to 15 percent of 1990 emissions by 2050 (*see* ECL § 75-0107 [1]; codified by DEC at 6 NYCRR § 496.1). The Legislature also directed “[a]ll state agencies” to consider whether any “permits, licenses, [or] other administrative approvals [or] decisions” would be “inconsistent with or [would] interfere with the attainment of the [Law’s] statewide greenhouse gas emissions limits” (L 2019, ch 106, § 7 [2]). The “[g]reenhouse gas emission limit” is specifically defined as “the maximum allowable level of statewide greenhouse gas emissions, in a specified year, expressed in tons of

carbon dioxide equivalent” (ECL § 75-0101[8]). If an agency concludes that a proposed action would be inconsistent with the 2030 or 2050 limits, it must “provide a detailed statement of justification as to why [the emissions limits] may not be met[] and,” if possible, “identify alternatives or greenhouse gas mitigation measures to be required where [the] project is located” (*id.*).

The Climate Law further requires that agency decisions “not disproportionately burden disadvantaged communities” as identified pursuant to statute (L 2019, ch 106, § 7 [3]). And the Climate Law requires agencies to generally “prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities” (*id.*). “Co-pollutants” are “hazardous air pollutants produced by greenhouse gas emissions sources” (ECL § 75-0101[3]).

The New York State Climate Action Council is a 22-member appointed body charged with developing a “scoping plan”—that is, a roadmap—to help the State achieve its clean energy and climate goals (*see generally* ECL § 75-0103). The Council’s members, gubernatorial appointees, legislative appointees, and the heads of a dozen State executive agencies and authorities, were charged with providing nonbinding recommendations to help meet the Climate Law’s goals (*see generally id.*; see also Climate Action Plan at 1, Executive Summary). The Council issued the scoping report in December 2022.

III. THE GREEN AMENDMENT

In 2021, New York voters adopted a new amendment to the New York State Constitution, section 19 of Article I. Commonly called the Green Amendment, the

provision grants that “[e]ach person shall have a right to clean air and water, and to a healthful environment” (*id.*). The amendment took effect January 1, 2022.

ARGUMENT

As shown in the substantial administrative record and accompanying affidavits, DOT and its federal partner took a hard look at the potential environmental effects of the project and rationally concluded that the project will have no significant effect on the environment. Thus, DOT appropriately determined that no environmental impact statement is required. DOT, through its comprehensive environmental assessment, complied entirely with the Climate Law, and DOT did not violate the Green Amendment.

I. DOT COMPLIED WITH SEQRA

DOT satisfied its SEQRA obligations by identifying and thoroughly analyzing the possibility of any environmental effects, rationally determining that the project will have no significant effect on the environment and making a reasoned elaboration of its determination.

In “direct action” projects like this one, DOT is the lead agency for SEQRA purposes (17 NYCRR § 15.5[a][1]). Accordingly, DOT prepared an environmental assessment (17 NYCRR § 15.6[a][1]) and determined that the proposed project would “not have a significant effect on the environment” (R. 25735); *see also* 17 NYCRR § 15.6[b]). DOT’s negative declaration, which was also a finding of no significant impact in NEPA parlance, is thorough, rigorous and substantially more

comprehensive than a typical environmental assessment undertaken by DOT (Leslie Aff. ¶ 22).

Contrary to petitioners' claims, the negative declaration shows that DOT took a hard look at the project's areas of environmental concern, thoroughly considered public comments, and rationally determined that the project will not have a significant effect on the environment (*see* 17 NYCRR § 15.9[a], [b]). DOT's affidavits, negative declaration, FDR/EA, and roughly 35,000-page administrative record show that DOT met its obligations under SEQRA and that its negative declaration was rational and fully justified.

In cooperation with the FHWA, the Department prepared the EA in accordance with all pertinent requirements (*see* 40 CFR parts 1500-1508; 23 CFR 771; 17 NYCRR part 15), including DOT's project development manual (Leslie Aff. ¶ 17). The Department appropriately and accurately assessed the social, economic, and environmental effects of the proposed action (*id.* ¶ 18). The Department's negative declaration is lawful and no environmental impact statement is required.

The Coalition and Harris petitioners argue that there is a relatively low threshold for the preparation of an EIS for type I actions, but an EIS is not a per se requirement (*Matter of Forman v Trustees of State Univ. of NY*, 303 AD2d 1019, 1020 [4th Dept 2003]). In completing an EA, the agency must consider many of the same concerns that it would in completing an EIS, including long-term and short-term environmental effects. A "negative declaration is properly issued when the agenc(y) ha(s) made a thorough investigation of the problems involved and

reasonably exercised [its] discretion” (*Chinese Staff & Workers Assn v City of New York*, 68 NY2d 359, 364 [1986]). Generally, a negative declaration may be issued, obviating the need for an EIS, if the lead agency determines that no adverse environmental impacts will result or that the identified adverse environmental impacts will not be significant (*see Matter of Town of Copake v New York State Off. of Renewable Energy Siting*, 216 AD3d 93, 99-100 [3d Dept 2023], quoting *Matter of Gabrielli v Town of New Paltz*, 116 AD3d at 1316 [3d Dept 2014] [internal quotations omitted]; 17 NYCRR § 15.6[b]).

“Where the record establishes . . . that the “determination to issue a negative declaration and forego the need for an EIS was neither arbitrary and capricious nor irrational” “that determination will not be disturbed” (*Matter of Forman* at 1021, citing *Matter of Iroquois Cent. School Dist. v Zagata*, 241 AD2d 945 [4th Dept. 1997]).

Petitioners acknowledge a primary purpose of an EIS is to provide notice to the public and other agencies of the potential project, and provide a formal review and comment period for the lead agency to solicit and receive feedback on a proposed action, associated mitigation measures, and other key considerations (Coalition MOL at 5). The purposes of an EIS include “inform[ing] the public and other public agencies as early as possible about proposed actions that may significantly affect the quality of the environment, and to solicit comments which will assist the agency in the decision-making process in determining the environmental consequences of the proposed action” (*Matter of Rye Town/King*

Civic Assn. v Town of Rye, 82 AD2d 474, 481-482 [2d Dept 1981], *lv dismissed* 56 NY2d 508 [1982]). Petitioners further suggest courts should not hesitate to annul a negative declaration and order preparation of a full EIS so the public and decision makers will benefit from additional rigorous analysis, public input, and agency review that accompanies an EIS (Coalition MOL at 7). But that is precisely what DOT has already done here – a rigorous analysis of all potential environmental impacts accompanied by years of open public engagement, multiple public comment opportunities, and close involvement by numerous other local, state and federal agencies (*i.e.*, City, County, DEC, EPA, FHWA). DOT’s environmental review has already included the extensive public engagement and other agency involvement the Coalition petitioners seek.

Petitioners also assert that the “massive” size and scope of this project itself – estimated at \$1.01 billion – justifies requiring an EIS. But a project’s size does not determine whether an EIS is required. Consider, for example, the most expensive construction project in Western New York history—construction of the new Buffalo Bills Stadium—is estimated to cost over \$1.5 billion. There, as here, the lead agency issued a negative declaration, completing its environmental review with no EIS (Omilian Aff., Exh. N).

Petitioners claim that DOT acknowledges the potential environmental impacts from the project, thereby necessitating an EIS (Coalition MOL at 9). Not so. That DOT identified and assessed a range of “environmental topics of concern” in its EA does not, *per se*, trigger a need to perform a full EIS, not where, as here,

DOT took a hard look at possible impacts and rationally concluded the project *will not have a significant effect on the environment*.

SEQRA *requires* an agency like DOT to, as a preliminary step in the environmental review process, identify a range of possible environmental concerns that an action might yield for the purpose of determining whether an action may have an effect on the environment (17 NYCRR § 15.11; *Spitzer*, 100 NY2d at 190 [“[i]n making its initial determination, the agency will study many of the same concerns that must be assessed in an EIS, including both long- and short-term environmental effects”]). DOT’s consideration of areas of environmental concern in the EA process is not an acknowledgement of potential environment impacts, as petitioners claim, rather it is a *step* in determining whether an EIS is required.

The Court of Appeals has repeatedly explained that a negative declaration is appropriate under SEQRA so long as the lead agency has taken the appropriate “hard look” and its determination is rational (*Chinese Staff & Workers Assn*, 68 NY2d at 364; *Spitzer*, 100 NY2d at 189; *Merson*, 90 NY2d at 754). This is precisely such a case. DOT took the requisite hard look. It considered the relevant areas of environmental concern, committed to incorporating and enforcing numerous construction-phase measures to eliminate potential impacts, and rationally determined that the project will ultimately have no significant effect on the environment. In accordance with SEQRA, no EIS is required and this Court should find that DOT may proceed with the project (17 NYCRR § 15.6).

A. DOT Took a Hard Look at the Relevant Areas of Environmental Concern of the Project.

The FDR/EA distills the analysis found in the approximately 35,000-page administrative record, demonstrating that DOT identified all the relevant areas of environmental concern, took a hard look at each, rationally concluded that the build alternative will not have a significant effect on the environment, and made a reasoned elaboration of the basis for its determination (*see* 17 NYCRR § 15.9[a], [b]). In so doing, DOT fully met its SEQRA obligations (17 NYCRR § 15.6[b]). The substantial FDR/EA and affidavits refute petitioners' claims that DOT failed to take a hard look at potential environmental impacts.

The law is well-settled that judicial review of a SEQRA determination is limited to determining whether the challenged determination was affected by an error of law or was arbitrary and capricious, an abuse of discretion, or the product of a violation of lawful procedure (*see Akpan v Koch*, 75 NY2d 561, 570 [1990]; *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 416 [1986]; *Matter of Forman v Trustees of State Univ. of NY*, 303 AD2d 1019, 1020 [4th Dept 2003]).

Judicial review of DOT's obligations under SEQRA is limited to whether DOT "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration of the basis for its determination'" (*Akpan*, 75 NY2d at 570; *see also Gernatt Asphalt Prods., Inc. v Town of Sardinia*, 87 NY2d 668, 688 [1996]). This Court must decide only whether DOT's determination "has a rational basis in the record" (*Hingston v New York State Dept of Envtl. Conserv.*,

202 AD2d 877, 879 [3d Dept 1994]), and may not substitute its judgment for that of DOT (*Matter of Regional Action Group for Env't. v Zagata*, 245 AD2d 798, 800 [3d Dept 1997]).²

DOT's SEQRA obligations must be viewed in light of a "rule of reason" (*Matter of Jackson*, 67 NY2d at 417). "Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed" to satisfy the substantive requirements of SEQRA (*id.*). "The degree of detail with which each factor must be discussed obviously will vary with the circumstances and nature of the proposal" (*id.*). Further, the New York State Legislature granted executive agencies "considerable latitude in evaluating environmental effects and choosing among alternatives" (*id.* [citing ECL 8-0109 [8]]). "Nothing in the law requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence" (*id.*). Likewise, it is not this Court's role to weigh the desirability of any proposed actions or choose among alternatives but only to ensure that the agency has satisfied the substantive and procedural requirements of SEQRA and of the regulations implementing it (*Matter of Jackson*, 67 NY2d at 416).

² Additionally, under CPLR 7803(3), this Court's review is limited to determining whether the challenged determination is rational, or arbitrary and capricious (*Flacke v Onondaga Landfill Sys., Inc.*, 69 NY2d 355, 363 [1987])

B. DOT identified and took a hard look at possible effects on air quality, both short- and long-term.

The Coalition and Harris petitions challenge DOT's analysis of, and determinations relating to, potential short- and long-term air quality impacts.

1) DOT analyzed air quality in coordination with DEC, EPA, and FHWA – an interagency collaboration of air quality experts.

DOT worked closely with three other agencies with expertise on air quality – DEC, EPA, and FHWA – in developing, implementing, and reviewing the project's air quality analyses. DOT employed several state-of-the-science, scientifically-developed models, to assess air quality impacts (Leslie Aff. ¶¶ 32-41). The air quality analysis methodology DOT employed included EPA-approved emissions models that estimate numerous air pollutants (*id.*, ¶¶ 34-36). DOT analyzed possible air quality effects in accordance with relevant federal and state procedures, including EPA's *Transportation Conformity Guidance for Quantitative Hot-spot Analyses in PM_{2.5} and PM₁₀ Nonattainment and Maintenance Areas* (*id.* at 38). DOT's methodologies were developed in coordination with, and reviewed by, the interagency Air Quality Group established for the project (*id.* at 39). Thus, DOT's air quality modeling methodology was rigorous, state-of-the-science, and developed by a team of agencies with air quality expertise.

2) The DEC Thruway monitor provides a reliable indicator of background air quality in the project area.

The Harris and Coalition petitioners complain that DOT neglected to study the background air quality of the Humboldt Parkway neighborhood and that the

DEC air monitor located at the NYS Thruway Authority Bridge Maintenance Facility, about three miles from the project site, is not representative of background air quality in the project area (Coalition MOL at 16; Harris MOL at 8-9).

But DOT's models for assessing air quality, including use of air quality data from the Thruway monitor is entirely appropriate and reliable for predicting air quality impacts in the Humboldt Parkway neighborhood and project area (Leslie Aff. ¶¶ 41-45). DOT selected the Thruway monitor in conformance with air quality modeling guidance, specifically the EPA Transportation Conformity Guidance for Quantitative Hot-spot Analyses in PM_{2.5} and PM₁₀ Nonattainment and Maintenance Areas, which provides the procedures for selecting a monitor location for background concentrations for such analyses (*id.* at 40-41). The EPA Guidance neither requires nor recommends on-site data collection for representative air quality concentrations (*id.*). DOT selected the DEC Thruway monitor to provide representative background concentrations (documented in the FDR/EA at Appendix D7 at 6-9) consistent with the EPA Guidance, including consideration of the distance of the monitor from the project site, upwind/downwind considerations, the geographic scale/purpose of the monitor, land use, and monitored PM_{2.5} concentrations at each location (*id.* at 41).

DOT used the Thruway monitor because it is the closest DEC monitor to the project and provides a conservative basis for representing background concentration levels of pollutants in and around the project site. Being a "conservative" basis means that the chosen monitor overestimates, rather than underestimates,

background concentration levels in the project area (*id.* at 43). This is because the monitor has a greater concentration of manufacturing, warehousing and logistics land uses nearby compared to the project area, where nearby use is primarily residential in character (*id.*). Another advantage of the Thruway monitor is that it provides data for both PM_{2.5} and PM₁₀, while other locations provide PM_{2.5} only (*id.*). Each of the four agencies in the Air Quality Group agreed that this monitor provided the best basis for background concentrations for this project (*id.* at 42-43).

It is important to note that the DEC air monitor data are used to represent background concentrations, which are just one component of the air quality analysis. This background concentration is added with the separately-analyzed emissions from the roadways in the study area to determine the total concentration for comparison to air quality standards (*id.*). The potential for other nearby sources (*e.g.*, rail line, auto-repair shops and the Buffalo Medical Center) to influence local concentrations was given appropriate consideration as documented in the FDR/EA (R. 23030).

Harris petitioners also claim that “the EA fails to conduct any sensitivity analyses to depict a forecasted range of potential harm upon communities” (Harris MOL at 10, Sahu Aff. ¶¶ 26, 37). This is incorrect. Each input in the traffic and air quality analyses conducted by DOT is based on relevant state and federal guidance documents (Leslie Aff. ¶ 32). These guidance documents are based on thorough, systematic review of data and methods, sensitivity analyses, and represent the

“settled science” of their times (*id.*). Similarly, the regulatory models used have undergone rigorous technical and scientific review and are regularly updated (*id.*).

3) ***DOT properly assessed PM2.5 effects.***

Petitioners next take issue with DOT’s studies of, and conclusions relating to, PM2.5 emissions (Harris Pet. ¶¶ 54-56 and 75). Petitioners take particular issue with DOT’s analysis of PM2.5 emissions and claim it is “unreasonable not to complete a fulsome analysis through EIS and to identify mitigation measures ‘consistent with the Climate Leadership and community Protection Act’” (Harris Pet., ¶ 75; Coalition MOL at 17). Harris asserts that, as a non-threshold pollutant, PM2.5 poses a human health hazard, particularly for vulnerable communities like the Humboldt Park neighborhood and that DOT failed to take a rigorous analysis of impacts of PM2.5 on the neighborhood (Harris MOL at 14-15). Harris questions DOT’s reliance on the federal NAAQS for PM2.5 in support of the negative declaration (*id.* at 15). Contrary to petitioners’ claims, however, DOT’s PM2.5 analysis is both rigorous and rational.

First, the Court of Appeals has repeatedly held that a reviewing agency’s use of NAAQS standards in assessing potential air quality impacts as part of a SEQRA review is rational and appropriate. In *Spitzer v Farrell*, 100 NY2d 186, 189 (2003), the Court considered a challenge to a SEQRA negative declaration issued by New York City Department of Sanitation (DOS) in assessing potential environmental concerns arising from a plan to truck landfill waste from NYC to landfills in New

Jersey. The *Spitzer* petitioners challenged NYC's use of NAAQS to assess whether the proposal would result in air quality impacts from diesel truck traffic.

When DOS assessed air quality as part of its SEQRA review, it used NAAQS standards to assess potential air quality issues. Ultimately, the Court of Appeals affirmed the negative declaration: "We conclude DOS took the requisite hard look and reasonably concluded the plan would not have a significant impact on air quality" (*Spitzer*, 100 NY2d at 191). The Court held that DOS's use of NAAQS standards in assessing whether diesel emissions might have a significant impact on air quality was appropriate, explaining:

To fully assess any potential impact on air quality, DOS studied both particulate matter and carbon monoxide. DOS determined that the diesel trucks required to transport the garbage to New Jersey would emit particulate matter and undertook a comprehensive study to determine whether the particulate matter emissions would have a significant impact on air quality. DOS based its study on the air standards imposed by the Clean Air Act. Although the SEQRA review could have been conducted without reliance on the federal standards, here it was rational for the agency, which is not an expert on air quality, to use such standards in its analysis.

(*id.*). The Court concluded that DOS's use of NAAQS standards to assess air quality impacts was rational and satisfied the SEQRA "hard look" requirement (*id.*).

The Court followed *Spitzer* in *Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan*, 30 NY3d 416, 431 (2017) when it held that an agency's consideration of the risk of airborne lead dust migrating from a construction site, which depended upon a NAAQS standard for lead exposure, was a "rational choice" for assessing the risk (*see also Matter of City of New York*, 5 Misc. 3d 1014(A),

1014A (Sup. Ct., NY Co. 2004) (agency rationally used NAAQS PM10 standards to assess air quality in SEQRA review; negative declaration upheld).

Here, in accordance with *Spitzer* and *Friends of P.S. 163*, DOT rationally chose the NAAQS standard for PM2.5 in assessing whether the project would have a significant effect on air quality in the project area. The EPA has established the NAAQS based on scientific studies, with an “adequate margin of safety” (Leslie Aff. ¶ 55), which is a standard intended to address uncertainties associated with inconclusive evidence and that provides a reasonable degree of protection against hazards that research has not yet identified (*id.*). In addressing these requirements, EPA takes into consideration the nature of health effects, size of populations at risk and estimated exposure, and scientific uncertainty related to the potential occurrence of such effects. The NAAQS are intended to protect against adverse health effects and to protect at-risk population groups, human health and welfare, including the health of sensitive populations such as children, the elderly, and people with asthma (*id.*).

Moreover, contrary to petitioners’ claims, DOT recognized the possibility of impacts from PM2.5 and took a hard look at such potential impacts. The FDR/EA and negative declaration reflect DOT’s methodology, analysis, conclusions, and reasoning relating to potential PM2.5 impacts arising from the project and demonstrate DOT took a hard look at possible PM2.5 impacts arising from the project.

As discussed above (Section I.B.1), DOT's air quality analyses were developed in conjunction with the four-agency air quality group, followed EPA and FHWA guidance, and used required EPA models (Leslie Aff. ¶ 38).³ Assumptions and inputs for the air quality modeling were conservative. The analysis included comparison to the NAAQS for PM_{2.5}, and also included the comparison of the build alternative to the no build alternative in the assessment of effects (*see id.*). DOT also conducted a PM_{2.5} "microscale" or localized concentration analysis for the project (Leslie Aff. ¶ 47). The analysis is documented in Section 4.9 and Appendix D7 of the FDR/EA (R. 16489-510, 23017-146) (*id.*). In short, DOT's analysis was rigorous, employed EPA-approved models and EPA guidance, and was developed in coordination with multiple expert agencies (Leslie Aff. ¶¶ 38-45, 48-51).

Harris petitioners take issue with DOT's determination that construction of the tunnel will not significantly impact air pollution in the neighborhood. Petitioners claim that DOT inadequately assessed PM_{2.5} by under-predicting PM_{2.5} exposure at the tunnel portals, and that DOT's prediction of a slight increase in PM_{2.5} at the tunnel portals should have triggered an EIS (Harris MOL at 12-15).

As documented in the FDR/EA (R. 16441-2, 16489-510, 23017-146), the air quality analysis showed that PM_{2.5} concentrations will decrease at locations along the tunnel cap and increase slightly near the tunnel exit portals. Of the 2,833

³ While petitioners challenge DOT's analysis of PM_{2.5}, DOT's air quality analysis included other mobile air pollutants including volatile organic compounds, nitrogen oxides, carbon monoxide, and PM₁₀ (R. 16489-515).

receptors⁴ in the model, the highest increase in annual average PM_{2.5} at a single receptor in year 2027 is 6%. However, as shown in Figure 4.4-7 and Table 4.4-9 of the FDR/EA (R. 16441-2), of the 2,833 receptors, only 14 would experience an increase of greater than 5% in year 2027 and these receptors are not located at residences, schools, or community facilities. 1,787 of the 2,833 receptors would experience a decrease in annual average PM_{2.5} concentrations. Concentrations would also be lower in year 2047 as compared to year 2027. Modeling results indicate that all of the receptors would have PM_{2.5} concentrations that are below the applicable NAAQS (Leslie Aff. ¶ 54).

As documented in the FDR/EA, the annual average PM_{2.5} concentration for the build alternative is 7.5 µg/m³ and 7.3 µg/m³ for 2027 and 2047, respectively (Leslie Aff. ¶ 58). The projected levels of PM_{2.5} at the tunnel ends will be below both EPA's then-current NAAQS levels, and the new, more stringent standard that took effect in May 2024.⁵ This means that even the receptors that are expected to have the greatest increase in PM_{2.5} levels will still be well within the health-based NAAQS standard that protects sensitive populations (FDR/EA Tables 4.9-5 to 4.9-8) (R. 16498-504). The PM_{2.5} levels projected for 2027 and 2047 are below the now

⁴ "Receptors" are specific locations in the model where the public would have access, such as sidewalks.

⁵ At the time of the air quality analysis and issuance of the negative declaration, the primary (health-based) annual NAAQS that was in effect for PM_{2.5} was 12.0 µg/m³. Effective in May 2024, EPA reduced the standard to 9.0 µg/m³ (Leslie Aff., ¶ 58).

effective NAAQS levels and increase, at most marginally. Consequently, DOT properly concluded the project will have no significant effect on PM_{2.5} levels.

Harris also alleges that DOT failed to conduct routine analyses of environmental impacts for highway construction projects, such as key sources of pollutants on highways, including starting and idling vehicles, as well as tire and brake wear (Harris MOL at 8, Sahu Aff. ¶ 8). This is not so. DOT's analysis of traffic and air impacts included extensive pollutant analyses. In assessing possible air quality impacts, DOT used the EPA MOVES model, a state-of-the-science modeling system that estimates emissions for mobile sources at the national, county, and project levels for criteria air pollutants, greenhouse gas emissions, and air toxics (Leslie Aff. ¶ 34). MOVES is EPA's motor vehicle emissions model for state and local agencies to estimate volatile organic compounds, nitrogen oxides, particulate matter (PM_{2.5} and PM₁₀), carbon monoxide, and other precursors from cars, trucks, buses, and motorcycles. The model is based on analyses of millions of emission test results and considerable advances in EPA's understanding of vehicle emissions (*see id.*). The MOVES model generates emission rates for particulate matter running exhaust, crankcase running exhaust, tire wear and brake wear separately. These four components (exhaust, crankcase exhaust, tire wear, and brake wear) were added together to determine the total PM_{2.5} and PM₁₀ emission rate (the PM₁₀ analysis also included road dust per the EPA PM hot-spot guidance) (Leslie Aff. ¶ 39). DOT also used AERMOD in its air quality analysis (*id.*, ¶ 35). AERMOD is a state-of-the-science, scientifically developed, reliable model used to

estimate pollutant concentrations (*id.* ¶ 36). It models concentrations at specific locations (receptors) using the emissions from the MOVES model, meteorological data and terrain. AERMOD was adopted by the EPA and promulgated as their preferred regulatory model (*see id.*).

As such, DOT's analysis of air quality was rigorous and included all necessary sources of pollutants. DOT's analysis demonstrates that adverse effects related to PM_{2.5} concentrations are not anticipated (Leslie Aff. ¶ 57). In addition, the project includes a variety of air quality mitigation measures at the tunnel portals, such as the planting of low growing shrubs and trees (*id.*). These measures were not included in the air quality modeling (*id.*).

Petitioners' complaints about DOT's air quality analyses and conclusions do not pass muster. They rely upon Sahu, an engineer, who disagrees with DOT's methodology and conclusions now, after DOT's analysis is complete. But, notably, Sahu offered none of his opinions during the public comment period on the draft environmental assessment, when DOT could have actually considered them in the environmental review process. As a result, these newly raised challenges to DOT's environmental assessment—as well as the other newly raised challenges by petitioners that could have been raised during the public comment process on the draft environmental assessment—are not properly before the court due to a failure to exhaust administrative remedies (*See Matter of Pilot Travel Ctrs., LLC v Town Bd. of Town of Bath*, 163 AD3d 1409, 1411 [4th Dept 2018] [petitioner failed to exhaust administrative remedies as to its challenge to a town's negative declaration

when it failed to offer “specific concerns” during the town’s public comment period on the proposed project]). In any event, DOT’s methodology was fully compliant with EPA guidance, requirements, and air quality models, was developed in coordination with a team of expert agencies, and is rigorous and sound. “It is not the role of this court to ... *resolve disagreements among experts*, or substitute its judgment for that of the agency” (*Fisher v Giuliani*, 280 AD2d 13, 19-20 [1st Dept 2001] [emphasis added], citing *Matter of Neville v Koch*, 79 NY2d 416, 424-425 [1992]; *see also Akpan*, 75 NY2d at 571). DOT took the requisite hard look at PM2.5 levels and rationally concluded that the project will not have a significant effect on them.

4) ***Petitioners’ challenges to DOT’s analyses concerning EV assumptions are baseless.***

The Harris petitioners also claim that DOT made “irrational,” “unsupported” and “unreasonable” assumptions concerning electric vehicles (EVs) (Harris MOL at 9). They assert that “[t]he agency assumes without any explanation that drivers in this community will switch to electric vehicles, and this reduction in gas vehicles will reduce air pollution.” (Harris MOL at 9). Relatedly, the Harris petitioners also claim that DOT should have taken into account the air pollution produced by manufacturers of EV batteries (Harris MOL at 10, Sahu Aff. ¶ 20).

Petitioners’ claims regarding DOT’s assumptions in modeling EVs are incorrect. As documented in Appendix D7 of the EA (R. 23017-146), DOT’s use of fuel/engine types for analysis of future air quality were based on 2019 vehicle

registration data. Using the 2019 vehicle registration data to define fuel/engine types for the future analysis years (2027 and 2047) is conservative because of the substantial increase in electric vehicles anticipated over the next several decades (Leslie Aff. ¶ 51). And accounting for increased electric vehicle sales would result in lower estimates of pollutant concentrations than shown in the FDR/EA (*see id.*). But DOT did not make that assumption (*see id.*). Thus, petitioners' assertion that DOT "assumes without any explanation that drivers in this community will switch to electric vehicles" is simply wrong. DOT made no such assumption and its estimates of drivers using EVs is a conservative underestimate.

Petitioners' complaint that DOT did not consider pollution caused by the manufacturers of batteries is also off-base. There are no local EV battery manufacturers in the area and thus they have no impact on local air quality that DOT should have considered. There also would be no basis to assume that the number of EV batteries manufactured at any location would change due to whether a portion of the Expressway is capped.

5) ***DOT committed to mitigation measures to assure that air quality impacts are not significant during construction.***

Harris Petitioners claim that "[t]he EA also forecasts that 'construction operations could increase air pollution in the form of fugitive dust, as well as particulate matter in exhaust emissions from material delivery trucks, construction equipment, and worker's private vehicles'" and that DOT did not attempt to forecast construction-phase particulate matter (MOL at 11).

DOT took a hard look at potential adverse impacts to air quality during construction (Vaidya Aff. ¶ 10). Moreover, the build alternative includes many design elements that will ensure short-term construction effects are not significant, as documented in Tables 1-3 of the negative declaration and set forth in further detail in FDR/EA § 4.20 (*see id.*). Among them, DOT will:

- Require contractors to use lower emission equipment (Tier 4 emissions standards) where appropriate and to the extent practicable. The contractor will also be required to consider and report on the use of Diesel Particulate Filter retrofits on older equipment over 50 horsepower per DOT Specification 696.0002 Diesel Engine Emission Control.
- Require contractors to prepare and implement a dust control plan that includes pro-active measures to prevent discharge of dust into the atmosphere.
- Avoid locating diesel engines within 50 feet of sensitive receptors such as residences and schools where practicable.
- Limit idling time for diesel powered equipment per DOT's standard specifications for delivery and dump trucks and all other diesel-powered equipment (with limited exceptions).
- Implement an outdoor ambient air quality monitoring program during construction. DOT will conduct real-time particulate monitoring at a number of locations within the community to be determined during final design. DOT will also conduct background monitoring to establish, and routinely verify, baseline levels. If the monitoring data show that air quality levels are approaching a concern level (also to be established during final design) that could result in an exceedance of the NAAQS, operational and/or mechanical deficiencies would be identified and corrected. If the data result in any particulate air quality levels that exceed the NAAQS, the applicable construction activities would be suspended until the deficiencies are identified and corrected.

(*id.* ¶ 17). DOT's air quality mitigation measures in the project proposal and its project contracts are not mere plans or aspirational requirements (*id.* ¶ 29) As made

clear in the Best Street contract, the contractor *must* satisfy the air quality mitigation measures in the contract including the requirements for lower emission vehicles, prohibitions on motor idling, and dust control measures (*id.* ¶ 29). Every phase of construction will include similar, mandatory air quality mitigation measures (*id.* ¶¶ 29, 32). In addition, the project includes a variety of air emissions mitigation measures at the tunnel portals, such as the planting of low-growing shrubs and trees (Leslie Aff. ¶ 57).

The build alternative will not result in adverse effects to environmental justice (or disadvantaged) populations and the FDR/EA describes the mitigation measures to which DOT has committed (R. 16419-51; Leslie Aff. ¶ 74).

6) *DOT took a hard look at construction-related noise and vibration effects.*

The Coalition challenges DOT's noise and vibration analysis as inadequate (Coalition MOL at 14-15). DOT, however, took the requisite hard look at noise and vibration impacts during construction, committed to numerous mitigation measures that will be required in contracts, and rationally concluded that the project will not cause significant impacts from noise or vibration.

DOT's analysis of construction-phase noise impacts is set forth in FDR/EA § 4.20.1 (R. 16540-2). To evaluate potential noise levels during construction, DOT employed the Roadway Construction Noise Model (RCNM) version 1.1, developed by the FHWA (R. 16541). The RCNM is a generally accepted methodology for assessing and predicting noise levels for construction projects (Vaidya Aff. ¶ 20). The

construction noise analysis was performed in iterations to predict noise levels for a variety of construction scenarios anticipated during construction of the build alternative at six representative distances (50, 100, 150, 200, 250, and 300 feet) from the construction zones, under both depressed and at-grade roadway conditions (Vaidya Aff. ¶ 19; R. 16540). Table 8 in the Noise Analysis Report (R. 23170) shows the results of this analysis (R. 16541).

DOT's noise analysis predicts that some locations could experience construction noise effects (*id.*). Although the negative declaration acknowledges that construction noise levels could exceed 80 d(B)A at distances of 100 to 150 feet or less (R. 25746), it also commits to a construction noise mitigation plan that will include several measures to reduce potential noise impacts (*id.*). DOT commits to implement a plan that includes the following components, among others:

- A construction noise monitoring program, including establishing the noise levels that will trigger the need for investigation and/or changes to construction approaches. These noise levels would be determined during final design. If the noise levels are exceeded, the applicable construction activities will be suspended until a plan to abate the noise issues has been approved by DOT. The construction noise monitoring program will be prepared with input from the community and allow for modification of methodologies in consideration of public input received throughout construction.
- Coordinating a work operation that will affect neighboring residences and businesses to the least extent practicable. Normal work hours will be scheduled between 6:00 a.m. and 9:00 p.m. No blasting or mechanical rock removal will be performed at night.
- Temporary construction noise abatement measures, such as shrouds or other noise curtains, acoustic fabric, physical barriers, and/or enclosures to reduce noise from pile drivers, compressors, generators, pumps, and other equipment when practicable. The need for each of these temporary

measures will be assessed during final design. The effectiveness and need of these temporary measures will also be assessed in real-time throughout construction based on public input (e.g., noise concerns) and the construction noise monitoring program.

(Vaidya Aff. ¶ 21; R. 16544-5). DOT has committed to enforcing these mitigation measures (Vaidya Aff. ¶¶ 15, 21-22, 28-31). The contractors performing construction are bound to implement them – they will be *required* during construction (*id.* ¶¶ 29, 31).

DOT also took a hard look at potential construction-related vibration impacts, committed to appropriate mitigation measures, and rationally concluded that the project will not cause significant impacts from vibration (R. 25747, 165442-5). DOT explains, “[c]onstruction vibration for this project comprises two types of vibration: vibration generated by mechanical equipment, which tends to be more continuous, and blast vibration, which is brief and episodic. Mechanical and blasting-related vibration are each discussed separately below. For each type of vibration, two types of effects are considered: 1) the potential for cosmetic damage to structures (threshold damage), and 2) the potential annoyance effects of vibration on building occupants (R. 16542; Vaidya Aff. ¶ 23).

Although neither FHWA nor DOT has guidelines for analyzing mechanical equipment vibration, DOT appropriately employed the construction vibration prediction methodologies provided by the Federal Transit Administration Transit Noise and Vibration Impact Assessment Manual for assessing potential vibration impacts associated with the project (R. 16543-4; Vaidya Aff. ¶ 24). This is a

generally accepted methodology for assessing and predicting noise levels for construction projects (*id.*). DOT concluded that vibration from mechanical equipment and blasting is not expected to cause property damage but has the potential to create “annoyance effects” at nearby residences for limited times (between 7:00 am. and 9:00 pm) (*id.*).

Annoyance effects from the operation of construction equipment will nevertheless be minimized through the mitigation commitments described in the FDR/EA, which include vibration monitoring, avoiding pile driving at night, and community outreach during construction (R. 16544; Vaidya Aff. ¶ 25). In addition, potential effects from blasting will be minimized in multiple ways. The contract specifications for the project will mandate criteria that were developed by the US Bureau of Mines to avoid property damage due to blasting (*id.*). Furthermore, test blasting will be used to develop blast designs (including charge weights) that are consistent with maintenance of those criteria. Vibration criteria in the specifications will include both Caution and Alert levels, where Alert is the level not to be exceeded, and Caution is a slightly lower level at which blast practices must be reviewed by DOT and the contractor (*id.* ¶ 26). DOT also commits to implementing a Construction Vibration Mitigation Plan, to be developed during final design, and which will include the following components, among others:

- a communication and public outreach plan throughout the construction period.

- No nighttime use of impact and drilling equipment including pile drivers, jackhammers, hoe rams, core drills, direct push soil probes (*e.g.*, Geoprobe), pavement breakers, pneumatic tools, and rock drills.
- Requiring contractors to use pre-auguring equipment to reduce the duration of vibratory pile driving when reasonable.
- Requiring contractor to develop and implement a blasting program designed to avoid the potential for damage to structures by modifying the weight of explosives per delay, the loading density, and the delay pattern consistent with GEM22, the Geotechnical Engineering Manual published by the DOT. Blast vibration will be kept within bounds as determined by US Bureau of Mines in Report of Investigations 8507 and adjusted on an as-needed basis during construction.
- Prior to construction blasting, test blasts will be conducted to assess appropriate explosive charge weights, and if deemed appropriate, industry-standard signature hole analysis.
- Conduct vibration and airblast monitoring per the blasting program.

(Vaidya Aff. ¶ 26; R. 16544-5). As with the air quality and noise mitigation measures, DOT has committed to enforcing these measures (R. 25737-57; Vaidya Aff. ¶¶ 28-30). The contractors performing construction are bound to implement them – they will be *required* during construction (Vaidya Aff. ¶¶ 29, 31).

7) ***DOT took a hard look at potential effects on GHG emissions.***

The Harris petitioners complain that DOT failed to forecast and discuss GHG emissions during the project's construction phase (Harris MOL at 11) and the Council argues that the creation of GHG emissions is a potentially adverse impact that must be examined in the environmental review process and takes issue with DOT's conclusion that the project will have a "net benefit" with respect to GHG emissions and have no adverse impact on the environment (Council MOL at 5-6).

Contrary to petitioners' assertions, the FDR/EA shows that DOT properly assessed the project's potential impacts on GHG emissions both, short- and long-term and rationally concluded it will have no significant effect. The EA documents the assessment of effects on GHG emissions and energy consumption, including construction-phase effects (R. 16511, 16514). DOT used the FHWA's Infrastructure Carbon Estimator (a modeling tool) to assess GHG emissions and energy consumption during construction of the project (*id.*).

Regarding short-term effects, § 4.10.4 of the FDR/EA (R. 16514) acknowledges that construction will require a short-term expenditure of energy use and its related production of GHG emissions. Moreover, construction-related air quality mitigation commitments and active air monitoring will minimize on-site GHG emissions from trucks and equipment (Leslie Aff. ¶ 78; R. 16545-8). And, as further discussed below in relation to Climate Law compliance (*see pp. 48-54*), the vast majority (80%) of construction-related GHG emissions do not happen on-site but are from off-site, or "upstream" construction of project materials (R. 16514, Table 4.10.6). Overall, the project will result in a net benefit with respect to operational (long-term) GHG emissions on an annual basis (Leslie Aff. ¶ 75).

The project also prioritizes reductions of greenhouse gas emissions and co-pollutants locally (Leslie Aff. ¶ 79). Although local short-term emissions related to construction will occur, they will be more than offset in reductions in GHG emissions and co-pollutants from the reduction in vehicle miles traveled from the project (*id.*). As documented in the FDR/EA (R. 16512-4), the 7,320 metric tons of

CO₂ equivalent that are projected to be emitted onsite as a result of construction will be offset by the annual reduction of 296 metric tons of CO₂ equivalent attributable to reduced vehicle miles traveled as a result of the project (*id.*). The record establishes that DOT took a hard look and made a reasoned determination that the project will not create a significant impact on GHG emissions.⁶

8) DOT took a hard look at other relevant areas of concern.

The Coalition claims that DOT's EA lacks a traffic study for impacts on traffic during construction when traffic will be reduced to two lanes during peak hours (Coalition MOL at 12-13). DOT *did*, however, assess impacts on construction traffic reductions expected during construction. Early in the environmental assessment process, DOT identified several potential project concepts and conducted multiple traffic studies in relation to various alternatives. DOT performed traffic analysis of the reduction of the Kensington to two lanes in each direction. Specifically, Concept 7 considered a traffic scenario of a four-lane tunnel. The discussion begins on page 49 of the Scoping Report, with traffic analysis on page 14 of Appendix C (R. 8879, 28743-51). In addition, Concept 9 modelled traffic at the Kensington as a four-lane boulevard with traffic diverted to other roads. That discussion begins on page 53 of the Scoping Report, with traffic analysis on page 19 of Appendix C (R. 8883, 28752-61).

⁶ Petitioners' separate claims alleging that DOT failed to comply with the CLCPA in relation to GHG emissions is discussed *infra*, Point II.

Based on the traffic studies DOT performed involving multiple concept scenarios that reduced traffic in each direction on the Expressway, DOT recognizes that construction of the build alternative will have short-term effects on traffic (R. 16549) and has committed to mitigation measures that will be imposed on contractors performing construction. The FDR/EA addresses displaced traffic during construction and construction-phase mitigation measures regarding impacts on traffic (R. 16549-50). Based on its multiple traffic studies as set out in the Scoping Report and the construction-phase mitigation commitments, DOT rationally concluded that the effects on traffic during construction will not be significant.

The Coalition also claims DOT failed to follow its own environmental review regulations and raise a slew of unsupported objections to DOT's negative declaration and conclusions. But these claims too are meritless. Coalition claims, for example, that excavation for the project will be lower than Scajacuada Creek and have not accounted for this. The Coalition has misinterpreted project documents. As DOT's engineer explains, "The cited Appendix A2 drawing shows exactly the opposite of [the Coalition's] claim. It shows that the proposed roadway profile (solid red line) and the bottom of excavation (light blue line) go above the elevation of the top of Scajaquada Drain structure, not under it" (Vaidya Aff. ¶ 33).

The Coalition also claims the tunnel drainage is designed to be pumped in the event it is hazardous but that the EA did not further address this "potential hazard" (Coalition MOL at 19). The potentially hazardous drainage relates to the

risk of a fire in the tunnel – a somewhat rare event that can occur anywhere on a highway and requires no further analysis (Leslie Aff. ¶¶ 68-70).

The Coalition also alleges that DOT skirted its obligation to protect important—but unidentified—historical resources (Coalition MOL at 19). But the Coalition alleges no specific impacts to any specific resource. Nonetheless, “DOT appropriately assessed the effects to historic and cultural resources under Section 106 of the National Historic Preservation Act (R. 16460-75, 31373-415). Projects reviewed under Section 106 do not require a separate review under the New York State Historic Preservation Act (Leslie Aff. ¶ 371; R. 19935-20063 and 31373-560).

The Coalition alleges that the DOT failed to consider human health (MOL at 20), but the rigorous environmental assessment plainly shows DOT considered human health impacts (Leslie Aff. ¶ 80). The Coalition also alleges that DOT failed to consider potential environmental impacts that “[b]eneficial effects from creation of approximately 11 acres of new publicly accessible greenspace” will have (Coalition MOL at 19). Petitioners do not claim, nor could they, that 11 acres of new greenspace will have any adverse impacts, let alone significant adverse impacts. DOT’s construction-phase mitigation commitments are appropriate, sufficiently detailed, and binding.

Petitioners complain that DOT acknowledged the project may cause serious air quality impacts by discussing several vague and non-committal mitigation measures, and did not explain how and to what extent the mitigation measures would reduce harm (Harris MOL at 16-17). They contend that DOT’s vague and

non-binding mitigations are no substitute for an EIS (*id.*). The Coalition similarly asserts DOT's mitigation measures are "impermissibly vague" and deferred until after the SEQRA process is complete (Coalition MOL at 13-14).

Petitioners next contend that DOT's identification of a "litany of mitigation measures that must be undertaken to minimize adverse effects of an action is an implicit acknowledgement that the action's environmental effects may be significant, and that an EIS must be prepared" (*id.* at 10). DOT's mitigation commitments, however, are sufficiently detailed, and DOT, as the agency overseeing the project, has committed to, *and is bound by*, them.

Petitioners also contend that DOT's identification of a "litany of mitigation measures that must be undertaken to minimize adverse effects of an action is an implicit acknowledgement that the action's environmental effects may be significant, and that an EIS must be prepared" (*id.*). But this is not so. Courts have repeatedly upheld a negative declaration that includes mitigation measures to limit potential environmental impacts, particularly where, as here, such measures followed public involvement and comment (*Merson v McNally*, 90 NY2d 742 [1997]; *Village of Tarrytown*, 292 AD2d 617 [2d Dept 2002] [dismissing petition seeking to annual lead agency's negative declaration that included mitigation measures]). *Merson* explained that the SEQRA environmental assessment process assists an agency "in determining the environmental significance or nonsignificance of actions" (*id.* at 751). The process allows the lead agency to identify the range of possible impacts and whether an impact can be mitigated or reduced (*id.*).

In *Merson*, the Court considered whether project modifications made during the environmental assessment process were an improper circumvention of the procedural requirements of SEQRA (*id.* at 752). *Merson* upheld an agency's negative declaration that included mitigation measures. *Merson* provides guidance as to the propriety of mitigation measures developed during the environmental assessment process, ultimately leading to a negative declaration.

The Court ruled that, where mitigation measures that were incorporated into a project as part of an open, deliberative process have negated the project's potential adverse impacts, the lead agency's determination of nonsignificance and issuance of a negative declaration is not improper (*Merson*, 90 NY2d at 753). The court noted that the environmental review process was meant to be "an open process" involving other interested agencies and the public and there "would ordinarily be no inherent problem in revising or modifying project plans to address concerns raised during the environmental review" (*id.* at 753-54; *see also Village of Tarrytown*, 292 AD2d 617 [2d Dept 2002] [upholding lead agency's negative declaration where environmental assessment included mitigation measures]).

Here, as documented in the negative declaration and FDR/EA, DOT has committed to imposing numerous measures to mitigate potential, adverse effects relating to noise, vibration, and air quality during construction (R. 25737-57; 16541-45; *Vaidya Aff.* ¶¶ 16-32). DOT will incorporate these measures into the final design and contract documents, ensuring that the construction contractors follow all

required mitigation measures throughout the project (R. 25737-57; 16541-4; Vaidya Aff. ¶¶ 29-32).

Further, these mitigation measures were not added to the project after completion of the EA but have been part of the design and environmental review process for years. DOT included development of mitigation measures in public as early as 2022, as the Scoping Report indicates:

Construction means and methods and phasing will be described in the DDR/EA and various measures to minimize construction-related impacts, including construction time restrictions, nighttime construction, local traffic detours, access to private property, and multiple lane closures, will be considered. Coordination with stakeholders will be conducted to receive input on these subjects.

(R. 33857). Public comments and DOT's responses concerning mitigation of construction-phase impacts are included in the December 2022 scoping report (R. 33797-4098). DOT continued to develop mitigation measures through the early EA process. The DDR/EA details the air, noise and vibration mitigation measures that DOT ultimately committed to and explains that they "would not be fully defined until final design plans and specifications have been prepared and, in some cases, until the contractor has been selected" (R. 34676). Detailed noise, vibration and air quality mitigation plans are included in the DDR/EA (R. 34677-82). Public comment regarding construction-phase mitigation measures was received during the DDR/EA comment period and DOT responded to those comments (R. 34113-15).

The record demonstrates that DOT's construction-phase mitigation measures are not post-EA add-ons but rather are elements the project design developed as

part of “an open process that also involves other interested agencies and the public” (*Merson*, 90 NY2d at 753). Consequently, DOT’s determination of nonsignificance and issuance of a negative declaration based on consideration of its construction-phase mitigation commitments did not violate SEQRA.

Turning to petitioners’ claims that DOT’s mitigation commitments are impermissibly vague and not sufficiently developed to support its negative declaration (Coalition MOL at 13-14; Harris MOL at 16-17), the evidence refutes these claims. DOT’s air quality, noise, and vibration mitigation measures are not mere plans or aspirational requirements (*Vaidya Aff.* ¶ 28). They “will be implemented” and the construction contractor(s) *must* satisfy the air quality mitigation measures set forth in the project contracts including the requirements for lower emission vehicles, prohibitions on motor idling, and dust control measures (R. 25737-57; 16541-45; *Vaidya Aff.* ¶¶ 28-30).

Pages 295-298 of the FDR/EA and Tables 1-3 of the negative declaration set forth the numerous air, noise and vibration measures, in detail, that will be implemented as part of the construction process, through the construction contracts that are to be executed for the project (*id.*; *Vaidya Aff.* ¶¶ 28-30). The mitigation measures, as set forth, are detailed and binding. They are a list of construction-phase commitments by DOT developed and implemented to ensure that construction does not cause any significant impacts on the environment. DOT’s construction-phase mitigation commitments are consistent with SEQRA and its negative declaration.

C. DOT Did Not Pre-determine its Negative Declaration to Avoid Conducting an EIS.

Petitioners assert that DOT has, since inception of the project, been focused on avoiding preparation of an EIS, purportedly in order to “reduce the schedule as much as possible” (Coalition MOL at 18). They claim, in doing so, that DOT violated its own SEQRA regulations at 17 NYCRR Part 15. Such allegations, however, are simply false. DOT did not pre-determine that it would not conduct an EIS in relation to the project (Leslie Aff. ¶ 80). Rather, DOT only concluded that an EIS was not necessary after having conducted a rigorous EA, in partnership with the FHWA, and determining that the build alternative would not have a significant effect on the environment.

The determination to prepare an EA did not dictate the level of analyses or public engagement that have been conducted for the project (Leslie Aff. ¶ 22). In fact, DOT conducted the EA’s traffic, social, economic, and environmental analyses with a level of thoroughness that DOT typically undertakes for EISs (*id.*). DOT plainly did not pre-determine or rush through an EA in order to speed up the process and avoid performing an EIS (Leslie Aff. ¶ 22). Rather, it engaged in a years-long project development process, conducted a comprehensive, rigorous EA and took a hard look at all relevant areas of environmental concern before determining that the project will have no significant environmental impacts. Finally, the statements that were made by a DOT employee at a 2009 meeting were made more than a decade before the current project’s initiation in 2022 (*id.*). DOT

never pre-determined that it would not conduct an EIS. Rather, it engaged in a fulsome, rigorous EA in full compliance with SEQRA.

D. DOT Engaged in Extensive Public Involvement and Information Sharing for Many Years.

The Coalition takes issue with DOT's public involvement and information-sharing during the EA process, alleging that DOT failed to meaningfully address comments concerning air quality impacts and environmental justice and that the public comment procedure was both skewed to be more favorable to the project and based on misinformation by DOT (Coalition MOL at 20 and Coalition Pet. at ¶¶ 126, 143-52, 172-3). Petitioners' complaints, however, ignore the facts. Contrary to petitioners' allegations, DOT engaged in a years-long campaign of public involvement through every step of project development and environmental assessment. DOT provided the public with full, accurate information and did not mislead the public.

DOT's engagement with the community and interested local, state and federal agencies began in 2007 (R. 25759). DOT held public meetings discussing the Expressway beginning in 2009 and continuing more frequently through 2024 (*id.*). DOT hosted monthly stakeholder meetings with elected officials, community leaders, and other agencies beginning in 2022 (*id.*). Stakeholders included local and state elected officials, residents, and nearly 20 community groups, including the Coalition (R. 16565-7). DOT staff also attended over 70 community events such as festivals, block club meetings, and church meetings, between April 2022 and

December 2023 (R. 25759-60). At all of these events DOT shared information and solicited public input concerning the project (*id.*).

DOT also sought public input in written form, received written comments, and considered those comments and input as part of its overall decision-making process (R. 25758). DOT received 1,599 comments during a four-month DDR/EA comment period (R. 16571). Throughout the process, DOT considered public comments and input as part of the overall decision-making process (R. 25758; Leslie Aff. ¶ 27). DOT revised the project design and conducted additional analyses based on public input and feedback (R. 16451; R. 25760-1; Leslie Aff. ¶ 27). All comments are in Appendix E of the FDR/EA (*id.*, ¶ 26; R. 23251-25266). Responses to substantive comments are provided in Appendix E3_01 (*id.*).

As the record shows, DOT engaged in open information-sharing with the public for years concerning the project. Petitioners' generalized complaints about the manner in which DOT engaged with the public relating to the project and the EA process are wholly without merit.

II. DOT COMPLIED WITH THE CLIMATE LAW

Petitioners all claim that DOT failed to comply with the Climate Law. The Harris and Coalition petitioners argue that the project is inconsistent with Climate Law emissions limits, and that DOT failed to provide a statement of justification (Harris MOL at 21-22; Coalition MOL at 20-22). All petitioners argue that DOT violated Climate Law requirements regarding disadvantaged communities (Harris MOL at 16-22; Coalition MOL at 20-23; Council MOL at 12-13). Finally, the Council

petitioners argue that DOT violated the Law by failing to abide by a scoping plan written by the Climate Action Council (Council MOL at 11-13). DOT satisfied its Climate Law obligations.

DOT rationally concluded that the project was not inconsistent with statewide emissions limits that go into effect in 2030 because the project will lead to a net decrease in GHG emissions. And, in any event, the short-term emissions from construction all take place before 2030, when the first emissions-budget goes into effect. Likewise, DOT rationally concluded that the project will *benefit* disadvantaged communities. As well as reducing GHG and co-pollutant emissions in local communities (by reducing vehicle miles traveled), the project reconnects these communities, enhances local infrastructure for pedestrians, bikers, and public transit users, and substantially increases local green space. DOT's determination to proceed with the project satisfies the Climate Law.

A. DOT Rationally Concluded that the project was Consistent with the Climate Law Emissions Limits.

DOT's conclusion that the project is consistent with the emissions-reduction requirements of the Climate Law has a rational basis in the record. Indeed, the technical analysis of GHG impacts of the project within the administrative record shows that the project will lead to a net decrease in GHG emissions over time, despite short-term emissions increases related to project construction.

To begin, DOT rationally recognized that the project itself (due to its lengthy useful life) would have GHG-emission implications in and beyond 2030, the first

year the Climate Law imposes an emissions budget (*see* ECL § 75-0101[8] [defining the “(g)reenhouse gas emission limit” as “the maximum allowable level of statewide greenhouse gas emissions[] *in a specified year*” (emphasis added)]; ECL 75-0107[1][a] [establishing 2030 as the first specified year for a “greenhouse gas emission[s] limit”]). DOT found that the project will, due to a decrease in vehicle miles traveled, result in a GHG reduction of 0.04% when compared to the no build alternative (R. 16512-5). Notably, and despite their claims here, neither the petitioners, nor anyone else, submitted comments with their own expert analysis purporting to show that there would be net GHG emission increases as a result of the project (Leslie Aff. ¶¶ 29, 77). Given the thorough analysis showing that the project will lead to lower GHG emissions, DOT rationally determined that there was no inconsistency with Climate Law emissions-reduction requirements (*see* ECL 75-0101[8]; ECL 75-0107[1]).

Construction-related emissions do not alter this result. Even setting aside the fact that construction-related emissions will be more than offset over time due to reduced vehicle miles traveled, construction related emissions cannot result in an inconsistency with the Climate Law’s emissions budget for 2030 because all construction will be completed before then. (R. 16540 [“Construction is expected to

start in December 2024 and be completed by June 2029”]).⁷ The Climate Law simply does not set a statewide emissions budget for any year before 2030.

In any event, the same result would hold even if DOT had ignored the actual plan to complete construction before 2030 and inaccurately treated all the GHG emissions from construction as taking place in that year. In 2030, the State will have an emissions budget of 245.87 million metric tons of carbon dioxide equivalent (see 6 NYCRR Part 496.4). The total carbon dioxide equivalent emissions from the construction of the project are .03662 million metric tons (or 36,620 metric tons) (R. 16514). Accordingly, it would take more than 6,700 such construction projects in 2030 to approach the State’s emissions budget. A conclusion that a project with such minimal impacts is not inconsistent with the Climate Law’s emissions budget for 2030 requirements is entirely rational. Accordingly, DOT rationally concluded, based on the uncontested analysis that the project will lead to a net decrease in GHG emissions, that the project was not inconsistent with the Climate Law’s GHG emissions budget.

⁷ Notably, a short-term construction project is readily distinguishable from greenhouse gas emitting energy infrastructure that may be inconsistent with CLCPA goals because it has a projected useful life that extends past 2030 (*compare Matter of Danskammer Energy LLC v New York State Department of Environment Conservation*, 208 Misc 3d 196 [Sup Ct, Orange County, 2022] [affirming DEC’s finding of CLCPA inconsistency based on greenhouse gas impacts of a proposed natural-gas fueled electricity generation facility that would operate into the 2030s]).

B. DOT Rationally Concluded that the Project did not Disproportionately Burden Disadvantaged Communities and Prioritized Reductions in Greenhouse Gases and Co-Pollutants.

DOT's conclusion that the project will benefit disadvantaged communities and reduce GHG and co-pollutant emissions in those communities is likewise rational and amply supported by the record.

As to community benefits, as well as reducing local GHG and co-pollutant emissions, the project reconnects neighborhoods, improves access to food stores and community facilities, enhances public access to the local MLK Jr. Park, creates 11 acres of publicly accessible greenspace, improves aesthetics, reduces noise levels along the tunnel cap, improves accommodations for pedestrians, bicyclists and public transit riders, and encourages local employment through local workforce and hiring measures (R. 16514-5; Leslie Aff. ¶¶ 7-12, 76; Vaidya Aff. ¶ 32). Given these substantial benefits to the local communities, DOT rationally concluded that the project did "not disproportionately burden disadvantaged communities." (L 2019, ch 106, § 7 [3]).

The Harris and Council petitioners' arguments that the project failed to prioritize reductions of GHG emissions or co-pollutants also lacks merit. There is no factual basis for the challenge, as no one submitted any analysis during the public comment period purporting to show a net increase of either GHG emissions or co-pollutants because of the project (Leslie Aff. ¶¶ 76, 97). DOT's analysis showed that the project will lead to a net decrease both in GHG emissions and associated co-

pollutants due to a reduction in vehicle miles traveled (R. 16515, 16507-8). Within the region, reductions in GHG emissions and co-pollutants will be expected to be greatest in the local disadvantaged communities, where the reduction in vehicle miles traveled will take place (Leslie Aff. ¶¶ 76-77). Thus, DOT's determination that it complied with its disadvantaged-communities obligations is rational and should be upheld.

C. DOT had no Obligation to Comply with the Climate Scoping Plan.

As a final matter, the Council's claim that DOT had a legal obligation to comply with the Climate Law's "climate scoping plan" lacks merit. The Legislature's intent is clear and shows that the climate scoping plan neither generally has the force and effect of law nor specifically binds DOT's decision-making. In the Climate Law, the Legislature describes the legally mandated "scoping plan"—which was to be adopted by unelected appointees to the climate action council—as "outlining . . . *recommendations*" for attaining the Climate Law's emissions limits (ECL § 75-0103[11]; *see* ECL § 75-0103[13] [the scoping plan "shall identify and make *recommendations* on regulatory measures and other state actions that will ensure the attainment of the statewide greenhouse gas emissions limits" (emphasis added)]). And the Legislature further made clear that it knew how to task agencies with specific responsibilities regarding the scoping plan. For example, it required DEC to promulgate regulations to achieve statewide GHG emissions reductions that

“[r]eflect, in substantial part, the findings of the scoping plan.” (ECL § 75-0109[2][c]).

The Legislature placed no such obligations on DOT in regard to the scoping plan (*see Colon v Martin*, 35 NY3d 75, 78 [2020] [“The maxim *expressio unius est exclusio alterius* applies in the construction of the statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded” (internal quotations and citations omitted)]. Thus, the Council’s argument that the climate scoping plan requires DOT’s legal compliance must be rejected as contrary to the clear intent of the Legislature.

In any event, the Council’s claim also fails due to lack of any actual conflict between the project and the Climate Scoping Plan. The plan recommends goals for reducing GHG emission goals by sector – for example, transportation, buildings, electricity, and industry – not for individual projects within those sectors (*Climate Action Council Scoping Plan Exec. Summ.* § 1.4 at 12 [December 2022]). Nor does it prevent the State from, for example, choosing greater reductions in some sectors and lower reductions in others. Thus, contrary to the Council’s assertion (Council MOL at 10-11), nothing in the Plan purports to bar DOT projects that reduce vehicle miles traveled by less than 6%.

III. DOT DID NOT VIOLATE THE GREEN AMENDMENT

The Council claims that DOT violated the Green Amendment because it approved the Expressway project “without regard to the Climate Scoping Plan,”

thus “hasten[ing] the arrival of “more adverse climate events.” (Council MOL at 13-14; Council Pet. ¶¶ 117-121). The Council fails to state a claim because alleging that the project is inconsistent with the Scoping Plan is not sufficient to allege a violation of the Green Amendment. Even if the Council had stated a claim, that claim fails because, as explained above, Point II, the project will result in a net decrease in GHG emissions from the transportation sector, as recommended by the Climate Scoping Plan, and in any event, the Council has not established that any increase in GHG emissions would contribute significantly to climate change.

To establish a violation of the Green Amendment, a party must show, based on established science, that a government action will significantly contribute to unclean air, unclean water, or an unhealthful environment (*see Wis. Dep’t of Revenue v William Wrigley, Jr., Co.*, 505 US 214, 231 (1992) [“the venerable maxim *de minimis non curat lex* (‘the law cares not for trifles’) is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept”] (cleaned up); *cf. Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 319 [1995] [“fact-based claims of inadequacies in physical facilities, curricula, numbers of qualified teachers, availability of textbooks, library books, etc.” are sufficient to survive a motion to dismiss because they “allege and specify *gross educational inadequacies* that, if proven, could support a conclusion that the State’s public school financing system effectively fails to provide for a minimally adequate educational opportunity”] [emphasis added]). Once a party does so, the government may

establish that its action is nonetheless merited (*see, e.g., People v Aviles*, 28 NY3d 497, 502 [2016] [discussing the “strict scrutiny” and “rational basis” tests analyzing constitutional claims]).

The Council fails to state or prove a claim for violation of the Green Amendment. First, the Council fails to state a claim because it asserts that the project will violate the Green Amendment by hastening climate change but makes no fact-specific allegations (*Campaign for Fiscal Equity*, 86 NY2d at 319) that the project will make a significant contribution to climate change, as required to show a Green Amendment violation based on the environmental harm from climate change. Instead, the Council alleges only that the project will cause an increase in GHG emissions that is inconsistent with the Climate Scoping Plan’s recommendation that the State significantly reduce statewide GHG emissions from the transportation sector (*see, e.g., Council Pet.* ¶ 54). Even if those allegations are accepted as true, they do not establish that the alleged increase in GHG emissions would contribute significantly to climate change.

The Council’s allegations overlook the difference between the requirements imposed on government decision making by the Climate Act, pursuant to which the Plan was issued, and by the Green Amendment. The purpose of the Act is to address the impacts of climate change by reducing *statewide* GHG emissions substantially (*see, e.g., Laws 2019, ch. 106, § 1[2]* [“substantial reductions in greenhouse gas emissions will be required by mid-century in order to limit global warming to no more than 2°C and ideally 1.5°C”]). To accomplish that, the Act sets

statewide goals for reducing GHG, and the Plan makes nonbinding sector-by-sector recommendations for meeting those goals (*see* p. 54 above). If the GHG emissions from an individual source like the project were inconsistent with the Plan's recommendation for reducing GHG emissions from the transportation sector, as alleged by the Council, that inconsistency could potentially interfere with the substantial statewide reductions in GHG emissions mandated by the Act. However, that inconsistency would not establish that the project itself will contribute significantly to climate change.

In contrast to the Climate Act, the Green Amendment prohibits an agency from approving a project that will contribute significantly to unclean air, unclean water or an unhealthful environment, including a project that contributes significantly to climate change, unless the project is nonetheless merited. The Council alleges that the project will increase GHG emissions (Council Pet. ¶ 67) but has not made fact-specific allegations that that increase will cause a marked change in climate change. Absent those allegations, the Council fails to state a Green Amendment violation.

Even if the Council had stated a claim, its claim would fail because it has not established that increased GHG emissions from the project will contribute significantly to climate change. First, as discussed above, DOT rationally concluded that the project will lead to a net decrease in GHG emissions. But even if the Council were correct that there will be an increase, the Council has submitted no evidence showing that the increase will contribute significantly to climate change.

In short, the Council has failed to state a claim for a violation of the Green Amendment and even if it had, its claim would fail because the Council has not shown that the project will contribute significantly to climate change.

CONCLUSION

For these reasons, the Court should dismiss the petitions in their entirety.

Dated: September 4, 2024

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CERTIFICATE OF COMPLIANCE

By August 15, 2024 letter, respondents informed the Court that all parties had consented to respondents filing a single oversized brief, limited to 14,000 words, in response to the three verified petitions. Patrick Omilian, Assistant Attorney General for the Office of the Attorney General of the State of New York, hereby certifies that, according to the word count feature of the word processing program used to prepare this memorandum, the countable text of this memorandum is 14,214 words.

Dated: September 4, 2024
Buffalo, New York

/s/ Patrick B. Omilian
Patrick Omilian