STATE OF NEW YORK
SUPREME COURT: ERIE COUNTY

In the Matter of the Application of

WESTERN NEW YORK YOUTH CLIMATE COUNCIL, COALITION FOR ECONOMIC JUSTICE, AND CITIZENS FOR REGIONAL TRANSIT

Petitioners,

For a Judgment Under Article 78 of the Civil Practice Law and Rules,

v.

NEW YORK STATE DEPARTMENT OF TRANSPORTATION, et al.

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

Constitutional Provisions

Solving the climate crisis is the greatest and most complex challenge that Homo sapiens have ever faced. The main solution, however, is so simple that even a small child can understand it. We have to stop our emissions of greenhouse gases. And either we do that, or we don't.

— Greta Thunberg,
Address at World Economic Forum: *Our House Is On Fire*, January 25, 2019

Making cities more livable starts with getting more cars off the roads, reducing pollution, and making significant investments in our public transit systems…
We are the first generation to feel the effects of climate change and the last generation to be able to do something about it.

-Governor Kathy Hochul,
Keynote Remarks at the Global Economic Summit, May 20, 2024

INTRODUCTION

Petitioners Western New York Youth Climate Council ("WNYYCC"), the Coalition for Economic Justice, and Citizens for Regional Transit respectfully submit this Memorandum of Law in support of their Verified Petition under Article 78 of the Civil Practice Law and Rules.

In 2019, confronted with an overheating planet and yet armed with a deep understanding of the global scientific consensus on climate change, the New York State Legislature passed an historic climate law: the Climate Leadership and Community Protection Act ("CLCPA"). The CLCPA, recognizing the existential threat posed by climate change, set the entire state on a legally

binding path to reduce greenhouse gas emissions by certain dates grounded in science.

The intent and urgency of the law is clear. The CLCPA marked a sea change in how decisions and approvals were to be made by government agencies across the state. As one court described it, the CLCPA "contemplates an unprecedented, all-of-government effort to ensure the state meets the law's aggressive, near-term emissions limits." *Danskammer Energy, LLC v New York State Dept. of Envtl. Conservation*, 76 Misc. 3d 196, 232 (Sup. Ct. Orange Cty. 2022).

Some of the tasks imposed by the CLCPA are undeniably complex and difficult, but the basic assignment is, as Greta Thunberg put it, very simple: reduce greenhouse gas emissions.

This lawsuit is about the failure of a state agency to act consistent with the CLCPA and in the face of the urgent need to reduce greenhouse gas emissions.

Respondents have issued approvals for the Kensington Expressway Project ("the Project") in Buffalo. The Project will be the largest infusion of dollars into a transportation project in the history of the second-biggest city in the State of New York. Yet it fails the basic assignment of the CLCPA: the Project does nothing to reduce greenhouse gas emissions.

In fact, contrary to Respondents' erroneous conclusion in the Determination of No Significant Effect – Negative Declaration ("DONSE-Negative Declaration"), the Project will make greenhouse gas emissions considerably worse by 2050 than if nothing were done at all. In addition, Respondents failed to follow, or even acknowledge, the specific recommendations outlined in the state's Climate Scoping Plan.

Indeed, in issuing the DONSE—Negative Declaration, Respondents proceeded as if the terms of the CLCPA, and the climate crisis itself, simply did not exist. The Project approvals are in clear violation of the CLCPA and the state's climate goals and must be annulled.

ARGUMENT

I. The Standard of Review.

A proceeding under Article 78 of the CPLR allows petitioners to challenge, "whether [an agency's] determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR § 7803.

The "arbitrary and capricious" standard means that a court inquires into whether the determination under review had a rational basis. Under this standard, a determination should not be disturbed unless the record shows that

the agency's action was "arbitrary, unreasonable, irrational or indicative of bad faith." *Matter of Cowan v. Kern*, 41 N.Y.2d 591, 599 (1977).

However, although an agency is afforded deference in its factual determinations, "[t]he ultimate responsibility of interpreting the law is that of the court." *KMO-361 Associates v. Davies*, 204 A.D.2d 547, 547 (2d Dep't 1994). Therefore, an action contrary to state law will be annulled as illegal. *Ferrari v. Town of Penfield Planning Board*, 181 A.D.2d 149, 151, (4th Dep't 1992). As the Court of Appeals has explained, "[i]n CPLR article 78 proceedings…[where] an issue of statutory interpretation underlies this question, [the Court] engage[s] in de novo review of the statutory interpretation." *Walsh v. NYS Comptroller*, 34 N.Y.3d 520, 523 (2019).

II. The Determination of No Significant Effect – Negative Declaration is Arbitrary and Capricious.

The State Environmental Quality Review Act ("SEQRA") governs the environmental review process in projects such as the Project at issue in this lawsuit. SEQRA's procedures will not be reviewed at length in this Memorandum, but importantly, the law and its implementing regulations require the preparation of an environmental impact statement ("EIS") where there is even the potential that a proposed action may include at least one significant adverse environmental impact. 6 NYCRR § 617.7(a)(1).

Thus, where, as here, a project proponent initially undertakes an environmental assessment rather than a full environmental impact statement, the identification of a potential adverse impact will trigger the requirement for a full EIS. "SEQRA mandates the preparation of an EIS when the proposed project may include the potential for at least one significant environmental effect." *Uprose v. Power Auth. of State of New York*, 285 A.D.2d 603, 608 (2d Dept 2001).

The creation of additional greenhouse gas emissions is a potentially adverse impact that must be examined in the environmental review process. When conducting an analysis of greenhouse gas emissions created by a project, "[p]roject proponents should present total projected [greenhouse gas] emissions as the sum of emissions from direct stationary sources, direct mobile sources, indirect stationary sources, indirect mobile sources, and waste generation. Statement (EIS) process." *Guide for Assessing Energy Use and Greenhouse Gas Emissions in an Environmental Impact Statement*, New York State Department of Environmental Conservation, July 15, 2009. In other words, project proponents must present the total net emissions added or emissions reductions of a proposed project.

Here, in the DONSE—Negative Declaration, Respondents omit the total greenhouse gas emissions created by the Project when accounting for

operational, direct, and construction related emissions, eliding the fact that the Project will add, by their own math, at least 26,924 metric tons of greenhouse gas emissions to the atmosphere by 2050, the year that CLCPA requires the State to have reduced greenhouse gas emissions by 85% of 1990 levels and aims be entirely net zero. Petition, at ¶¶ 64-77. The addition of 26,924 metric tons of greenhouse gas emissions to the atmosphere, *the equivalent to burning more than three million gallons of gasoline*, is undeniably a potentially adverse impact to greenhouse gas emissions.

Respondents' conclusion in their DONSE-Negative Declaration that the Project would have a "net benefit" with respect to greenhouse emissions and thus no adverse impact has no basis in the record. It is contradicted by simple arithmetic and the numbers contained in Respondents' own FDR/EA. The conclusion that there will be no significant adverse impact with respect to greenhouse gas emissions is unreasonable, irrational, and arguably indicative of bad faith.

Climate change is the most urgent and daunting environmental crisis the world has ever faced. Respondents may not be permitted to hide the ball with respect to yet more greenhouse gas emissions that will be added to the atmosphere. Under SEQRA, a full EIS is required.

III. The Climate Leadership and Community Protection Act.

A. The Legislative Intent of the CLCPA.

Recognizing that "[c]limate change is adversely affecting economic well-being, public health, natural resources, and the environment of New York," the Legislature, in 2019, enacted the CLCPA to put the state on a legally binding path to avert climate catastrophe. The Climate Leadership and Community Protection Act, 2019 Sess. Laws of N.Y. Ch. 106 (S. 6599) § 1. The CLCPA requires, among other things, that by 2030, greenhouse gas emissions must be reduced 40% from the level they were at in 1990, and that by 2050 emissions must be reduced 85% from the 1990 level. ECL §§ 750107(1)(a)–(b), 75-0109(4)(a)–(b), (f).

The Legislature's explicit goal in enacting the CLCPA is to mitigate the existing harms of climate change and prevent even greater harm in the future, while simultaneously ameliorating the pollution burdens borne by disadvantaged communities. *Id.* § 1(2)(a) ("The severity of current climate change and the threat of additional and more severe change will be affected by the actions undertaken by New York and other jurisdictions to reduce greenhouse gas emissions."); *id.* § 1(7) ("Climate change especially heightens the

vulnerability of disadvantaged communities, which bear environmental and socioeconomic burdens as well as legacies of racial and ethnic discrimination.").

B. The Implementation of the CLCPA.

The CLCPA operates by requiring every executive branch agency to examine the consistency of a proposed action or decision with the greenhouse gas emissions reductions requirements of the law. CLCPA § 7(2) ("all state agencies…shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in article 75 of the environmental conservation law."). If an action or decision is inconsistent with the aims of the CLCPA, the agency is required to provide "a detailed statement of justification as to why such limits/criteria may not be met, and identify alternatives or greenhouse gas mitigation measures to be required where such project is located." *Id.*

In addition, the CLCPA gives state agencies the mandate to "prioritize reductions of greenhouse gas emissions and co-pollutants" in disadvantaged communities, a term also defined in the statute. "Disadvantaged communities" under the CLCPA are "communities that bear burdens of negative public health effects, environmental pollution, impacts of climate change, and possess certain socioeconomic criteria, or comprise high-concentrations of low- and moderate-

income households." ECL § 75-0101(5). They are to be specifically identified by an entity called the Climate Justice Working Group. *Id*.

Importantly, the CLCPA did not simply provide state agencies with a vague mandate to act "consistent" with the emissions reductions limits placed into law. It also provides state agencies with a detailed roadmap for how to arrive at the emissions reductions legally required in 2030 and 2050. The CLCPA established a Climate Action Council, staffed with the heads of all major state agencies, including Respondent NYSDOT, as well as additional appointees of the governor and legislature. The task of the Climate Action Council was to establish, with the help of advisory panels staffed by subject matter experts, specific recommendations for all sectors of the state economy to guide agency decision-making. ECL § 75-103. The final product of the Climate Action Council to be used by state agencies in order to inform their decision-making for consistency with the CLCPA is the Climate Scoping Plan. *Id*. at (13).

The Climate Scoping Plan was published in December of 2022. Verified Petition, at ¶ 22. The Scoping Plan makes clear that in order to meet the state's climate goals, "[t]ransformative, challenging, and potentially disruptive levels of effort are required across sectors." *See New York State Climate Action Council Final Scoping Plan* ("Climate Scoping Plan"), at 120.

With respect to the transportation sector—the number one source of greenhouse gas emissions in the state—the Scoping Plan instructs:

> An aggressive and implementable mix of policies will be required to accelerate GHG emission reductions to the level needed by 2030…[In addition to electric vehicle sales,] a substantial portion of personal transportation in urbanized areas would be required to shift to public transportation and other low-carbon modes.

Climate Scoping Plan, at 10.

Deeper in the Scoping Plan and its Appendix, the Climate Action Council makes clear that in order to accomplish consistency with the CLCPA, i.e., to meet the emissions reductions goals required by law, significant reductions of statewide "VMT" or vehicle miles traveled must be made, on the order of 6% across the state. Petition, at ¶¶ 59-60. The Scoping Plan makes clear that these reductions must particularly be made in urban areas. *Id.*, at 58.

In short, the CLCPA marked an end to "business as usual" for agency decisions and approvals that could affect overall greenhouse gas emissions in New York State, including with regard to transportation projects. The statute and its implementation, including the Climate Action Council and the Climate Scoping Plan, require that when Respondent NYSDOT undertakes a significant transportation project, particularly in an urbanized area such as Buffalo, it must make significant reductions in VMT and thus greenhouse gas emissions in order

for the project to be consistent with the state's attainment of the necessary greenhouse gas emissions reductions.

IV. The Project is Inconsistent with the CLCPA Because it Does Not Even Attempt to Follow the Climate Scoping Plan.

In the DONSE-Negative Declaration and FDR/EA, Respondents champion the so-called compliance with the CLCPA because of the claimed reduction of VMT of 0.04% per year. Petition, at ¶¶ 73-74. (In reality, EA's actual calculations reveal that the 0.04% reductions in VMT will not be realized until 2047. Even by 2037, the reduction will only be 0.02%. *Id.*, at ¶ 78.)

The Climate Scoping Plan plainly calls for much more significant VMT reductions in order to obtain consistency with the CLCPA. The Climate Scoping Plan instructs that VMT reductions of at least 6%–*150 times the maximum VMT reduction realized by the Project*—must be made *statewide*. Petition at ¶¶ 59-60, 87.

Because at least a full six percent reduction of VMT must be made across the entire state, the Climate Action Council instructs that much more significant reductions must be made in urbanized areas such as Buffalo. *Id.*, Affirmation of Nickolas Sifuentes, dated June 12, 2024 ("Sifuentes Aff."), at ¶ 11. Reducing VMT in urbanized areas is one of the easier challenges presented by climate change and compliance with the CLCPA. Sifuentes Aff., at ¶¶ 15-16.

The Project is a once-in-a-generation—or perhaps a once-in-several-generations—opportunity to make meaningful action towards the climate goals mandated by the CLCPA. The greenhouse gas emissions locked in by Respondents' investment in the Kensington Expressway will hasten the arrival of adverse climate events, and make compliance with the CLCPA more difficult if not impossible. Sifuentes Aff., ¶¶ 18-19.

The Project is a clear departure from the recommendations of the Climate Action Council and the Climate Scoping Plan and is thus plainly inconsistent with the CLCPA. Because the approvals were issued in violation of the CLCPA, they must be annulled.

V. The Project Fails to Prioritize Greenhouse Gas Emissions Reductions in a Disadvantaged Community.

"In enacting the [CLCPA], the Legislature found that climate change is adversely affecting economic well-being, public health, natural resources, and the environment of New York, and that such adverse effects would continue and worsen if greenhouse gas emissions were not reduced." *Danskammer*, *supra*, at 249 (Sup. Ct., Orange County 2022) (cleaned up). The Legislature found these adverse effects were particularly present in disadvantaged communities. As a result, the Legislature designed the CLCPA to include a requirement that greenhouse gas emissions reductions be "prioritized" in disadvantaged communities. CLCPA § 7(3). The same section also flatly prohibits state

agencies, such as Respondent NYSDOT from making decisions that would disproportionately burden a disadvantaged community. *Id.*

Here, the entirety of the Kensington Expressway within City of Buffalo limits lies within disadvantaged communities as defined by the CLCPA. Petition, at ¶¶ 45-46. Yet the Project fails to prioritize greenhouse gas emissions reductions and, in plain violation of the prohibition in § 7(3), will substantially increase those greenhouse gas emissions during construction in those disadvantaged communities. *Id.*, at ¶¶ 115-116.

Because the Project was approved in violation of § 7(3) of the CLCPA, those approvals must be annulled.

VI. The Project Threatens the Right to Clean Air and a Healthful Environment of the Petitioners' Members, Especially the Western New York Youth Climate Council's Members.

Enacted in 2021, with the support of more than 70% of all New Yorkers, the Green Amendment provides citizens of New York with a constitutional right to clean air and a healthful environment. NYS Constitution, Article I, § 19.

It goes without saying that the adverse effects of climate change, including wildfire smoke, dangerous heat waves, and toxic algae blooms in the Great Lakes, constitute a denial of clean air and a healthful environment.

Respondents' approvals, issued without regard to the Climate Scoping Plan, and the Project, which will, on net, add to New York State's greenhouse

gas emissions, will hasten the arrival of more adverse climate events, and are thus in violation of Petitioners' members' constitutional right to clean air and a healthful environment.

The United States Government's *Fifth National Climate Assessment* establishes that young people and children will experience more adverse climate events in their lifetimes than the average citizen. It will be the members of the WNYYCC and their peers who pay the price for Respondents' failure to follow the requirements of the CLCPA. The approvals must be annulled for this reason as well.

CONCLUSION

The CLCPA applies to this Project, as it applies to "[any] approvals or decisions [by] all state agencies, offices, authorities, and divisions." CLCPA § 7(2). Nevertheless, the Project's Final Design Report / Environmental Assessment ("FDR/EA") contains no discussion (let alone any adoption) of the specific recommendations made by the state's Climate Action Council regarding how to reduce greenhouse gas emissions in transportation. Worse, in issuing the "Determination of No Significant Effect-Negative Declaration" the Respondents erroneously assert that the Project will have a "net benefit" with respect to greenhouse gas emissions, when the Respondents own EA demonstrates that the Project will *add*—not reduce—greenhouse gas emissions

by 2030 and by 2050, the near-term and long-term emissions reductions deadlines contained in the CLCPA.

As the Governor of New York, Kathy Hochul has said, those in power at this moment represent "first generation to feel the effects of climate change and the last generation to be able to do something about it." By approving the Kensington Expressway Project without making any reductions in greenhouse gas emissions, and by actually adding to the state's greenhouse gas emissions, Respondents have violated the CLCPA and their approvals must be annulled. Respondents should be ordered to undertake an environmental impact study with specific instructions to follow the recommendations of the Climate Scoping Plan, consistent with the CLCPA.

DATED: Buffalo, New York.
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