STATE OF NEW YORK
SUPREME COURT: COUNTY OF ORANGE

DANSKAMMER ENERGY, LLC,

Petitioner-Plaintiff,

v.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; COMMISSIONER BASIL SEGGOS in his official capacity; LAURA AND LARRY DOES 1-10 in their official capacities; GOVERNOR KATHY HOCHUL in her official capacity; and THE STATE OF NEW YORK,

Respondents-Defendants.

Index No. EF008396-2021

MEMORANDUM OF LAW OF *AMICUS CURIAE* THE PEAK COALITION IN SUPPORT OF RESPONDENTS-DEFENDANTS

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The PEAK Coalition—UPROSE, THE POINT CDC, New York City Environmental Justice Alliance, New York Lawyers for the Public Interest, and Clean Energy Group—respectfully submit this amicus brief in support of Respondents-Defendants' proper denial of Petitioner-Plaintiff Danskammer Energy LLC's Title V Air Permit for inconsistency with the Climate Leadership and Community Protection Act ("CLCPA") and lack of sufficient justification.

ARGUMENT

I. NYSDEC Has Statutory Authority to Deny Permits for Proposed Actions that Are Inconsistent with the CLCPA

Petitioner-Plaintiff urges this Court to interpret the CLCPA as prohibiting agencies from denying permits for projects deemed inconsistent with the CLCPA. This interpretation is completely misdirected, strays from the CLCPA's intent, and will cause an exceedingly destructive outcome. Thus, this Court should reject Petitioner-Plaintiff's interpretation and find that the CLCPA authorized New York State Department of Environmental Conservation ("NYSDEC") to deny Danskammer's permit application for its failure to comply with the CLCPA.

Administrative laws distinctly allow for agencies to have the powers expressly conferred by its authorizing statute as well as "those required by necessary implication." *New York State Bd. of Regents v. State Univ. of New York*, 178 A.D.3d 11, 19 (2019) (quoting *Matter of City of New York v. State of N.Y. Commn. on Cable Tel.*, 47 N.Y.2d 89, 92 (1979)). The authority to deny projects that are inconsistent with or interfere with the goals of the CLCPA is necessary by implication to achieve the mandates of the CLCPA. In fact, interpreting Section 7(2) as prohibiting NYSDEC from denying permits is in direct conflict with the legislative intent. The

fundamental objective of the CLCPA is to address the climate change crisis by reducing greenhouse gas emissions. CLCPA § 1(4), S.B. 6599, 242d Sess. (N.Y. 2019). This legislative intent must control when interpreting the provisions of the statute. *See Nostrom v. A.W. Chesterton Co.*, 15 N.Y.3d 502, 507 (App. Ct. 2010). Moreover, "the courts in construing a statute should consider the mischief sought to be remedied by the new legislation, and they should construe the act in question so as to suppress the evil and advance the remedy." N.Y. Stat. Law § 95 (McKinney). This Court should look to the what the legislature intended to remedy in enacting the CLCPA—the grave harms of climate change. Hence the statute must be interpreted in a way that gives the agencies the ability to advance the intended remedy. Without the authority to deny permits deemed inconsistent with the law itself, agencies would have no authority to require CLCPA compliance, resulting in a total inability to achieve the intended remedies.

Directing agencies to scrutinize their decisions for consistency with the CLCPA, the statute requires NYSDEC to "evaluate each permit, license, grant, loan, contract, or other administrative decision for consistency with those mandates. While considering and issuing permits, . . . 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." CLCPA § 7(2), S.B. 6599, 242d Sess. (N.Y. 2019). If an agency decides to approve a project determined to be inconsistent with or interfere with the goals of the CLCPA, the agency must provide "a detailed statement of justification" and "identify alternatives or greenhouse gas mitigation measures to be required where such project is located." *Id*. Should this Court adopt the Petitioner-Plaintiff's interpretation of Section 7(2), the provision would require NYSDEC and other agencies to make insincere justifications where

none may exist and approve projects the agency finds to be in clear violation of the CLCPA. This would be an absurd interpretation of Section 7(2) in the context of the entire statute. The court must "interpret a statute so as to avoid an unreasonable or absurd application of the law." *Lubonty v. U.S. Bank Nat'l Assoc.*, 116 N.Y.S.3d 642, 645 (App. Ct. 2019). Reading Section 7(2) as requiring agencies to evaluate decisions for consistency with the CLCPA and granting the authority to subsequently deny projects that do not comply avoids such absurd application of the law.

Even without turning to statutory interpretation, agency regulations alone allow for NYSDEC to deny permit application for "failure to meet any of the standards or criteria applicable under any statute or regulation pursuant to which the permit is sought". 6 NYCRR § 621.10(f). Though the CLCPA clearly grants DEC the authority to deny projects such as the one in the present case, DEC has always exercised discretion in environmental permitting and can deny an application for failure to meet any of the standards under CLCPA.

Lastly, where an "agency such as DEC is charged with implementing a statute (*see* ECL 19–0307), its interpretation is entitled to judicial deference." *Astoria Generating Co. v. Gen. Couns. of New York State Dep't of Env't Conservation*, 299 A.D.2d 706, 707 (2002) (internal citations omitted). The agency's interpretation should not be disturbed "unless that interpretation is unreasonable, irrational or contrary to the clear wording of the statute" *Matter of Industrial Indem. Co. v. Cooper,* 81 N.Y.2d 50, 54 (1993). To prevail over the agency's interpretation, the "petitioner must demonstrate that its interpretation is the only reasonable construction of the statute." *John Gallin & Son, Inc. v. Eristoff*, 16 A.D.3d 784, 785 (2005). The Petitioner-Plaintiff has failed to demonstrate that its interpretation of the law is the only reasonable construction of

the statute. Therefore, the court should find in favor of the agency's interpretation and denial of the permit application.).

II. NYSDEC Has Statutory Authority to Deny Permits for Proposed Actions that would Disproportionately Burden Disadvantaged Communities

Petitioner-Plaintiff fails to include any mention of Section 7(3) of the CLCPA in their petition to this court. Section 7(3) stipulates:

> In considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, pursuant to article of the environmental conservation law, all state agencies, offices, authorities, and divisions shall not disproportionately burden disadvantaged communities as identified pursuant to subdivision 5 of section 75-0101 of the environmental conservation law. All state agencies, offices, authorities, and divisions shall also prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities as identified pursuant to such subdivision 5 of section 75-0101 of the environmental conservation law.

To this end, CLCPA makes it plain that Section 7(3) must, contemporaneously, consider impacts to disadvantaged communities as well as a proposed action's consistency with statewide emissions reduction mandates pursuant to Section 7(2). As such, DEC was correct in its assertion, "the Department cannot issue a Title V permit to Danskammer for the Project, unless the Department can ensure compliance with all requirements of CLCPA Section 7." *See* NYSDEC Notice of Denial of Title V Air Permit. Moreover, as part of its denial of a Title V permit for a similar facility located in Astoria, Queens, DEC remarked, "...in addition to ensuring compliance with the requirements of Climate Act Section 7(2) …the Department would also have to ensure compliance with the requirements of Climate Act Section 7(3) prior to issuing any Title V or other permit…" *Id.*

The Petitioner's own Environmental Justice analysis indicates that the proposed action would have been located proximate to numerous "low income" and "minority" communities that

would have experienced adverse impacts to air quality from the net GHG emissions increase of 1,907,648 short tons of carbon dioxide equivalent (CO2e) per year that would have been generated by the proposed action.[1] While the Petitioner neglected to utilize maps that identify interim disadvantaged communities (DACs)[2], which the State has indicated may be utilized until the Climate Justice Working Group releases final maps, or Potential Environmental Justice Areas pursuant to Commissioner Policy 29[3], it is still reasonable and accurate to conclude that the proposed action would disproportionately burden disadvantaged communities.

Pursuant to Section 75-0101 of the Environmental Conservation Law, disadvantaged communities are those that, "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." Additionally, EPA defines "disproportionate effects" as situations where, "there exists significantly higher and more adverse health and environmental effects on minority populations, low-income populations or indigenous peoples."[4] It is reasonable for this Court to interpret the framing of "disproportionate burdens" to be equivalent to disproportionate effects. To this end, by the Petitioner's own admission, the proposed action would have increased concentrations of criteria air pollutants when compared to baseline conditions. For instance, according to the Petitioner's Environmental Justice analysis, the proposed action would have increased baseline particulate matter less than 2.5 microns in diameter (PM2.5) by six micrograms per cubic meter (µg/m3). In fact, according

[1] See https://www.danskammerenergy.com/wp-content/uploads/2019/12/Article-10-Application-Exhibit_28.pdf
[2] See https://www.nyserda.ny.gov/ny/disadvantaged-communities
[3] See https://www.dec.ny.gov/public/911.html
[4] See https://www.epa.gov/environmentaljustice/ej-2020-glossary#:~:text=Disproportionate%20Effects%20%2D%20Term%20used%20in,income%20populations%20or%20indigenous%20peoples.

to the Petitioner's own analysis, the proposed action would have increased emissions for at least five criteria air pollutants known to adversely impact public health to amounts that are above the Environmental Protection Agency's Significant Impact Levels for each. Therefore, the proposed action would have impacted disadvantaged communities that already bear burdens of negative public health effects and environmental pollution. As such, these impacts would have been disproportionate and resulted in increased burdens to these communities. Therefore, DEC was enjoined by State law to deny the permit application and the Court should find in favor of its decision to do so.,

III. New Technologies and Labor Arguments Do Not Justify Renewal of Title V Air Permit

Petitioners indicated to this Court that they had demonstrated the feasibility of transitioning its fuel source to so-called green hydrogen and renewable natural gas in the future. This transition is a false solution and not in compliance with the mandates of the CLCPA and will continue to cause environmental and health hazards to nearby communities. DEC's denial of Danskammer's Title V Air Permit is a consistent policy interpretation that ensures a just transition towards renewable technologies that complies with the state's GHG emission reduction goals.

There are no commercial-scale hydrogen power plants in the United States today. The use of hydrogen as a fuel source for large-scale power plants and the accompanying safety infrastructure have not been tested at any commercial scale. Yet more and more utilities are using the unproven promise of hydrogen implementation to justify continuing their fossil fuel operation and "transition" to hydrogen in the future. Without independent reviews of the impacts of hydrogen production and combustion, hydrogen and renewable natural gas blending proposals in existing fossil fuel plants should not be approved by any regulatory body as it would unjustifiably extend the life of antiquated assets that harm frontline communities.

Science clearly shows that the production of hydrogen, unless completely using renewable energy in the first place, will result in higher greenhouse gas emissions even when combined with carbon capture and storage (CCS) than burning gas or coal.[5] When hydrogen is produced entirely through renewable resources (green hydrogen), the use of green hydrogen for combustion in power plants or other industrial processes will still result in dangerous levels of nitrogen oxide (NOx) emissions.[6] The need for a significant amount of renewable resources in the first place to produce green hydrogen also diverts valuable energy that can otherwise directly reduce power sector emissions. In addition, green hydrogen production also poses threats to public safety through its dangerous levels of water consumption during electrolysis and the need for expensive transportation and storage upgrades beyond current fossil-fuel infrastructure.[7] Thus, green hydrogen for power generation can only distract from the climate goals of New York and could well hinder the state's compliance with CLCPA.

Danskammer's claim that hydrogen and renewable natural gas will become mature technology within the next five years as low to zero carbon fuel sources is misleading if not malicious. DEC should not be ruling on Title V air permits based on what technologies may exist in the future but on existing mature technologies and pathways for practical renewables to help achieve CLCPA mandates. Despite Petitioner's claims that NYSERDA is developing hydrogen as a clean energy alternative, the Authority has yet to produce concrete evidence that hydrogen is already a viable technology. Instead, NYSERDA is simply fulfilling its responsibilities to

[5] Howarth, R. W., & Jacobson, M. Z. (2021). How green is blue hydrogen? Energy Science & Engineering, 9(10), 1676–1687.
[6] Cellek, M. S., & Pınarbaşı, A. (2018). Investigations on performance and emission characteristics of an industrial low swirl burner while burning natural gas, methane, hydrogen-enriched natural gas and hydrogen as fuels. *International Journal of Hydrogen Energy*, *43*(2), 1194–1207.
[7] Murakami, Y. (2019). Hydrogen embrittlement. *Metal Fatigue*, 567–607.

understand and explore all resources that may be available as part of the State's comprehensive decarbonization strategy. No state agency has yet to claim that hydrogen solutions comply with the Climate Act, and NYSERDA itself has indicated that hydrogen should not be considered a pre-conceived solution, especially without incorporating the needs of frontline communities. Rulings on Title V Air Permits must be grounded in reality based on the current state of technology readiness.

Claims that a transition from fossil fuels to hydrogen is a way to keep good-paying jobs for workers and transition them into the green economy is another misdirection tactic from the Petitioner. A just transition to renewable energy and energy storage can fully account for workers transitioning from fossil fuel jobs to truly renewable sectors. The New York State Climate Action Council (Council) has already conducted economic impact modeling to assess the impacts of the clean energy transition. The study[8] found that transitioning to renewables and storage will create hundreds of thousands of jobs in the next few decades, with a projected 60% increase in the workforce from 2019 to 2030 and nearly 700,000 new jobs in the state of New York by 2050. Although those working in the fossil fuel sector will indeed experience job displacement, the Council's scenario shows that every job displaced is offset with 10 jobs added. Existing worker transitions are already taking unionized fossil workforce into account. In New York, Utility Workers Union of America Local 1-2 shows that a transition to working in renewable and long-duration storage is possible. Rise Light and Power has proposed to fully transition its nearly 2-gigawatt generating facilities at Ravenswood Generating Station into a renewable energy hub while maintaining, if not growing, its current unionized workforce.

[8] See https://climate.ny.gov/-/media/Project/Climate/Files/2021-11-30-CAC-Meeting-Presentation.ashx

There are currently no market mechanisms nor consensus regulatory framework to monitor the production and uses of hydrogen that addresses all the negative externalities of hydrogen. Pursuing the promise of hydrogen in transforming New York's energy sector is a proposal for an unregulated and careless approach that undermines the rule of law and endangers the lives of residents. Although green hydrogen may potentially advance clean energy goals in New York, any form of green hydrogen utilization that results in combustion is an unacceptable environmental and public health hazard. Reliability concerns that stem from a full transition to distributed energy resources can already be adequately addressed through a careful combination of renewable and storage technologies. The day for transition to zero emissions power generation is already here, and DEC has followed a reasoned path by looking past the false promises and rejecting hydrogen as a potential justification for repowering the Danskammer power plant.

CONCLUSION

WHEREFORE, proposed *amicus curiae* respectfully request the Court uphold NYSDEC's denial of Petitioner-Plaintiff's Title V Air Permit.

Dated: New York, New York
March 16, 2022

Respectfully submitted,

By: */s/ Sonya Chung*

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RULE 202.8-B CERTIFICATION

I hereby certify pursuant to Part 202.8-b of the Uniform Civil Rules for the Supreme Court & the County Court that, according to the word count tool on Microsoft Word, the total number of words in this brief is 2,553. Thus, this document complies with the word count limit in the aforementioned rule.

Dated: March 16, 2022

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