

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

In the Matter of the Application of

SIERRA CLUB, BROOKHAVEN LANDFILL
ACTION AND REMEDIATION GROUP, and
LONG ISLAND PROGRESSIVE
COALITION,

Petitioners,

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

-against-

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION and
CAITHNESS LONG ISLAND, LLC,

Respondents.

ORAL ARGUMENT
REQUESTED

VERIFIED PETITION

Index No. _____

Petitioners-Plaintiffs Sierra Club, Brookhaven Landfill Action and Remediation Group, and Long Island Progressive Coalition (collectively, “Petitioners”), for their verified petition for judgment pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”) and their complaint seeking a declaratory judgment pursuant to section 3001 of the CPLR, by their attorneys, Earthjustice, allege as follows:

PRELIMINARY STATEMENT

1. This case is about whether New York’s Department of Environmental Conservation (“DEC”) unlawfully grandfathered one of the biggest sources of pollution on Long Island by effectively exempting the Caithness Long Island Energy Center, a massive gas-burning

power plant, from requirements the Legislature imposed in the state’s transformative 2019 climate law.

2. In 2019, the Legislature passed and the Governor signed New York’s landmark Climate Leadership and Community Protection Act (“CLCPA”). The CLCPA requires all State agencies—including DEC—to consider the greenhouse gas emissions and impacts to vulnerable and burdened communities of each permitting decision. If such an action would threaten the CLCPA’s greenhouse gas reduction mandates, it cannot proceed without justification and mitigation. If such an action cannot be sufficiently mitigated to avoid disproportionately burdening disadvantaged communities (the particularly vulnerable communities identified under state law), it cannot proceed at all.

3. In spite of the CLCPA’s categorical application to all permitting decisions, DEC has adopted a policy of effectively waiving its requirements whenever the agency considers whether to renew permits granted years before the CLCPA was enacted—regardless of whether the permit would authorize enormous emissions of greenhouse gases and significantly burden any disadvantaged communities.

4. The result is that DEC abdicated its responsibilities to examine the emissions consequences of the Caithness gas plant, even though the facility is—on its own—one of New York’s largest single sources of greenhouse gas emissions. In fact, DEC has never considered the impacts of Caithness gas plant’s emissions as required under the CLCPA, because DEC has adopted the impermissible policy of assuming that any CLCPA issues are taken care of so long as the gas plant adheres to operations authorized by an expired permit issued long before the CLCPA was enacted.

5. The continued, unmodified operation of the Caithness gas plant without any mitigation of its emissions imposes serious consequences on New Yorkers. In passing the CLCPA, the Legislature found that “[c]limate change is adversely affecting economic well-being, public health, natural resources, and the environment of New York.” CLCPA § 1, 2019 N.Y. Sess. Laws Ch. 106 (S. 6599). It further determined that “substantial emissions reductions are necessary to avoid the most severe impacts of climate change.” *Id.* § 1(5). Yet DEC has simply ignored its responsibility to reduce emissions when considering the Caithness plant’s permit renewal.

6. In fact, DEC’s determination not to evaluate or consider reducing or mitigating the emissions of large greenhouse gas sources such as the Caithness gas plant effectively guarantees the agency’s failure to meet the mandate that the Legislature imposed in the CLCPA. The CLCPA requires an additional reduction of 30 percent in New York’s emissions over the next five years. Yet the five-year permit that DEC granted to Caithness includes no reductions at all, because DEC did not even evaluate the plant’s emissions under its flawed policy of ignoring the emissions produced by most renewal permits.

7. The operation of the Caithness plant also burdens the surrounding communities, which are designated as “disadvantaged communities” under state law and require special solicitude under the plain terms of the CLCPA. These communities have struggled under the burden of air pollution that has contributed to areas in North Bellport having the lowest life expectancy on Long Island. Yet DEC ignored its duty under the CLCPA to evaluate the burden imposed by the Caithness gas plant on the surrounding communities and did not consider whether any mitigation might be provided to reduce the toll on these communities.

8. Although Petitioners raised all these issues during the permitting process, DEC disregarded its legal responsibilities under the CLCPA and arbitrarily ignored the significant consequences of its action. The agency's decision cannot stand.

PARTIES

9. Petitioner Sierra Club is a grassroots environmental organization with more than 600,000 members across the country; the Atlantic Chapter is responsible for membership and activities in New York State. Sierra Club works to promote a cleaner, healthier, and more sustainable natural environment in its members' communities. Sierra Club has approximately 36,000 members in New York State.

10. Petitioner Long Island Progressive Coalition mobilizes Long Islanders through political education, grassroots organizing, leadership development, and the creation of cooperative economic institutions to fight for structural change to attain racial justice, build community wealth, and realize a just transition to a 100% renewable energy future. This work has included advocating for passage of the CLCPA, increased use of solar, and for financing programs to create green jobs and fight global warming.

11. Petitioner Brookhaven Landfill Action and Remediation Group ("BLARG") is a volunteer-run organization of Brookhaven residents dedicated to addressing the racial and environmental injustices that disproportionately harm people of color. BLARG seeks to represent Brookhaven residents whose health and wellbeing are affected by environmental harms perpetrated within their community.

12. Petitioners' members live in the areas immediately surrounding the Caithness gas plant and are regularly exposed to air pollution from the gas plant in their homes, at their children's schools, and whenever they spend time outdoors.

13. Respondent the New York State Department of Environmental Conservation (“DEC”) is a New York State government agency.

14. Respondent Caithness Long Island LLC is a limited liability company that owns and operates the Caithness gas plant.

JURISDICTION AND VENUE

15. This Court has jurisdiction pursuant to CPLR 7801,7803, and 7804(b).

16. Petitioners timely initiated this special proceeding by properly filing their Notice of Petition, Verified Petition, and all supporting affidavits, exhibits, and memorandum of law.

17. Venue is properly in Nassau County pursuant to CPLR 506, because Respondent DEC made the determination complained of in the 10th judicial district, the material events took place in the 10th judicial district, and Respondent DEC’s office with responsibility over the decision is located in the 10th judicial district.

LEGAL BACKGROUND

The Climate Leadership and Community Protection Act

18. In 2019, based on its determination that “[c]limate change is adversely affecting economic well-being, public health, natural resources, and the environment of New York,” and that emergency action was needed to prevent further damage, the Legislature passed, and the Governor signed, the landmark Climate Leadership and Community Protection Act, 2019 N.Y. Sess. Laws Ch. 106 (S. 6599) (“CLCPA”). CLCPA § 1(1). The CLCPA addresses the urgent threat of climate change by requiring the state to rapidly reduce its greenhouse gas emissions and transition to a clean energy economy. The CLCPA imposes detailed obligations on agency decisionmakers to ensure that their decisions—including specifically permit approvals—support an all-of-government effort to achieve the law’s mandatory emissions limits.

19. The Legislature concluded that urgent emissions reductions were critical because “[t]he 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(2)(a). Finding that “substantial emissions reductions are necessary to avoid the most severe impacts of climate change,” *id.* § 1(5), the Legislature required steep and rapid reduction of the state’s greenhouse gas emissions. ECL 75-0107(1); 75-0109(4)(a)–(b), (f). While the Legislature permitted a longer runway for reduction of emissions in other sectors, 70% of New York’s power generation must come from renewable energy by 2030 and the state must achieve zero-emissions electricity by 2040. N.Y. Pub. Serv. Law § 66-p(2).

20. The Legislature was particularly attuned to the unequal burdens already borne by communities that were within the pollution range of fossil fuel infrastructure. The Legislature observed that “Climate change especially heightens the vulnerability of disadvantaged communities, which bear environmental and socioeconomic burdens as well as legacies of racial and ethnic discrimination,” and therefore instructed agencies that “[a]ctions undertaken by New York state to mitigate greenhouse gas emissions should prioritize the safety and health of disadvantaged communities.” CLCPA § 1(7).

21. The legislative history of the CLCPA is replete with concern for mitigating and reducing emissions from existing gas plants and concern for improving air quality in the communities they have polluted for years.

22. Numerous state senators linked their votes in favor of the CLCPA to their concerns about air quality or respiratory illnesses caused by plants that were permitted prior to passage of the CLCPA. For example, Senator Ramos stated: “I’m voting in the affirmative because at least 4,000 people die every day in New York from illnesses related to pollution, and

my district is no exception. Because we have a facility that spews fossil fuels into our air.” *See* NY Senate Debate and Vote on Senate-Assembly Bill S6599, A084296, June 18, 2019 at 6443, attached hereto as Exhibit 2; *see also* Exhibit 2 at 6459 (“. . . without a planet that is healthy and that can sustain the test of time, rent laws and other issues that we take up won't even be relevant because we won't even have clean air to breathe . . . in Hunts Point, the air is dirtier, the air creates so many problems for the people who live in that community. And I am so proud to be taking such a bold step forward with all of my colleagues here today”) (statement of Senator Biaggi); *see* Exhibit 2 at 6450–51 (“[W]e finally have a bill that can . . . stop the environmental scourge in our communities, to make sure that we can fix the asthma problems in our area, the health problems in our area that’s related to environmental justice.”) (statement of Senator Comrie).¹

23. In the Assembly, the law’s sponsors also emphasized that the CLCPA’s focus on reducing the state’s reliance on fossil fuel power plants would “have many benefits, including . . . better health outcomes for our citizens.” *See* NY Assembly Debate and Vote on Senate-Assembly Bill S6599, A084296, June 19, 2019 at 343, attached hereto as Exhibit 3 (statement of Assemblymember Englebright). Assemblymember Latrice Walker, another bill sponsor, explained her vote for the CLCPA with a lamentation that “polluting power plants” trigger “asthma attacks and lung disease among New York’s most vulnerable communities.” Exhibit 3 at 420. She added that such health burdens themselves make New Yorkers “less prepared to deal with the impacts of climate change.” Exhibit 3 at 421. Assemblymember Ortiz echoed Assemblymember Walker’s concerns about respiratory illnesses stating that “I hope that this

¹ All exhibits annexed to this Verified Petition are identified and verified in the attached Affirmation of Dror Ladin.

particular bill with the projection of emission reduction in the future, we will be able to accomplish our mission of reducing asthma not only in my district, but throughout the State of New York.” Exhibit 3 at 438.

24. To guide New York in making the emissions reductions that the CLCPA requires, the Legislature established the Climate Action Council, an official body consisting of state leaders charged with developing a roadmap to achieve the state’s climate targets. *See* ECL 75-0103. The Climate Action Council consists of twenty-two members, including the Commissioners of Transportation, Health, Economic Development, Agriculture and Markets, Housing and Community Renewal, Environmental Conservation, and Labor; the Chairperson of the Public Service Commission; the Presidents of the New York State Energy Research and Development Authority, the New York Power Authority, and the Long Island Power Authority; and the Secretary of State, as well as members appointed by the Governor and legislative leaders. *Id.*

25. The role of the Climate Action Council was to develop and approve, by supermajority vote, a Final Scoping Plan to establish a specific guide for achieving the emissions reductions the CLCPA requires. The Final Scoping Plan instructs the Executive Branch on measures for emissions reductions in all sectors of the state economy. *Id.* After holding 32 meetings and receiving over 35,000 public comments, the Climate Action Council voted in December 2022 to advance its Final Scoping Plan. *See* New York State Climate Action Council, Scoping Plan (Dec. 2022), <https://climate.ny.gov/-/media/Project/Climate/Files/NYS-Climate-Action-Council-Final-Scoping-Plan-2022.pdf> [hereinafter Scoping Plan].

26. The final Scoping Plan provides that “New York should also have a detailed process in place to ensure that the fossil fuel generators are gradually and safely retired while

still maintaining reliability . . . If a reliability need or risk is identified, zero-emission solutions should be fully explored, such as storage, transmission upgrades or construction, energy efficiency, demand response, or another zero-emission, dispatchable resource.” Scoping Plan, *supra*, at 227. The Plan specifically instructs that “[o]nly after these zero-emission and alternative fuel resources are fully analyzed and determined to not be able to reasonably solve the identified grid reliability need shall retention of existing . . . fossil fuel-fired generation facilities be considered.” *Id.*

27. The Plan instructs DEC to examine every potential permit requirement “to reduce emissions from fossil fuel-fired generating units to the maximum extent practicable to achieve the requirements of the Climate Act while maintaining system reliability.” Scoping Plan, *supra*, at 228. Thus, “DEC should examine all potential regulatory options, including new . . . permit requirements or amendment of current . . . permitting requirements . . . to determine the most efficient, effective, and enforceable format to achieve” emissions reductions. *Id.*

28. The Scoping Plan is formally required by the CLCPA and represents a suite of climate actions and policies that agencies should take and adopt to achieve the CLCPA’s mandate. But because a single Plan cannot address every decision and approval with potential climate impacts that agencies must make, the CLCPA includes a comprehensive safeguard to ensure that officials do not undermine achievement of the CLCPA climate targets with decisions they make that might not be specifically covered by the Plan. That safeguard is found in CLCPA Sections 7(2) and 7(3). Section 7(2) ensures that all agency decisions do not impede achievement of the CLCPA’s mandatory emissions limits, and any impacts of unavoidably climate-harmful actions are adequately mitigated. Section 7(3), in turn, ensures that agency decisions do not disproportionately burden the state’s disadvantaged communities.

29. The Legislature thus ordered all state agencies, offices, authorities and divisions to evaluate whether each “administrative approval and decision”—including in particular the agency’s “considering and issuing [of] permits”—is “inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in” state law. CLCPA § 7(2). As the Third Department has explained, CLCPA Section 7(2) is not a mere procedural requirement: “Importantly, that provision further provides that if an inconsistency is found, the agency ‘shall 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.’” *Matter of Clean Air Coalition of W. N.Y., Inc. v. New York State Pub. Serv. Comm’n*, 226 A.D.3d 108, 114 (3d Dept 2024) (quoting CLCPA § 7(2)). “[T]he environmental mitigation expressly contemplated in the CLCPA” is a key protection of the law. *Id.*

30. In addition to the analysis required by Section 7(2), agencies must also analyze the effects of decisions subject to the CLCPA to ensure that their permitting decisions “shall not disproportionately burden disadvantaged communities . . .” CLCPA § 7(3). Agencies must affirmatively “prioritize reductions of greenhouse gas emissions and co-pollutants” in such communities. *Id.* “Co-pollutants” are non-greenhouse gas air pollutants that are also produced by greenhouse gas emission sources. ECL § 75-0101(3). The CLCPA defines disadvantaged communities as “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” and tasks a new entity called the Climate Justice Working Group with developing criteria to identify such communities. ECL § 75-0101(5).

31. In March 2023, the Climate Justice Working Group issued criteria for identifying disadvantaged communities and the State created an online map showing the geographical locations of disadvantaged communities. NYSERDA, *Disadvantaged Communities*, <https://www.nyscrda.ny.gov/ny/Disadvantaged-Communities> (last visited Jan. 15, 2025).

DEC's Title V Permitting Authority

32. Title V of the federal Clean Air Act requires that all major sources of air pollution acquire and operate under a legally-enforceable air permit that authorizes a certain level of air pollution emissions while mandating certain pollution controls.

33. Title V permitting authority is primarily exercised by state permitting authorities.

34. DEC has responsibility over New York State's air pollution control program, and issues air pollution control permits and registrations to sources of air pollution in accordance with its federally-approved permitting program under 6 NYCRR Part 201.

35. Title V permits are limited to no more than five years and are required for major sources of air pollution.

36. According to DEC, "By requiring the use of effective pollution control technology and enforcing compliance with permit conditions, DEC's air permitting program has been a vital means of reducing emissions to meet stringent air quality standards that protect human health and the environment." DEC, *Air Facility Permits, Registrations and Fees*, <https://dec.ny.gov/environmental-protection/air-quality/controlling-pollution-from-facilities/permits-registrations-fees> (last visited Jan. 15, 2025).

37. To obtain a permit, a facility owner or operator applies to DEC and provides information on a facility's emissions and controls. DEC staff review the permit, including determining how much pollution it will emit and what controls can be implemented to reduce

pollution.

38. DEC has issued policy guidance recognizing that Sections 7(2) and 7(3) of the CLCPA apply to its air permitting decisions, including renewal decisions. *See* DEC, Division of Air Resources, DAR-21: The Climate Leadership and Community Protection Act and Air Permit Applications (Dec. 14, 2022), attached hereto as Exhibit 4.

39. Under law, there is no difference between a renewal permit and a new permit. Once a permit reaches the end of a term, which can last no longer than five years, a new application is necessary and the agency must subject it to the same scrutiny. According to DEC's own regulations, "Permits that are being renewed are subject to the same procedural and review requirements, including those for public participation and affected State and EPA review, that apply to initial permit issuance." 6 NYCRR 201-6.6.

40. DEC's policy is nonetheless to treat renewal permits differently from other permits when it comes to CLCPA review. Specifically, DEC has developed a policy under which it generally does not subject permit renewals to the full CLCPA scrutiny so long as the permit renewal "does not include a significant modification" and does not seek "an increase in actual or potential [greenhouse gas] emissions" over the previous permit term. Exhibit 4 at 3 (DAR-21).

41. DEC has also added a standard-less exception to this general policy, noting that it may nonetheless conduct an analysis in certain instance if it decides for an unspecified reason that "the facts surrounding the project indicate that an analysis is warranted." Exhibit 4 at 2 (DAR-21).

42. For all other permits, DEC undertakes the much more searching review required by the CLCPA. The agency specifically recognizes that "CLCPA review is independent from other reviews (e.g. New Source Review, 6 NYCRR Part 212) that may also be required for the

permit action.” Exhibit 4 at 3 (DAR-21). Therefore, the agency requires that:

[T]he applicant must provide an objective analysis of the [greenhouse gas] and carbon dioxide equivalent (CO₂e) emissions from the project, that includes upstream or downstream emissions known to be attributable to the project, including upstream emissions attributed to production, transmission, and use of fossil fuels or imported electricity. For projects that would increase [greenhouse gas] emissions, the applicant should also provide a description of any proposed alternatives or [greenhouse gas] mitigation measures.

Exhibit 4 at 3 (DAR-21).

43. The applicant must further provide information about “Projected future GHG and CO₂e emissions for the years 2030, 2040 (for facilities in the electric generation sector), and 2050, including any proposed future emissions reduction strategies.” Exhibit 4 at 4 (DAR-21).

44. For electrical generation facilities, DEC additionally recognizes that the CLCPA ordinarily requires specific plans to meet the 2040 zero-emissions mandate included in the law:

For facilities in the electric generation sector, the analysis should discuss how the facility intends to comply with the requirement that the electric generation sector be zero emissions by 2040. This discussion should cover the feasibility and impacts from any alternative fuels or technologies that will be used by the facility to comply, and any alternatives or mitigation measures that will be implemented.

Exhibit 4 at 5 (DAR-21).

45. The agency’s policy is to nonetheless set all of these recognized CLCPA requirements aside when a facility seeks a renewal permit, regardless of whether the agency has *ever* evaluated the facility’s CLCPA compliance.

FACTUAL BACKGROUND

46. Petitioners have members whose homes are located in state-designated disadvantaged communities surrounding the Caithness power plant, including in North Bellport and Brookhaven.

47. The areas immediately adjacent to the Caithness power plant are among Long Island’s most diverse communities, such as North Bellport in which 22.7 percent of residents are

Black and 37.4 percent are Hispanic or Latino.

48. These diverse communities have been forced to bear much of the burden of pollution on Long Island. While only 14% of census tracts on Long Island are designated disadvantaged communities under New York state law as a result of their environmental burdens, the communities surrounding the Caithness gas plant bear this unfortunate distinction as a result of their vulnerability to and ongoing harm from pollution.

49. One of these communities, North Bellport, ranks at the 87th percentile nationally for concentrations of PM 2.5, a dangerous air pollutant, and is in the 97th percentile nationally for ground-level ozone (also known as “smog”), a powerful lung irritant and asthma trigger.

50. According to the United States Environmental Protection Agency, exposure to ozone “can cause a number of health problems, including coughing, breathing difficulty, and lung damage. Exposure to ozone can make the lungs more susceptible to infection, aggravate lung diseases, increase the frequency of asthma attacks, and increase the risk of early death from lung disease.”² People at greater risk from ozone exposure include people with lung disease, older adults, and people who are active outdoors.

51. Poor air quality and continued air pollution have undoubtedly contributed to North Bellport having the lowest life expectancy on Long Island, at a mere 73.2 years, nearly eight years less than the average for Long Island and especially jarring when compared to more affluent areas such as Shelter Island where life expectancy rises to 92.9 years.

52. North Bellport also bears the unfortunate distinction of having the third-highest number of emergency visits for children under the age of 4 and the second-highest asthma-

² EPA, Air Quality Guide for Ozone 2 (Feb. 2023), <https://document.airnow.gov/air-quality-guide-for-ozone.pdf>.

related number of emergency visits for all ages within Suffolk County.

53. Mobile sources of air emissions are an additional contributor to poor air quality in the area, particularly arising from fuel combustion originating from passenger automobiles from the heavily trafficked I-495, and high-volume of commercial vehicle and truck traffic to service waste management, composting, and recycling centers, warehouses, and a multitude of other industrial facilities in the area.

54. The continued threat of poor air quality only further exacerbates vulnerabilities that already threaten the predominantly low-income, Black and Brown disadvantaged communities residing near the Caithness gas plant. These communities already suffer immense environmental harm from high industrial activity in their vicinity. Most notably, the Brookhaven Landfill is the subject of multiple ongoing DEC corrective action plans attempting to control hydrogen sulfide emissions, odor issues, and groundwater contamination.

55. The Caithness Long Island Energy Center, located in Yaphank, is a large gas-burning power plant that commenced commercial operation in 2009. The gas plant is one of the largest single sources of greenhouse gas emissions in the state of New York.

56. According to the United States Environmental Protection Agency, in 2023 the Caithness gas plant emitted 989,177 tons of CO₂, just short of one million tons.

57. Its previous permit expired on January 11, 2017. Respondent Caithness Long Island, LLC, sought a renewal permit on July 1, 2016.

58. On May 2, 2018, DEC initially completed its permit review.

59. In response to comments from the United States Environmental Protection Agency, DEC revised its initial draft permit and issued a new Notice of Complete Application on November 22, 2021.

60. On January 4, 2022, DEC extended the comment period on the draft permit.

61. On February 7, 2022, organizations including Petitioners submitted comments on the draft permit. The comments “focus on the statutorily required analysis that the DEC must undertake under Section 7(2) and Section 7(3) of the CLCPA,” observing that “[i]t appears that no such analysis was conducted, which is contrary to the plain text of the statute.” Comments of Brookhaven Landfill Action and Remediation Group (BLARG), Long Island Progressive Coalition (LIPC), The National Association for the Advancement of Colored People (NAACP) Brookhaven Town Branch, All Our Energy, Sierra Club, and Earthjustice re Draft Title V Air Permit Renewal for Caithness Long Island Energy Center 2 (Feb. 7, 2022), attached hereto as Exhibit 5.

62. The comments point out that:

The amount of GHG emissions from the Caithness gas plant add up to nearly 1 million tons of CO₂ per year, and the fact that the DEC has not conducted a CLCPA analysis because there were ‘no emission sources added or altered, and total annual emissions are still limited to the same amount as in the previous permit’ is precisely the problem. This business-as-usual approach is especially troubling given Section 7(3)’s statutory mandate to reduce emissions in the overburdened communities such as those that neighbor the Caithness gas plant.

Exhibit 5 at 2 (February 2022 Comments).

63. The comments further point out that DEC found power plants emitting far fewer greenhouse gas emissions to be inconsistent with the state’s mandatory emissions reductions:

An existing major source of GHG emissions is just as inconsistent and incompatible with the CLCPA’s climate mandates as a proposed new one . . . Compare EPA Air Markets Data for Caithness for 2020 (899,998.235 short tons of CO₂ per year), with Oct. 27, 2021 DEC Astoria decision (finding that the potential to emit 723,872 short tons of direct GHG emissions per year was inconsistent and/or a potential interference).

Exhibit 5 at 6 (February 2022 Comments).

64. The comments point out that DEC is required to consider whether the Caithness

gas plant contributes to a disproportionate burden on the disadvantaged communities surrounding the plant, and note specifically that several nearby communities have very low life expectancy and a “high” level of social vulnerability as assessed by the Center for Disease Control (“CDC”) and Agency for Toxic Substances and Disease (“ATSDR”), indicating that these communities are exceptionally vulnerable to external stresses on human health.” Exhibit 5 at 11–12 (February 2022 Comments).

65. As the comments point out, “Where these communities have already suffered immense environmental harms, it would be patently inequitable to require its residents to continue to endure a disproportionate level of risk without a proper evaluation of potential mitigation or alternatives to Caithness’ current” levels of pollution. *Id.* at 12.

66. DEC issued a “Responsiveness Summary” describing its response to the comments it received.

67. In its brief response to comments, the DEC explained that it would not require a full CLCPA review of the Caithness gas plant, regardless of the scope of the plant’s emissions and regardless of the fact that it had never conducted a CLCPA review of the plant’s existing level of operation. Instead, because the permit renewal did not involve any “changes being made to the equipment at the facility” or any “change to the primary purpose of the facility’s operation,” DEC would not look further so long as there were no changes to the facility’s prior (albeit extremely high) level of emissions. *See* DEC, Responsiveness Summary July 3, 2024: Caithness Long Island Energy Center 1-4722-044426/00007 at 1–2 (July 3, 2024), attached hereto as Exhibit 1.

68. DEC similarly dispensed with any review of the facility’s disproportionate burden on disadvantaged communities under CLCPA § 7(3) and pointed to its response as to the lack of

change in operations, as well as the permit's compliance with separate federal regulations regarding air pollution.

69. On September 23, 2024, DEC took final action and issued the Caithness gas plant a new Title V air permit.

70. The Title V air permit authorizes the Caithness gas plant to emit pollutants into the adjoining communities where Petitioners' members live and spend time, injuring Petitioners' members.

71. Petitioners' members are exposed to so much air pollution that at least one member has had to install air filtering equipment, although that has not been enough to avoid the air pollution. *See* Odekon Affidavit ¶ 14. Petitioners' members include individuals living nearby who suffer from respiratory issues that require medication, which puts them at significant increased risk from the pollutants the plant emits into their homes and neighborhoods. *See* Nix Affidavit ¶ 9. And Petitioners' members include older and disabled individuals who are particularly vulnerable to air pollution emitted by the Caithness gas plant when they spend time outdoors near the plant as part of their regular activities. *See* Nix Affidavit ¶¶ 7–10, Summers Affidavit ¶ 6–8, Odekon Affidavit ¶ 7–8, 12.

72. In addition, because Petitioners' members live in areas designated by the state as disadvantaged communities, Petitioners' members are injured by DEC's failure to consider the mitigation that might be available to their community to offset some of the harms caused by the Caithness gas plant's emissions. For example, DEC has identified the following as potential options for mitigating impacts on disadvantaged communities when it undertakes an analysis of a permit under CLCPA § 7(3):

- Use of electric powered equipment instead of fossil fuel powered equipment, including electric vehicles;

- Use of lower emission technologies;
- Use of alternative process technologies that would reduce or eliminate GHG emissions or co-pollutants;
- Financial mitigation, such as providing funds for GHG or co-pollutant emissions reduction projects in the local disadvantaged community;
- Operational mitigation, such as limitations on the amount of fossil fuel combusted at the project or the allowable hours of operation for the project;
- Designing truck travel routes that avoid, or minimize impact to, disadvantaged communities;
- Adding electric vehicle charging stations at the facility or in the local disadvantaged community; and
- Physical mitigation, such as the planting and upkeep of trees, green infrastructure, or other means of carbon sequestration.

DEC, DEP 24-1: Permitting and Disadvantaged Communities under the Climate Leadership and Community Protection Act (May 8, 2024), <https://dec.ny.gov/sites/default/files/2024-05/prgrmpolicy24dash1.pdf>.

73. DEC's failure to conduct a CLCPA § 7(3) evaluation has deprived Petitioners' members of the mitigation benefits they might have received as members of the state-designated disadvantaged communities affected by the Caithness gas plant's permit.

FIRST CAUSE OF ACTION

Failure to Comply with CLCPA Section 7(2).

74. Petitioners repeat and re-allege the allegations contained in each paragraph above and incorporate such allegations by reference as if set forth herein.

75. The CLCPA requires all state executive branch decisionmakers, including the DEC, to consider whether their permitting decisions are inconsistent with or would interfere with New York's attainment of greenhouse gas reduction requirements established in Article 75 of the Environmental Conservation Law. CLCPA § 7(2).

76. It also requires a decisionmaker who concludes that a decision inconsistent with these limits is nonetheless justified 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.” CLCPA § 7(2).

77. DEC nonetheless decided to grant the Caithness gas plant a renewal permit while taking a shortcut that prevented the agency from actual evaluation of whether the permit would be inconsistent with or would interfere with New York’s attainment of greenhouse gas reduction requirements established in Article 75 of the Environmental Conservation Law.

78. DEC did not even consider whether any permitting conditions could be imposed that would reduce the level of emissions produced by the Caithness gas plant.

79. DEC has not provided the required detailed justification, much less identified any alternatives or mitigation to ameliorate the enormous amount of greenhouse gas emissions resulting from the permit decision.

80. DEC’s action violated the obligations the Legislature imposed on all state decisionmakers through the CLCPA.

SECOND CAUSE OF ACTION

Failure to comply with CLCPA § 7(3).

81. Petitioners repeat and re-allege the allegations contained in each paragraph above and incorporate such allegations by reference as if set forth herein.

82. Section 7(3) of the CLCPA prohibits State agencies from making administrative approvals or decisions that would disproportionately burden disadvantaged communities.

83. When the DEC decided to grant the Caithness gas plant an air pollution permit, it was clear that the decision would result in an increase in environmental burdens on the disadvantaged communities surrounding the gas plant.

84. DEC nonetheless decided to grant the Caithness gas plant a renewal permit while taking a shortcut that prevented the agency from actual evaluation of whether the permit would

impose a disproportionate burden on the surrounding disadvantaged communities. DEC also did not consider whether mitigation was available that might reduce the burdens and benefit the affected communities.

85. DEC's action violated the obligations the Legislature imposed on all state decisionmakers through the CLCPA.

THIRD CAUSE OF ACTION

Arbitrary and capricious decision to rely on the Caithness plant's previous permit—which was issued long before the CLCPA—to effectively exempt the gas plant's renewal permit from full CLCPA review.

86. Petitioners repeat and re-allege the allegations contained in each paragraph above and incorporate such allegations by reference as if set forth herein.

87. DEC recognizes that renewal permits are subject to the same review as new permits, and that new permits require a full CLCPA analysis.

88. DEC nonetheless refused to conduct a full CLCPA analysis of the Caithness gas plant, relying, for this decision, on the existence of the gas plant's previous, now-expired permit to determine CLCPA compliance.

89. DEC's decision is arbitrary and capricious for at least three reasons.

90. First, the agency's decision is based on neither facts nor reason: The previous permit was issued before the CLCPA's emissions limits existed and the CLCPA specifically requires a reduction in the emissions previously permitted rather than authorizing a continuation of the status quo. Nor is there any reasonable basis for treating new sources of greenhouse gas emissions differently from renewal of existing sources; both contribute to climate change in an identical fashion.

91. Second, the agency's decision impermissibly ignores an important aspect of the problem the CLCPA is intended to address. The agency's decision that existing levels of

pollution are effectively grandfathered completely disregards the CLCPA's requirement that the agency prioritize *reductions* of pollution in disadvantaged communities. Instead, the agency simply entrenches existing levels of pollution by failing to fully consider the disproportionate burdens borne by the surrounding existing gas plants.

92. Third, the agency's policy has no effective standards that can guide either the agency or the public in achieving reasonable, non-arbitrary outcomes.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully request that the Court:

- a) Pursuant to CPLR 7803(3) and 7806, enter judgment in favor of Petitioners and grant the relief required to vacate, annul, or otherwise undo DEC's decision;
- b) Award Petitioners costs, fees, and disbursements incurred in connection with these proceedings; and,
- c) Grant such other and further relief as this Court deems just and proper.

Dated: January 22, 2025
New York, NY

Respectfully submitted,

EARTHJUSTICE:




Dror Ladin
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Counsel for Petitioners

VERIFICATION

Dror Ladin, being duly sworn, states that he is the attorney representing Petitioners in this action and that the foregoing petition is true to his own knowledge; that the grounds of his belief as to all matters not stated upon his knowledge are attached exhibits and attached affidavits by members of Petitioners; and that the reason why the verification is not made by Petitioners is that Petitioners are not in the county where he has his office, there are two or more parties united in interest and pleading together and none of them acquainted with the facts is within that county, and all the material allegations of the pleading are within the personal knowledge of the attorney.



Dror Ladin Esq.

Sworn to before me this 22
day of January, 2025



NOTARY PUBLIC

