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.

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF VERIFIED PETITION

Index No.: 808662/2024

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INTRODUCTION

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

This is not a complicated petition. The Climate Leadership and Community Protection Act ("CLCPA") has put this state on a statutorily binding path to reduce climate change causing greenhouse gas emissions. To accomplish this overarching goal, the legislature commanded executive branch agencies, including Respondents, to make *every* act or decision consistent with achieving those greenhouse gas emissions reductions, or to justify and mitigate that inconsistency.

How are executive branch agencies supposed to know if a project is consistent with those reductions? The lynchpin of the CLCPA, the state's Climate Scoping Plan—which Respondents helped draft!—provides, in the words of the Respondents, the "roadmap" for realizing those reductions.

In this proceeding regarding the Kensington Expressway Project ("the Project"), Respondents professed compliance with the CLCPA despite: (1) erroneously concluding that the project would result in a "net benefit" with

respect to greenhouse gas emissions, and (2) failing to implement—or even engage with—the Climate Scoping Plan.

In opposition to the Petition, Respondents raise a variety of arguments, some of which contradict arguments Respondents themselves have made before the Fourth Department, some of which misrepresent the Respondents' own administrative record, and some which rely on impermissible post-hoc justification. None are meritorious.

Respondents' approvals of the Project were issued in clear violation of the CLCPA and must be annulled.

ARGUMENT

I. Respondents' Arguments Regarding The Calculation Of Greenhouse Gas Emissions Are Contrary To What Respondents Have Argued To The Fourth Department.

As established in Petitioners' Memorandum of Law, Respondents were required under applicable policy guidance to account for *all* greenhouse gas emissions associated with the Project, including construction, and to report the overall net effect on emissions. *See* WNYYCC Memo of Law, at 5 ("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'")

(quoting *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 opposition, Respondents do not dispute this applicable guidance. Instead, they make a head-scratching claim (not contained in the DONSE) that construction emissions can simply be ignored, because they will occur in years other than 2030 and 2050.[1] Respondents' Memo, at 48-49.

However, less than one year ago, in the case *Matter Of Renew 81 For All v. New York State Dept. of Transp.*, 224 A.D.3d 1273 (4th Dep't 2024), Respondents argued to the Appellate Division, Fourth Department, that emissions calculations for highway projects under the CLCPA *properly include construction related emissions*.

In that case, which concerned the Respondents' approval of a project involving the removal of I-81 from downtown Syracuse ("the I-81 project"), Respondents walked the Fourth Department through the overall emissions effects of the various alternatives—including, necessarily, the effects of construction:

> For the no-build alternative, the Department recognized that *although there would be no construction-*

[1] Respondents also erroneously claim that construction emissions will be offset by operational savings—a proposition flatly disproven by Respondents own FDR/EA.

> *related GHGs*, GHGs would increase as a result of ongoing maintenance on the existing viaduct's aging infrastructure….
>
> Under the viaduct alternative, GHGs would decrease over the next 30 years compared to the no-build alternative, with an anticipated decrease of 166,934 metric tons of CO2-equivalent (CO2e) in 2026 and 124,494 metric tons CO2e in 2056…Further, *although there would be a spike in GHGs during construction* that would not occur with the no-build alternative, the long-lasting efficiency improvements from the viaduct alternative would outweigh the impact of that initial spike in emissions; in fact, *the agencies concluded that the GHG emissions associated with construction would be offset by reductions in on-road emissions in approximately the first 14 months of operation*.
>
> GHG emissions likewise decrease with the community-grid alternative. Compared with the no-build alternative, the community-grid alternative will cause a decrease in GHGs by 167,585 metric tons CO2e in 2026 and 123,402 metric tons CO2e in 2056…Unlike the viaduct alternative, the community-grid alternative will reduce overall vehicle miles traveled by over 4 million and *the emissions from construction would be offset by the reduction in on-road emissions in less than eight months of operation*.

Reply Brief of State Appellants, *Matter of Renew 81 For All v. Department of Transportation, et-al,* CA 23-0038, at 34-35 (emphasis added).

"[T]he doctrine of estoppel against inconsistent positions precludes a party from framing his pleadings in a manner inconsistent with a position taken in a prior proceeding." *Environmental v. Larchwood Corp.*, 101 A.D.2d 591, 593

(2d Dep't 1984). "The doctrine is invoked to estop parties from adopting such contrary positions because the judicial system cannot tolerate this playing fast and loose with the courts." *Ford Motor Credit Co. v. Colonial Funding Corp.*, 215 A.D.2d 435, 436 (2d Dep't 1995) (internal citations and quotation marks omitted).

Having argued to the Fourth Department[2] that consistency with the CLCPA must include a calculation of all emissions, including construction related emissions, Respondents are judicially estopped from arguing to this Court that the construction related emissions should simply be ignored.

Although the doctrine of judicial estoppel applies to all litigants, Respondents are *executive branch agencies*, charged with carrying out the laws of the State of New York. It is problematic, to say the least, for Respondents to say the state's historic climate law means one thing when that interpretation supports their approvals of a particular project, then argue the law means something totally contrary when it supports another project.

This Court should not permit Respondents to play "fast and loose" with any law, much less one of such profound significance.

[2] Respondents were successful in their appeal before the Fourth Department, and the petition was dismissed. *Matter Of Renew 81 For All v. New York State Dept. of Transp.*, 224 A.D.3d 1273 (4th Dep't 2024).

II. Respondents' Arguments Regarding The Calculation Of Emissions Are Contrary To Applicable Guidance.

As it happens, Respondents' argument that construction-related emissions can simply be ignored flies in the face of the science of climate change, which focuses on cumulative emissions, as well as the applicable guidance governing greenhouse gas emissions analyses for transportation projects.

In point of fact, Respondents, in preparing the Environmental Impact Statement for the *I-81 project*, explained clearly that construction related emissions are to be *annualized over the life of a project*: "To evaluate total net change in emissions, operational emissions and energy consumption were added to construction emissions and energy consumption by annualizing construction emissions over the lifetime of the Project, estimated at 50 years." I-81 Viaduct Project, Final Environmental Impact Statement, Section 6-4-5 Energy And Climate Change, April 2022 PIN 3501.60[3], at 6-274.

Indeed, Respondents pointed out in that project that construction emissions are even more harmful, from a climate change perspective, than operational ones:

[3] Retrieved from https://parsonsecmpublic.s3.amazonaws.com/I-81-FEIS/04-2022/06-4-5%20Energy%20and%20Climate%20Change_April%202022.pdf (last accessed September 15, 2024) (also attached as Exhibit B to the Brady Aff.).

> Note that in terms of impact on global climate, emissions that occur in bulk over a few years during construction would have a greater long-term effect than the same amount reduced over 50 years, due to longer dwell time of the pollutants in the atmosphere. However, since the reductions far outweigh the increases, the benefit is still clear.

Id.

Thus, even if Respondents were not precluded under the doctrine of judicial estoppel from making the argument they make here—that construction related emissions can be ignored—the argument is baseless since it flies in the face of applicable guidance, which clearly required Respondents to account for all associated emissions with the project.

Respondents' last ditch argument, that in the grand scheme of the state's overall emissions budget for the year 2030, the 36,620 metric tons of greenhouse gas emissions created by construction will be a mere drop in the bucket of the state's overall emissions budget, fares no better.

First, it bears pointing how internally dissonant Respondents' argument is: on one hand, Respondents pat themselves on the back for achieving a net operational greenhouse gas emissions savings (excluding construction) of 296 metric tons, while dismissing the creation of 36,620 metric tons from construction—the equivalent of burning *more than four million gallons of gasoline*

or more than forty million pounds of coal[4]—as a mere drop in the bucket. Respondents' Memo, at 51. This is not a serious argument.

Second, Respondents' attempts to elide this Project's climate effects by focusing on the overall picture of statewide climate emissions or the transportation "sector" misses the clear command of the CLCPA. The text of CLCPA § 7(2) applies sweepingly to any and all "approvals and decisions…[of] all state agencies, offices, authorities, and divisions." CLCPA § 7(2). The CLCPA did not grant state agencies the discretion (which Respondents apparently seek avail themselves of here) of deciding when and which projects should be consistent with the emissions reductions required by the statute. As Respondents themselves have explained to the Fourth Department, under the CLCPA, "where [any] government action may increase statewide GHGs, the agency must provide a detailed statement of justification for the project." *Respondents' I-81 Reply Brief, supra*, at 33. Respondents failed to do so and have thus violated § 7(2) of the CLCPA.

Simply put, Respondents failed to account for construction when reporting the impact on greenhouse gas emissions in the DONSE. Accounting for construction, the Project clearly creates a potentially adverse impact with

[4] https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator#results

regard to greenhouse gas emissions and the approval must be annulled for this reason alone.

III. Respondents' Interpretation Of The CLCPA Would Render It Ineffective.

Respondents do not dispute that they failed to follow, or even engage with, the state's Climate Scoping Plan. Instead, they contend that the Climate Petitioners have misconstrued that CLCPA and placed upon them a burden—following the state's roadmap for achieving emissions reduction—not contemplated by the statute. As explained below, *that is precisely* what the CLCPA contemplates for state agencies.

First, however, it must be noted that Respondents are entitled to no deference on this question. "[W]here, as here, the dispositive issue is one of statutory interpretation, we will 'engage in de novo review of the statutory interpretation' and 'need not accord any deference to the agency's determination.'" *Matter of Schwabler v. DiNapoli*, 194 A.D.3d 1235, 1236 (3d Dep't 2021) (quoting *Matter of Walsh v. New York State Comptroller*, 34 N.Y.3d 520, 523–524 (2019).

Try as they might, Respondents cannot dispute that the CLCPA § 7(2) requires *every act or decision* of any state agency to be consistent with the state's emissions reductions requirements enshrined in the CLCPA. And, in Respondents' own words, the Climate Scoping Plan provides the "roadmap" to

guide agencies on how to achieve those required emissions reductions. It follows then, that for an act to be consistent with achieving the required emissions reductions, it must follow the roadmap provided to achieve those emissions reductions.

However, Respondents take issue with this straightforward interpretation and conclude that because the Climate Scoping Plan contains "recommendations," Respondents are free to ignore its contents and analyze a project's consistency with emissions reductions, completely unguided by the "roadmap." Respondents' Memo, at 53-54.

Before addressing why Respondents' argument violates basic tenets of statutory construction, it is worth reviewing what the Climate Scoping Plan is, and how it fits in the structure of the CLCPA.

To ensure that state agencies, such as Respondents, understand how to make decisions consistent with attainment of these limits, the CLCPA 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 Respondent Dominguez, the Commissioner of Transportation. *Id*. The role of the Climate Action Council was to develop and approve, by supermajority vote, a Final Climate Scoping Plan to establish a specific guide

for achieving the emissions reductions the CLCPA requires. After holding 32 meetings and receiving over 35,000 public comments, the Climate Action Council voted in December 2022 to advance its Final Climate Scoping Plan. The Climate Scoping Plan instructs the Executive Branch on the necessary measures for emissions reductions in all sectors of the state economy. ECL 75-0103.

The Climate Scoping Plan is the lynchpin of the state's emissions mandates: it provides agencies the *how* when tasked with implementing the state's emissions reductions. Undoubtedly, the Climate Scoping Plan contains "recommendations," as the CLCPA contemplates agencies will have an array of options in terms of how to achieve the necessary emissions reductions. But while the Climate Scoping Plan provides those options, the CLCPA in no way made following its roadmap *optional* for state agencies. On the contrary, § 7(2) plainly requires state agencies to approve projects that are consistent with the emissions reductions; in other words, that put the state on the trajectory to meet its required emissions reductions.

Under Respondents' interpretation of § 7(2), this critical statutory provision, the "an unprecedented, all-of-government effort to ensure the state meets the law's aggressive, near-term emissions limits" would be rendered meaningless. *Danskammer Energy, LLC v New York State Dept. of Envtl.*

Conservation, 76 Misc. 3d 196, 232 (Sup. Ct. Orange Cty. 2022). Agencies would be free, as Respondents have done here, to simply declare a particular project consistent with the CLCPA's emissions reductions despite the project not following the "roadmap" provided by the Climate Scoping Plan and thus not actually doing anything to achieve those reductions.

To frame it another way, if state agencies were free to ignore the Climate Scoping Plan and its specific recommendations when issuing project approvals, such as Respondents have done here, then how would state agencies determine if a particular project is consistent with the emissions reductions goals in the CLCPA, as they are required to do under § 7(2)? Under Respondents' interpretation, there is no answer to this question.

Finally, contrary to Respondents' arguments, it is Respondents who have violated basic canons of statutory interpretation in arriving at this conclusion. As the leading treatise on statutory interpretation provides, "[t]he presumption against ineffectiveness ensures that a text's manifest purpose is furthered, not hindered." Scalia and Garner, *Reading Law: The Interpretation of Legal Texts*, at 63. "This canon follows inevitably from the facts that (1) interpretation always depend on context, (2) context always includes evident purpose, and (3) evident purpose always includes effectiveness." *Id*.

As discussed above, Respondents' interpretation of § 7(2)'s command (that every act or decision of a state agency be consistent with achieving required emissions reductions) would render that clear instruction completely ineffective, since agencies would be free, as Respondents have done here, to simply shrug off the recommendations of how to actually achieve those reductions.

Respondents invoke to the so-called omitted-case canon, the premise that which is omitted is treated as intentionally omitted. But Respondents make a simplistic and blinkered application of this canon. As Scalia and Garner explain, "The omitted-case canon—the principle that what a text does not provide is unprovided—must sometimes be reconciled with the principle that a text does not include only what is express *but also what is implicit*." *Id.*, at 96 (emphasis added).

In this case, state agencies have a clear responsibility to determine whether a particular project is consistent with the state's emissions limits, and the Climate Scoping Plan provides clear instruction on how to make this determination. Respondents' interpretation of the § 7(2), that the CLCPA's "roadmap" may simply be ignored, makes no sense.

Respondents, having failed to implement or even engage with the recommendations of the Climate Scoping Plan, that is, how to actually achieve

required emissions reductions, have failed to ensure the Project is consistent with those reductions as required by CLCPA § 7(2).

IV. Respondents' Arguments Regarding Compliance With § 7(3) Of The CLCPA Lack Support In The Record.

It is not disputed that CLCPA § 7(3) requires agencies and officers, such as Respondents, to prioritize reduction of greenhouse gas emissions and co-pollutants in disadvantaged communities. Nor is it disputed that the Project area is located in disadvantaged communities.

However, in opposition to this petition, Respondents argue they complied with this provision by (1) pointing to a number of subjective "benefits" of the Project and (2) claiming, with no support in the record, that emissions and co-pollutants will be reduced in the Project area.

First, the subjective "benefits" Respondents point to, such as "impove[d] aesthetics" are not what is required by § 7(3). That section plainly requires the prioritization of *quantifiable* reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities. The Project fails to meet that objective, since, as set forth in the Climate Petition and above, it creates a net increase in greenhouse gas emissions.

On the second argument Respondents make, that emissions and co-pollutants will be reduced, Respondents rely on the Affidavit of Catherine

Leslie, who speculates, with no reference to the Administrative Record, that the Project prioritizes reduction of emissions and co-pollutants because "[t]he construction emissions described in the FDR/EA…will occur offsite outside of the local community." Leslie Aff., at ¶ 79.

This is a proceeding on an administrative record. As the Supreme Court has explained, "[it is a] foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 576 U.S. 743, 758 (2015) (Scalia, J.). For that reason, litigation affidavits from agency officials, such as the Leslie Affidavit, may not be used to justify agency action based upon post-hoc rationalizations. As the Supreme Court explained a few years ago:

> [W]e refer to this as a prohibition on post hoc rationalizations, not advocate rationalizations, because the problem is the timing, not the speaker. The functional reasons for requiring contemporaneous explanations apply with equal force regardless whether post hoc justifications are raised in court by those appearing on behalf of the agency or by agency officials themselves…
>
> Justice Holmes famously wrote that "[m]en must turn square corners when they deal with the Government." …But it is also true, particularly when so much is at stake, that "the Government should turn square corners in dealing with the people."

Dep't of Homeland Sec. v. Regents of the Univ. of Cal., ___ U.S. ___, 140 S. Ct. 1891, 1910 (2020) (cleaned up). *See also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971) (rejecting "litigation affidavits" from agency officials as "merely `post hoc' rationalizations").

Ms. Leslie's assertions regarding "local" greenhouse gas emissions are not supported in the record. As a quintessential post hoc justification, these assertions regarding of the impact of construction emissions are not proper in this proceeding.

The FDR/EA clearly shows that greenhouse gas emissions, accounting for construction, will increase as a result of the Project. This is a violation of § 7(3) of the CLCPA and the Project approvals must be annulled for this reason as well.

With regard to the claims under the Green Amendment, Climate Petitioners rest on the arguments made above and in support of their Petition.

CONCLUSION

For the reasons set forth above, and in the Verified Petition and supporting Memorandum of Law, the Respondents' approvals must be annulled as they were issued in clear violation of the CLCPA.

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