SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY

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DANSKAMMER ENERGY, LLC,
Plaintiff/Petitioner

-against-

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,
Defendants/Respondents.

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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF008396-2021

DECISION and ORDER

Motion Date: May 3, 2022

Motion ##1-8

The following papers numbered 1 to 37 were read and considered on (1) a petition to annul a determination of the Respondent New York State Department ot Environmental Conservation which denied a Title V permit; (2) a motion by non-party Independent Power Producers of New York, Inc. for leave to file an Amicus Curiae brief; (3) a motion by non-parties New York State AFL-CIO, the New York State Building and Construction Trades Council and the Hudson Valley Building and Construction Trades Council for leave to file an Amicus Curiae brief ; (4) motion by non-party NRG Energy, Inc. for leave to file an Amicus Curiae brief; (5) a motion by non-party Mitsubishi Power Americas, Inc. for leave to file an Amicus Curiae brief; (6) a motion by the Respondents New York State Department of Environmental Conservation, Commissioner Basil Seggos, New York State Governor Kathy Hochul, and the State of New York, pursuant to CPLR 7804 (f) and 3211 (a) (2) and (7), dismissing a portion of the first and the entirety of the second, third, and fourth causes of action; and for an order, pursuant to CPLR 2201, staying the proceedings; (7) a motion by non-party The PEAK Coalition for leave to file an Amicus Curiae brief; and (8) a motion by non-parties Sierra Club and Orange RAPP for leave to file an Amicus Curiae brief.

Upon the foregoing papers, it is hereby,

ORDERED, that the motions are decided as set forth herein.

Factual/Procedural Background

The Plaintiff/Petitioner Danskammer Energy, LLC (hereinafter "Danskammer") operates an existing natural gas fired power energy plant in the Town of Newburgh, Orange County.

In 2019, Danskammer, *inter alia,* filed an application with the Defendant/Respondent New York State Department of Environmental Conservation (hereinafter the "DEC") for a Title V air permit to construct and operate an expanded approximately 536 net megawatt ("MW") repowered natural gas fired power plant (the "Danskammer Energy Center") on the site for a five year period.

The DEC denied the application, *inter alia*, based on Section 7(2) of the newly enacted Climate Leadership and Community Protection Act ("CLCPA"). The CLCPA was enacted, *inter alia*, to reduce greenhouse gas ("GHG") emissions in the state, and requires state agencies to consider the effect of proposed uses on GHG emissions when issuing permits, etc.

Danskammer commenced this proceeding to challenge the determination. Danskammer argues, *inter alia*, that although the CLCPA permits the DEC to consider the effect of a proposed

use on GHG emissions, it does not authorize the DEC to deny a permit on such a basis when the application, as here, otherwise conforms with all other relevant requirements. Indeed, Danskammer asserts, in so doing, the DEC established a *de facto* rule proscribing the development of any upgraded fossil fuel power plants like Danskammer without following proper procedural safeguards, and prior to the promulgation of rules, etc. called for under the CLCPA. Moreover, Danskammer argues, the decision was wrong on the merits, as the proposed re-powering of the plant will have the net effect of lowering GHG emissions.

The Defendants/Respondents the DEC, DEC Commissioner Basil Seggos, New York State Governor Kathy Hochul, and the State of New York (hereinafter referred to collectively as "State Respondents") move to dismiss a portion of the first cause of action, and the entirety of the second, third, and fourth causes of action; and for an order staying the proceedings pending the conclusion of further administrative proceedings. The State Respondents argue, *inter alia*, that CLCPA Section 7(2) permits the denial of a Title V permit on the facts presented, and that it exercised its authority to do so appropriately. Otherwise, it argues, the remaining issues must await the exhaustion of administrative remedies.

Numerous non-parties have moved for leave to file Amicus Curiae briefs.

The motions are decided as follows.

Factual/Procedural Background

The Regulatory Background

In July of 2019, the Governor signed the CLCPA into law. The stated goal of the legislation is "to reduce greenhouse gas emissions from all anthropogenic [emanating from human activity] sources 100% over 1990 levels by the year 2050, with an incremental target of at

least a 40 percent reduction in climate pollution by the year 2030." *CLCPA § 1 (4).*

Among other things, the CLCPA added a new article 75 to the Environmental Conservation Law. *See ECL §§ 75-0101 through 75-0119.*

The CLCPA became effective in January 2020, with the exception of ECL §75- 0115, which becomes effective October 1, 2022.

The CLCPA establishes the Climate Action Council (hereinafter "Council"), which consists of 22 members, including the Commissioners of Transportation, Health, Economic Development, Agriculture and Markets, Housing and Community Renewal, Environmental Conservation, Labor, the Chairperson of the Public Service Commission, the Presidents of NYSERDA, the New York Power Authority, and the Long Island Power Authority, and the Secretary of State, as well as two members appointed by the Governor, three appointed by the Speaker of the Assembly, three appointed by the Temporary President of the Senate, one appointed by the Minority Leader of the Assembly, and one appointed by the Minority Leader of the Senate. *ECL § 75-0103(1)(A).*

The Council is to prepare a draft "scoping plan" on or before two years from the effective date of the CLCPA (*i.e.*, on or before January 1, 2022). The scoping plan is required to outline "the recommendations for attaining the statewide greenhouse gas emissions limits in accordance with the schedule established in Section 75-0107 of this Article, and for the reduction of emissions beyond eighty-five percent, net zero emissions in all sectors of the economy, which shall inform the State Energy Planning Board's adoption of a State Energy Plan in accordance with Section 6-104 of the Energy Law. The first State Energy Plan issued subsequent to completion of this scoping plan required by this section shall incorporate the recommendations of

the Council."

The CLCPA requires regional public comment hearings, and public comment.

The scoping plan must "identify and make recommendations on regulatory measures and other State actions that will ensure the attainment of the statewide greenhouse gas emissions limits established pursuant to Section 75-0107 of this Article."

Relevant to the case at bar, the scoping plan is to include "measures to reduce emissions from the electricity sector by displacing fossil-fuel fired electricity with renewable electricity or energy efficiency." *ECL § 75-0103(13)(b).*

The Council must update its scoping plan at least every five years. *ECL § 75-0103(15).*

The CLCPA require the DEC to "establish a statewide greenhouse gas emissions limit as a percentage of 1990 emissions, with a reduction to 60% of 1990 emissions by 2030, and 15% of 1990 emissions by 2050." *ECL §75-0107(1).*

The CLCPA itself does not set specific GHG emission limits for any sector of the New York economy, including electricity generation. Rather, with regard to the electric generation sector, the CLCPA directs the Public Service Commission (hereinafter "PSC"), in a provision set forth within Public Service Law (hereinafter "PSL") 66-p, to establish a renewable energy program no later than July 1, 2021. Such a program should provide that 70% of electricity generation in the state be generated by "renewable energy sources" by 2030, and that 100% of such electricity generation should be generated by renewable energy sources by 2040.

The PSC adopted such a program, at least in part, by issuing an Order on October 15, 2020, that modified its Clean Energy Standard.

The CLCPA recognizes that aggressive clean energy generation targets must be balanced

against the obligation to provide "safe and reliable electric service" to the people of the state. *PSL § 66-p.* Accordingly, Section 66-p authorizes the PSC to "modify the obligations of jurisdictional load serving entities and/or the [renewable energy source] targets upon consideration of the factors described" in Section 66-b. *PSL § 66-p (2).* The provision also authorizes the PSC to "temporarily suspend and modify" the requirements of the renewable energy program in the event it makes a finding that the program "impedes the provision of safe and adequate electric service."

The CLCPA sets time frames for public hearings, workshops, consultation with stakeholders, and, finally, for the promulgation of regulations by DEC to implement the Council's plan, stating that: "[n]o later than four years after the effective date of this article, the [DEC], after public workshops and consultation with the council, the environmental justice advisory group, and the climate justice working group established pursuant to section 75-0111 of this article, representatives of regulated entities, community organizations, environmental groups, health professionals, labor unions, municipal corporations, trade associations and other stakeholders, shall, after no less than two public hearings, promulgate rules and regulations to ensure compliance with the statewide emissions reduction limits and work with other state agencies and authorities to promulgate regulations required by section eight of the chapter of the laws of two thousand nineteen that added this article." *ECL § 75-0109(1).*

With respect to the contemplated regulations to be promulgated after the issuance of the scoping plan, and extensive consultation with numerous stakeholders (*supra*), the CLCPA requires the DEC to include in its regulations "legally enforceable emissions limits, performance standards, or measures or other requirements to control emissions from greenhouse gas emission

sources, with the exception of agricultural emissions from livestock." The regulations must "[r]eflect, in substantial part, the findings of the scoping plan." [1]

Under the CLCPA, the DEC is obligated to issue such regulations in 2024.

In an unconsolidated section of law, CLCPA § 7(2) provides:

> In considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and contracts, all state agencies, offices, authorities and divisions shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas limits established in article 75 of the [ECL]. Where such decisions are deemed to be inconsistent with or will interfere with the attainment of the statewide greenhouse gas emission limits, each agency, office, authority or division 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.

On or about December 30, 2020, the DEC promulgated 6 NYCRR. Part 496, which adopted "limits on the emission of greenhouse gases from across the State and all sectors of the State economy for the years 2030 and 2050, as a percentage of 1990 emissions of 60 percent and 15 percent, respectively, as established in the [CLCPA]."

Relevant to the case at bar, Article 10 of the PSL provides for a comprehensive, unified proceeding for the siting and environmental review of proposed electric generating facilities before the New York Board on Electric Generation Siting and the Environment (hereinafter the "Siting Board"), and sets forth the process with which an applicant must comply to site or repower such electrical generation.

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[1] According to the parties, as of the date of this proceeding, the Council has not issued either a draft or a final draft scoping plan, and, other than the issuance of the numerical statewide GHG emissions limits for 2030 and 2050, and the DEC has not issued proposed regulations to implement the CLCPA, nor has it held public workshops or publicly consulted with the Council regarding any proposed regulations.

Article 10 supplants the environmental review process under the State Environmental Quality Review Act (hereinafter "SEQRA"), and preempts all other state and local permits and approvals. *PSL § 172.*

With respect to certain Federally-delegated or approved permitting programs, including Title V air permits, PSL § 172 states: "the department of environmental conservation shall be the permitting agency for [such] permits . . . In issuing such permits, the commissioner of environmental conservation shall follow procedures established in this article to the extent that they are consistent with Federally-delegated or approved environmental permitting authority. The commissioner of environmental conservation shall provide such permits to the board prior to its determination whether or not to issue a certificate. The issuance by the department of environmental conservation of such permits shall in no way interfere with the required review by the board of the anticipated environmental and health impacts relating to the construction and operation of the facility as proposed, or its authority to deny an application for certification pursuant to section one hundred sixty-eight of this article, and, in the event of such a denial, any such permits shall be deemed null and void."

Danskammer's Permit Application

Danskammer describes its permit application as follows.

On or about May 24, 2018, approximately a year before the CLCPA was signed into law, and a year and half before it became effective, Danskammer began the process under Article 10 of the Public Service Law for approval to replace the existing generating equipment at its natural gas-fired power plant with more efficient turbines (informally referred to as a "repowering" of the facility) by filing a letter and attached Public Involvement Program (hereinafter "PIP") with the

Secretary of the Siting Board.

The existing Danskammer generating station has four operating steam turbines with a combined nameplate generating capacity of 511 MW (the intended full-load sustained output of a facility). Danskammer proposed to repower its plant through the addition of a new combustion turbine generator and steam turbine generator. The existing turbines would be retired once the new combined cycle plant was completed. *See New York State Department of Public Service Case No, 18-F-0325.*

The application requires a Title V air permit, which is issued by the DEC pursuant to authority granted under the Federal Clean Air Act. *PSL § 172(1).*

On or about November 15, 2019, consistent with the Article 10 procedures set forth in PSL § 172, Danskammer applied, though its consultant TRC Companies, Inc. (hereinafter "TRC"), to the DEC for a modification to its Title V air permit (hereinafter the "Title V Permit Application").

On or about January 31, 2020, the DEC issued its First Notice of Incomplete Application (hereinafter "NOIA"), requesting that Danskammer provide, among other things, "[a]n assessment of how the issuance of a Title V permit modification by [DEC] would be consistent with the greenhouse gas emissions limits established in Article 75 of the environmental conservation law, as required by Section 7(2) of the [CLCPA] (Chapter 106 of the Laws of 2019)."

Throughout early to mid-2020, Danskammer and its consultant team conferred with the DEC staff, and the staff for the Department of Public Service (hereinafter "DPS"), on a CLCPA consistency assessment, how to model emissions, and the scope of the response to the DEC's

request.

Danskammer retained ICF International, Inc. (hereinafter "ICF"), a well-known consulting and technology services company known for its work in the energy sector, to conduct the requested analysis and prepare the CLCPA consistency assessment.

On or about July 8, 2020, Danskammer, through ICF, submitted a "Supplemental Greenhouse Gas Analysis" to the DEC. The Supplemental Greenhouse Gas Analysis concluded that the Project would be "among the most efficient electric generating facilities in NYS, ... will reduce system-wide GHG emissions in the northeast by displacing less efficient and higher-emitting generating facilities both inside and outside NYS." (ICF Report at 3).

The Supplemental Greenhouse Gas Analysis further concluded that the project would complement "intermittent renewable energy resources added to the NYS electrical grid by providing a flexible resource to the electric system due to its quick ramp rate." In other words, the new Danskammer Energy Center would provide an added benefit because of its ability to quickly ramp up electricity production to meet unexpected spikes in energy demand, or reductions in load that might occur through intermittency and the marginal reliability benefits associated with renewable generation such as wind or solar.

The Supplemental Greenhouse Gas Analysis further noted that, to meet the CLCPA's goals, some firm dispatchable resources (such as natural gas-fired power plants) would need to be retained and converted to RNG fuel, or "green" hydrogen, and that the project would be a prime candidate to convert to RNG.

Further, the analysis concluded, the feasible conversion of the Danskammer facility to RNG or green hydrogen was consistent with NYSERDA's June 24, 2020, study entitled "Energy

+Environmental Economics, New York State Decarbonization Pathways Analysis." The analysis showed that increased electrification of the grid would be necessary to meet the CLCPA goals (resulting from initiatives such as the conversion of conventional vehicles to electric vehicles and the conversion/transition of industrial, commercial and residential buildings away from fossil fueled heating) and would thereby significantly increase electricity demand, which could cause reliability challenges for the state's electricity system. Periods of low renewable generation could place added stress on the system absent fast-start from dispatchable resources, such as the Danskammer Energy Center, which, in the future, could operate on carbon-free fuels like RNG and green hydrogen.

On or about August 18, 2020, the DEC issued a request for supplemental information and clarifications, which asked for sixteen different categories of information, none of which pertained to the CLCPA consistency analysis.

On or about September 8, 2020, the DEC issued a second NOIA, requesting supplemental information on the CLCPA consistency analysis. Specifically, the DEC requested that the analysis "be revised as based on GHG emissions within NYS, as well as relevant upstream out-of-state emissions, and not solely on projected out-of-state GHG emissions reductions." The additional analysis was also to include estimated fugitive emissions, and additional information on the potential use of RNG for the project.

On or about November 17, 2020, Danskammer responded with a supplemental report prepared by ICF (hereinafter "November Supplemental Report"). The report provided the requested analysis and concluded that the project would result in a significant net reduction of statewide GHG emissions from 2025 through 2029, and that, with a transition to green hydrogen

or RNG by 2040, the reduction would continue into 2040 and beyond.

The DEC's Decision

The DEC denied the requested Title V permit.

As background, the DEC noted that Danskammer had submitted a Title V air permit modification application seeking authorization to construct and operate a new natural gas-fired combined-cycle power generation facility having an optional capacity of 536 net megawatts (MW) at the current site of its existing 532 MW [nameplate capacity] generating facility (hereinafter "Danskammer Generating Station").

The DEC concluded that, after review of all of the information and materials presented, and over 4,500 public comments, the proposed project (hereinafter "Project") would be inconsistent with or would interfere with the attainment of the statewide (GHG) emission limits established in Article 75 of the ECL.

Moreover, the DEC concluded, Danskammer had not demonstrated that the Project was otherwise justified, as it failed to show either a short term or long term need for the Project.

Nor had Danskammer identified adequate alternatives or adequate GHG mitigation measures.

Thus, the DEC held, the Project did not satisfy the requirements of Section 7(2) of the CLCPA, and it was compelled to deny the Title V permit.

The DEC reasoned as follows.

The CLCPA established economy-wide requirements to reduce statewide GHG emissions. This includes all emissions from anthropogenic sources within the State, as well as upstream GHGs produced outside of the State associated with either: (1) the generation of

electricity imported into the State; or (2) the extraction and transmission of fossil fuels imported into the State.

As required by the CLCPA, the DEC, on December 30, 2020, finalized its regulation to translate these statutorily required statewide GHG emission percentage reduction limits into specific mass-based limits, based on estimated 1990 GHG emission levels, to wit: Pursuant to 6 NYCRR Part 496, the 2030 and 2050 Statewide GHG emission limits are, respectively, 245.87 and 61.47 million metric tons of carbon dioxide equivalents (hereinafter "CO2e"[2]), measured on a 20- year Global Warming Potential (hereinafter "GWP") basis.

In addition to the Statewide GHG emission reduction requirements established in the ECL, and particularly relevant for the Project at bar, the CLCPA includes a new PSL Section 66-p. That section required the PSC to implement programs to ensure that, subject to certain limited exceptions, 70% of electricity is renewable by 2030 and all electricity generation in the State is emission-free by 2040.

The DEC held that, while the state was currently in the process of implementing the CLCPA, including through the development of the scoping plan and the regulations described above, the requirements of Section 7 of the CLCPA were already in effect and applicable to Danskammer's application. Section 7 had three elements relevant to Danskammer's application.

First, the DEC must consider whether granting the permit will be inconsistent with or interfere with the attainment of the Statewide GHG emission limits established in ECL Article 75.

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[2] Carbon dioxide equivalent or CO2e means the number of metric tons of CO2 emissions with the same global warming potential as one metric ton of another greenhouse gas, and is calculated using Equation A-1 in 40 CFR Part 98.

Second, if the issuance of a Title V permit for the Project would be inconsistent with or would interfere with the Statewide GHG emission limits, the DEC must provide a detailed statement of justification for the Project, notwithstanding the inconsistency.

Third, in the event a sufficient justification is available, the DEC must also identify alternatives or GHG mitigation measures to be required for the Project.

Here, the DEC found, none of these elements were met.

As to the first, the DEC found that the Project, as acknowledged by Danskammer in its application, would result in significant direct GHG emissions, to wit: the Project's overall potential to emit (hereinafter "PTE") GHGs would be 1,954,952 short tons of CO2e per year, utilizing a GWPl00. "By any metric," the DEC found, "this was a substantial amount of potential direct GHG emissions from a new source in the state."

Moreover, the DEC noted, there were other direct GHG emission figures in the application.

For example, for purposes of the Prevention of Significant Deterioration/Nonattainment New Source Review Netting Analysis, and the calculation of Emission Reduction Credits, Danskammer provided a baseline actual GHG emission figure. The figure was derived from actual GHG emissions from the existing facility. Danskammer calculated baseline actual GHG emissions of 47,304 short tons of CO2e per year (GWP 100) from the existing facility. By subtracting this amount from the Project's PTE of GHGs, Danskammer calculated a Project net GHG emissions increase of 1,907,648 short tons of CO2e per year.

In addition, in Danskammer's November 2020 GHG Supplement, it included different estimates for the increase in direct GHG emissions from electric generation by the Project.

Unlike the PTE figures *supra*, the DEC noted, these estimated amounts were based on the projected dispatch of the new facility over time. According to Danskammer, the Project would not be expected to operate one hundred percent of the time. However, the DEC noted, Danskammer and ICF projected that the Project would have a much higher capacity factor than the existing facility located at the Project site. Based on projected dispatch of the Project according to Danskammer, the increase in direct GHG emissions from the Project was projected to be 1.577 million short tons of GHGs per year in 2025, 1.085 million in 2030, and 1.104 million in 2035.

The DEC asserted that it was unable to, and did not need to, "address or evaluate all of the methodological assumptions or analytical decisions made" by Danskammer or ICF for purposes of their estimates of GHG emissions from the Project. Rather, the DEC noted, as estimated by Danskammer, there was a range of estimates of projected GHG emissions from the Project– to wit: direct GHG emissions from the Project in 2030 might range from 1.085 million short tons of CO2e (GWP20) to 1.955 million short tons of CO2e (GWP100)– and that, regardless of where the actual emissions ultimately fell along that range, the emissions would still constitute a substantial and direct source of new GHG emissions in the state.

Thus, the DEC found, the Project was inconsistent with or would interfere with the attainment of the Statewide GHG emission limit for 2030.

Also, the DEC held, "importantly," the GHG emissions estimates *supra* included only the direct GHG emissions from on-site fossil fuel combustion at the Project. They did not include the upstream GHG emissions associated with the extraction and transmission of the fossil fuels to the Project.

Here, the DEC noted, in response to the First and Second NOIA, Danskammer provided estimates of upstream GHG emissions associated with the Project, to wit: the November 2020 GHG Supplement estimated an increase of 476,000 short tons of GHGs (using GWP20 for methane) in 2030 attributable to the upstream GHG emissions from generation by the Project.

However, the DEC noted, this estimate was based on Danskammer's and ICF's projected dispatch of the Project, and did not correspond to the full PTE provided in the initial Title V Application. Thus, if the Project were to operate more frequently than projected, the upstream GHG emissions associated with the Project would increase accordingly.

Regardless, the DEC held, the upstream GHG emissions associated with the Project were substantial, to wit: even presuming that the projections of upstream GHG emissions were correct, 476,000 additional short tons of GHG emissions in 2030 from the Project would be inconsistent with or would interfere with the attainment of the Statewide GHG emission limit for 2030.

Moreover, the DEC noted, to determine the total amount of GHG emissions attributable to the Project, the upstream GHG emissions needed to be added to the direct GHG emissions from the Project. Doing so, the total GHG emissions from the Project, even according to Danskammer, would be between 1.561 and 2.4231 million short tons of CO2e in 2030.

In sum, the DEC found, "by any metric," but particularly under the CLCPA, the range of estimated GHG emissions from the Project would be constitute a substantial increase in GHG emissions in the state from a single source.

Moreover, it found, the Project would constitute a wholly new and fossil fuel-fired electric generation source.

Therefore, the DEC held, the Project would make meeting the statewide GHG emission limits established in ECL Article 75 substantially more difficult.

In addition to the substantial GHG emissions from the Project, the DEC noted, the Project was also inconsistent with other longer-term requirements of the CLCPA, given that it would be a new facility which would burn fossil fuels to produce electricity. That is, constructing and operating a new fossil fuel-fired power plant, especially one, as here, that would be expected to have a useful life beyond 2040, would accomplish the exact opposite, and would perpetuate a reliance on fossil fuels. Thus, the proposed Project was inconsistent with the State's laws and objectives, including the statutory requirement that all electricity in the State be emission-free by 2040.

Indeed, the DEC noted, although, in its application, Danskammer acknowledged the requirement for emission-free electricity by 2040, it noted that it was "not proposing any specific approach at this time" to meet that requirement. Rather, Danskammer provided several potential options for how it might meet the requirement in the future, including: (1) converting the Project to RNG; (2) continuing to operate the Project only to the extent authorized by PSC under the CLCPA; or (3) other solutions that were not currently identifiable. Finally Danskammer noted, if no option proved feasible, it could shut down the plant altogether.

However, the DEC held, these proposed options were "uncertain and speculative in nature."

With respect to the first, Danskammer had not established the feasability of using RNG or hydrogen as a fuel, either from either a supply or GHG emission perspective. Rather, there was uncertainty surrounding the feasibility of firing hydrogen in existing combustion turbines.

Further, when compared to natural gas, hydrogen has a higher explosive potential, a higher leak potential, a lower volumetric heating value, and a higher flame temperature. A lower volumetric heating value means that more fuel needs to be fired to achieve the same output, and the additional volume of fuel fired, combined with the higher flame temperature, is expected to cause higher emissions of Oxides of Nitrogen (NOx) without the installation of additional NOx controls. Thus, an existing combustion turbine facility may be required to modify its fuel feed system, fuel firing system, and/or emission control system to facilitate hydrogen firing in the combustion turbine while maintaining compliance with its permitted emission limits.

Further, the DEC noted, if a blend of hydrogen and natural gas is combusted, some amount of GHG emissions will still be generated from the natural gas component of the fuel mixture, potentially jeopardizing the facility's compliance with the zero emissions by 2040 requirement in the CLCPA.

Moreover, while it may be technically feasible to operate the Project on RNG, Danskammer, in the ICF report, acknowledges that a transition to RNG is predicated on the availability of RNG in existing pipeline infrastructure by 2040. However, for such capacity to be realized, third parties would need to pursue approval for the necessary infrastructure to generate and deliver RNG in sufficient quantities to allow the Project to continue to operate. That approval process - which would likely also be subject to Section 7(2) of the CLCPA– might effect the ability to commence construction and operation on a schedule that meets the needs of the Project.

In addition, the DEC noted, neither it, nor the Siting Board, nor the PSC, had yet determined the extent to which RNG combustion may be an acceptable means of meeting the

zero-emission by 2040 requirement of the CLCPA.

Regardless, Danskammer was not specifically proposing to transition to either hydrogen or RNG. Rather, while its application discusses and assumes that the Project will ultimately transition to hydrogen or RNG, these were essentially "aspirational references," as the application contemplates firing fossil fuels at the Project.

The remaining two options, the DEC noted– continuing to operate based on approval by the PSC or some other solution that was not currently identifiable– were also indeterminate and relied on potential future action by PSC, or additional developments.

Indeed, the DEC held, in general, Danskammer's assertions that the Project would be consistent with the CLCPA were based primarily on the project displacing other less efficient and higher GHG emitting electric generation sources. That is, while Danskammer acknowledges substantial direct and upstream GHG emissions from the Project itself, it claims that other electric generation sources in the state would reduce GHG emissions by an even greater amount once the Project is operating. However, the DEC held, this contention relied upon projected actions at other locations by other owners and operators of other electric generation sources.

Further, the projected displacement of less efficient fossil fuel generators by the Project was based on electricity sector modeling performed for Danskammer by ICF. However, the DEC found, "[a]s with any such electricity sector modeling, its outputs are largely determined by chosen inputs and assumptions." Thus, such electricity sector modeling, particularly to the extent it is utilized to estimate GHG emission from sources other than the Project itself, might not provide the level of precision necessary to serve as the primary basis for a determination as to the Project's consistency with the CLCPA.

Indeed, the DEC noted, a conclusion that the chosen assumptions used in electricity sector modeling can drastically change the results was illustrated by the fact that Danskammer initially projected statewide GHG emission increases in 2030, and then later projected reductions, to wit: Danskammer's own analysis initially projected that, in 2030, the Project would result in 191,000 short tons of additional direct CO2 emissions in the state, along with 84,000 short tons of CO2e of additional upstream GHG emissions associated with the Project. However, after the Second NOIA, Danskammer updated its modeling analysis which resulted in a projected a statewide GHG emission decrease in 2030.

In any event, the DEC held, in the case of a new fossil fuel-fired electric generation facility, the projected displacement of other less-efficient and higher-emitting electric generating units was not a sufficient basis to determine consistency with the statewide GHG emission limits. That is, the extent to which the Project might displace other electric generating units was uncertain, and was dependent upon a number of factors not fully controlled by Danskammer, including the relative dispatch of the Project and other sources, as well as future market conditions.

In any event, the DEC noted, for purposes of CLCPA § 7(2), the DEC must review the project at issue. The CLCPA does not specifically take into account actions that may or may not occur at other GHG emission sources.

In sum, the DEC held, because, overall, it was at best uncertain whether the Project would actually displace other electric generation sources to the extent necessary to offset the direct and upstream GHG emissions attributable to the Project, the projected displacement of other electric generation was not a sufficient basis to determine consistency with the CLCPA.

In addition, the DEC held, Danskammer did not offer a sufficient basis to otherwise justify the Project, notwithstanding the inconsistency with the Statewide GHG emission limits.

For example, based on publicly available studies and reports by the New York Independent System Operator (hereinafter "NYISO"),[3] any previous reliability deficiency had been resolved. Therefore, at least through 2030, there was no demonstrated reliability need for the Project.

Thus, the DEC held, because there was no justification for the Project, notwithstanding its inconsistency with the statewide GHG emission limits, it need not reach the mitigation element of the CLCPA Section 7(2) analysis. In any event, it noted, Danskammer had not proposed any additional GHG mitigation measures pursuant to the CLCPA, beyond those required by other existing regulations.

The Proceeding/Action at Bar

Danskammer commenced the proceeding/action at bar to challenge the DEC's determination.

Initially, and significantly, Danskammer argues, CLCPA § 7(2), while requiring the DEC to consider statewide GHG emission reduction limits for 2030 and 2050 in its decision-making process, does not authorize the DEC to deny a Title V permit based on the same if the permit (as here) otherwise meets all other standards and requirements. That is, although the CLCPA states several goals for the reduction of GHG emissions in the state, it does not establish any substantive limitations on GHG emissions, or any other standards directly applicable to the

[3] In New York State, NYISO studies and evaluates the long-term reliability needs of the State.

issuance of a federal Title V permit. Rather, the CLCPA contemplates further legislation and the promulgation of regulations by the appropriate regulatory agency pursuant to the State Administrative Procedure Act (hereinafter "SAPA") process. Here, Danskammer notes, other than the general reduction limits for statewide GHG set forth in Part 496 of Title 6 of DEC's regulations (*supra*), the further legislation and regulations contemplated and required by the CLCPA have not yet been promulgated, and will likely not be promulgated for at least two years.

Indeed, Danskammer notes, the DEC's denial did not cite any facility-specific, or even sector-specific, GHG emission standards or limits that would be violated if the permit were issued. Rather, the DEC's denial "boils down to a simplistic, albeit erroneous, determination- that because Danskammer's permit application would, if granted, authorize the construction and operation of an approximately 536 net megawatt ("MW) replacement facility fueled primarily with natural gas (the "Danskammer Energy Center") on the site of the existing Danskammer Generating Station, and such new plant would result in additional GHG emissions that do not currently exist, it cannot be consistent with the CLCPA's goals of reducing GHG emissions over the next twenty nine years." Danskammer asserts that this "crude reasoning" ignores the fact that the upgraded Danskammer Plant will be more efficient and will reduce GHG emissions per MW of electricity produced, and that the upgraded plant will displace current less efficient generation units serving the same load, which will result in an actual reduction of statewide GHG emissions.

Moreover, Danskammer contends, the DEC's decision effectively enacts a ban on Title V permits for all new or repowered electricity generation sources that emit any GHG– regardless of the efficiency of the plant, the emission control technologies, and reliability needs– well in advance of the deadline for such plants to either develop technologies to reduce or eliminate

GHG emissions or terminate operations.

Further, Danskammer argues, such a ban was in effect enacted with the DEC adhering to the procedural due process requirements of the New York State Constitution and SAPA.

Moreover, Danskammer argues, the DEC's denial was unlawful because it ignores the fact that Danskammer's Title V permit application was sought in conjunction with a comprehensive power plant siting proceeding commenced pursuant to Article 10 of the PSL. That is, Danskammer applied for the Title V permit as part of a larger proposal to replace its existing plant operations to increase its efficiency. However, although the DEC acknowledged that the Siting Board was then reviewing Danskammer's Article 10 application, it held that the Title V permit was "independent from" the Article 10 proceeding; and that the Climate Action Council. Thus, Danskammer asserts, the DEC's rejection of the Title V permit, based solely on the CLCPA, and in advance of the completion of the ongoing Article 10 proceeding, was legally unsupported and unsupportable.

As factual background, Danskammer asserts as follows.

In response to the DEC's request, Danskammer provided data showing that the amount of fugitive emissions attributable to the delivery of natural gas from pipeline to project would be less than one pound per year.

Further, it provided information regarding the feasibility of operating on green hydrogen or RNG. This included a NYSERDA report and a PSC ruling demonstrating: (i) that RNG use would constitute a zero-emissions fuel source and that, were the project to convert to RNG use, its consumption would represent approximately 3.49% of the current RNG feedstock; and (ii) that it would be feasible to operate the Project using RNG, both presently and in the future.

However, Danskammer argues, although the DEC acknowledged that Danskammer had proposed several options to transition away from natural gas by 2040, including the use of green hydrogen or RNG, or simply shutting down the plant, the DEC "simply decreed, without substantive analysis, that none of those options was acceptable."

For example, the DEC rejected the potential future conversion of the plant to green hydrogen as "speculative."

However, Danskammer asserts, it was the DEC who "freely speculated" that the Project would not be able to reduce or eliminate GHG emissions twenty to thirty years in the future; while at the same time refusing to afford Danskammer even the 5 year length of the proposed Title V permit to demonstrate the feasibility of converting the plant to green hydrogen. Indeed, it argues, the DEC, while admitting that use of RNG or green hydrogen was feasible, nonetheless rejected the same based on speculation about potential future supply constraints.

The DEC also summarily rejected the ICF report's analysis of how a more efficient state-of-the-art plant would displace other less-efficient and higher-emitting generation sources, concluding, with no support in law or logic, that such displacement was not a sufficient basis to determine consistency. That is, the DEC relied on no competing study for its conclusion, and "apparently irrationally" determined that any new GHG emissions source would be inconsistent with the CLCPA's statewide GHG reduction goals, even if the new GHG source resulted in a net reduction in statewide GHG emissions. This is true even though CLCPA Section 7(2) contemplates the very kind of state wide displacement analysis rejected out of hand by the DEC.

The DEC also found that the Project was inconsistent with the CLCPA's target of an emission-free electrical grid by 2040, although that target, set forth in PSL Section 66- p, is not

part of the Section 7(2) consistency determination, and is, in any event, clearly was within the province of the PSC to determine.

Moreover, Danskammer argues, even if the DEC possessed the authority to make such a determination (which it does not), any evidence from Danskammer as to the same would need to include, at least to some extent, a degree of speculation and uncertainty, given that the target date of CLCPA was nineteen years away; the Council had not yet issued a scoping plan; and the DEC had not yet issued regulations setting the standards and limits to further the CLCPA goals.

Danskammer notes that the DEC also purported to evaluate the need and justification for the project, even though neither the Title V program, nor any other New York state law or regulation, grants the DEC the authority to make determinations about the need and justification for new electricity generation. Rather, this is a function given to the Siting Board under PSL Article 10, and to the PSC, the New York State Reliability Council, and the NYISO for other purposes.

Thus, Danskammer argues, although the DEC had no authority or expertise to determine whether a power plant in New York is needed or justified, it nevertheless decided to expropriate the authority vested exclusively in the Siting Board to make such determinations, and unlawfully went on to make that determination in an attempt to justify its flawed Title V decision, to wit: The DEC examined, but rejected, the conclusions of a 2020 NYISO Reliability Needs Assessment (hereinafter "RNA") published in 2020, which found that there was not enough generation in New York City to avoid blackouts. NYISO concluded that the New York system would only have sufficient resources if the probability of an unplanned disconnection of full load is equal to or less than the standard of once in every 10 years or 0.1 event per year. NYISO

further concluded that reliability needs could be met with "combinations of solutions including generation, transmission, energy efficiency, demand response measures, or changes in operating protocols."

Here, the DEC rejected that conclusion, instead referencing information included in a presentation regarding post-RNA base case updates, in which the presenters posited that transmission upgrades could result in power peak load to reduce transmission security needs.

The DEC interpreted this presentation as a resolution of the deficiencies identified in the NYISO's RNA report, allowing up to 800 MWs of capacity to be removed from "Zone G - where the project is to be located - in 2030" without resulting in "loss of load expectations"– meaning the number of hours per year that electricity production cannot meet demand.

Having concluded that the NYISO presentation "resolved deficiencies" identified in the NYISO RNA report, the DEC then simply subtracted the Project's proposed MWs from Zone G, where Danskammer operates, noted no anticipated loss of load expectations from the missing power generation, and concluded that there is "no demonstrated reliability need or justification for the Project."

Danskammer argues that such analysis and conclusions are entirely outside of, and exceeded, the DEC's authority in making a determination in a Title V permit application.

In addition, Danskammer asserts, the DEC's conclusions have no foresight, understanding or consideration of how the installed capacity base of generation within New York will change and evolve over the next twenty years, and its requirements to maintain grid reliability.

Indeed, it argues, under New York law, the DEC is not responsible for, nor is it qualified to, oversee the operations of electrical corporations that own power generation, and whether

those generation sources provide safe, reliable utility service at a reasonable rate. Neither is the NYSIO, although the NYISO's studies certainly help inform that responsibility. Rather, the Siting Board and the PSC are charged with doing so. Indeed, Danskammer notes, both of those entities were considering such information in the context of its ongoing Article 10 proceeding, which will impermissibly and prematurely come to an end if DEC's unlawful and irrational Title V permit denial is allowed to stand.

In sum, Danskammer asserts, the DEC's analysis and conclusions as to need and reliability reflect a gross oversimplification of anticipated load projections and related capacity issues; are outside of the DEC's technical expertise and Legislatively-delegated authority; and are factually erroneous, arbitrary and capricious. Thus, it argues, in so ruling, the DEC has also exceeded its authority pursuant to CLCPA § 7(2) and the Environmental Conservation Law generally.

Moreover, Danskammer asserts, the DEC's decision is arbitrary and capricious for multiple other reasons.

First, the DEC failed to explain how a Title V permit with a five-year term can be inconsistent with the CLCPA, given that the permit will need to be renewed well before the first year that the CLCPA statewide GHG emission limits will go into effect (*i.e.* 2030).

Second, the DEC cited PSL § 66-p as a substantive basis for the denial or the permit. PSL § 66-p, which is also part of the CLCPA, empowers the PSC to eliminate GHG emissions from the electricity generating sector by 2040, if doing so will not threaten the safety and reliability of electricity service in the State. CLCPA § 7(2) does not include this 2040 goal, which appropriately falls within the jurisdiction and expertise of the PSC. That is, the safety and

reliability of electric service in New York is indisputably outside the jurisdiction and expertise of the DEC.

Thus, Danskammer argues, the DEC erred in concluding that modern state-of-the-art and readily dispatchable electric generation would not be needed in the years leading up to 2040; which is a determination that it has no authority or expertise to make, and which is contradicted by numerous reports, studies, and even by members of the Council itself.

Further, the DEC failed to recognize that the PSC has the power under the CLCPA to order Danskammer closed by 2040 if it determines that New York State has adequate zero emission generation capacity to meet the State's energy needs. This fact alone, Danskammer argues, refutes a conclusion that granting a Title V permit would be inconsistent with achieving the statewide GHG emission reduction goals in the CLCPA.

In sum, Danskammer argues, there is nothing in either the law or the regulations which empower the DEC to deny a Title V permit to Danskammer more than eight years in advance of the 2030 statewide limit, and more than two years in advance of the date the CLCPA requires the DEC to promulgate "legally enforceable emissions limits, performance standards, or measures or other requirements to control emissions from greenhouse gas emission sources."

Moreover, Danskammer notes, the CLCPA makes clear that DEC should develop the required regulations in an "equitable" manner. *Environmental Conservation Law ("ECL") § 75-0109(3)(a).* Here, it argues, the DEC's actions here were far from "equitable," as there is no support in the statutory scheme for the "standardless approach" taken by DEC, which effectively bans new GHG sources from power plants without any legal authority to do so, and without promulgating the regulations that the CLCPA and SAPA require.

Thus, Danskammer argues, the Court should annul, vacate and set aside DEC's October 27, 2021, and should remit the matter to the Siting Board.

Danskammer notes that, on or about November 24, 2021, in order to preserve its rights before the administrative tribunal, it filed an administrative appeal of DEC's notice of denial. However, it argues, it is not required to exhaust such administrative remedies before pursuing this action because (a) the administrative proceeding is futile, (b) the issues before the Court are ones that purely involve the construction of statutory and regulatory matters, and (c)the DEC's decision to deny Danskammer's Title V permit application was wholly beyond the powers granted to DEC and in violation of the New York State Constitution.

On the issue of futility, Danskammer notes that Commissioner Seggos issued a press statement on the same day that the DEC denied the Title V permit in which he stated: "Our review determined the proposed project does not demonstrate compliance with the requirements of the [CLCPA]. The proposed project would be inconsistent with or would interfere with the statewide greenhouse gas emissions limits established in the [CLCPA]. Danskammer failed to demonstrate the need or justification for the proposed project notwithstanding this inconsistency."

Danskammer argues that Seggos's press statement made clear that he himself had reviewed the proposed project ("Our review determined") and made a decision regarding the Title V permit prior to the commencement of the administrative adjudicatory hearing (*supra*); thus suggesting that such a hearing, in which Commissioner Seggos would decide the fate of Danskammer's Title V permit, would be futile because he had already reviewed the proposed project and made his decision to deny it.

Further, the DEC notes, that same day, Governor Hochul, the state official who appoints the DEC Commissioner, stated: "I applaud the Department of Environmental Conservation's decisions to deny the Title V Permits for the Danskammer Energy Center and Astoria Gas Turbine Power, LLC in the context of our state's clean energy transition."

As a first cause of action, Danskammer seeks a declaration that CLCPA § 7(2) does not give the DEC the authority to deny a permit solely on the basis that a proposed action may be inconsistent with statewide GHG emission limits. Rather, that the CLCPA § 7(2) only affords a state agency the authority to make a public statement of justification when granting a permit or approving other actions that may be inconsistent with statewide GHG limits, and to require mitigation and alternatives as a condition of such approval.

As a second cause of action, Danskammer argues that the DEC's decision, in effect, promulgated a new "rule" with the meaning of SAPA without following the procedural safeguards required thereunder.

Indeed, Danskammer argues, even assuming, *arguendo*, that the CLCPA authorized the DEC to deny a Title V permits on the basis of the CLCPA, the denial here was inconsistent with the DEC's own regulation– 6 NYCRR Part 496. That is, in its Regulatory Impact Statement, which is required under SAPA, the DEC repeatedly stated that Part 496 did not impose any costs because "[t]he rule does not impose any compliance requirement on any entity, and therefore does not directly impose any costs on regulated entities."

Further, Danskammer asserts, on or about December 8, 2021, the DEC issued revised guidance (Proposed DAR Policy DAR-21), which attempted to establish an internal policy consistent with its decision in this case after the fact. This "post hoc guidance" instructed the

DEC staff to find a project inconsistent with the CLCPA if it "does not conform with the Scoping Plan or regulations designed to achieve compliance with the Statewide emission limits established in ECL Article 75 and reflected in Part 496," or "the project creates or enables a significant new source of GHG emissions," or "the project facilitates the expanded or continued use of fossil fuels through infrastructure development" or "the project interferes with the attainment of zero-emissions electric generation sector by 2040 requirement."

Danskammer notes that Policy DAR-21 does not instruct DEC staff to deny a Title V permit if finds a project to be inconsistent with the CLCPA; and was not promulgated as a "rule:" under SAPA.

Thus, Danskammer argues, in denying Danskammer's Title V permit application, the DEC did not follow its own internal guidance, or any other known regulation promulgated pursuant to SAPA. Instead, the DEC established its own *de facto* rule specifically for the evaluation of Title V permit applications for power plants. Further, under such rule, the DEC has established a *de facto* ban on all Title V permits for natural gas-fired power plants.

Further, Danskammer argues, this *de facto* rule places the burden of proving CLCPA consistency on an applicant, and provides the DEC unilateral authority to reject the applicant's analysis and/or proposed mitigation measures. All without any complying with SAPA.

Danskammer argues that, to that the extent that the DEC relied upon guidance that was not properly promulgated as a rule or regulation to deny the Title V permit, such reliance was inappropriate, and unlawfully deprived Danskammer of its rights under the New York State Constitution and SAPA. That is, by failing to follow the rule making procedure set forth in SAPA and the New York Constitution, Danskammer, as well as other stakeholders and regulated

businesses with interests in Title V air permitting, were deprived of the opportunity to have any input into the DEC's *de facto* Title V rule, and were deprived of the opportunity to make reasoned business decisions based on notice of a change of policy.

As a third cause of action, Danskammer asserts that the CLCPA does not authorize the DEC to deny permits for a project based on its determination that the project is inconsistent with statewide GHG limits covering all emission sources in the state. Rather, that the CLCPA sets forth a clear series of steps to be taken to promulgate regulations. This includes a requirement that the DEC such regulations in an "equitable" manner. *ECL 75-0109(3)(a).*

Here, Danskammer notes, the Council has not yet issued its scoping plan, and the DEC has not promulgated any regulations implementing such a plan.

Moreover, here, the Title V permit sought by Danskammer would have had a term of five years, expiring in 2027, which is over two years before the 2030 CLCPA statewide GHG emissions limit are to go into effect.

Thus, it notes, renewal of the permit will not only precede the effective date of the 2030 statewide emissions limit, but also, will presumably occur after the DEC has issued regulations containing emissions limits and standards of general applicability.

Thus, Danskammer argues, the DEC's denial of the Title V permit as being inconsistent with the CLCPA statewide emissions limitations for 2030 and 2050 and, in the absence of any lawfully promulgated regulations establishing such emission limits and standards, amounts to a "standardless" determination that is not authorized by Title V, the CLCPA or any other provision of New York State law.

As such, the decision violates the New York State Constitution, which provides in

relevant part: "No person shall be deprived of life, liberty, or property without due process of law." *N.Y. Const. art. I, § 6.*

As a fourth cause of action, Danskammer argues that, even if the DEC had the authority to deny a Title V permit on the basis of CLCPA inconsistency, its decision was based on a record that demonstrates that the permit issuance would result in a decrease in statewide GHG emissions or, at best, was based on a record that was incomplete, either by the DEC's design or its incompetence.

Danskammer asserts that the record, which was supplemented several times to address repeated questions and requests from the DEC, included unrefuted studies and reports from ICF which demonstrated that the Project would reduce statewide greenhouse gas emissions.

Indeed, Danskammer asserts, there is no set of facts contained in the application which would provide the DEC with a rational basis for finding that the application was inconsistent with the CLCPA's statewide GHG emissions limits. Accordingly, Danskammer argues, the DEC, with no facts or study showing otherwise, irrationally disregarded ICF's conclusion in its November Supplemental Report that the Project, by displacing older, less efficient electric generating sources that emit more GHG than the project, would result in a significant net decrease in statewide GHG emissions, in furtherance of the CLCPA goals.

The DEC also "irrationally dismissed" as "speculative" Danskammer's commitment to conduct a pilot study to evaluate, during the Title V permit five year term, the feasibility of future conversion of the plant's turbine to run on green hydrogen to achieve future reductions in GHG emissions. Danskammer argues that uncertainty in 2021, in reference to the feasibility of using green hydrogen in existing combustion turbines, is not a basis to find "inconsistency" with the

CLCPA emissions standards that do not even begin to take effect until 2030.

The DEC also rejected, without basis in the record, evidence that the proposed future use of RNG would reduce GHG emissions. Supplemental information submitted by Danskammer demonstrated that, were the Project to use RNG, its consumption would represent approximately 3.49% of the current RNG feedstock, which demonstrated that it would be feasible to operate the plant on RNG.

However, Danskammer argues, the DEC arbitrarily rejected the ICF analysis and irrationally concluded that, while it would be "technically feasible" for the plant to operate on RNG, there would be "future supply constraints" that made it not a viable option for demonstrating consistency.

Accordingly, Danskammer asserts, the DEC's dismissal of the Project's future use of RNG as a basis for a consistency determination, or as alternative or mitigation measure as those terms are used in Section 7(2), was arbitrary and irrational.

In addition, Danskammer argues, the "justification" requirement of Section 7(2) is the exclusive province of the Article 10 Siting Board, which has the authority under the Public Service Law to determine whether there is a need for individual power plants. *See PSL ((164(1)(b) and 172(1).*

Moreover, it asserts, even if DEC had the authority to consider the need for the proposed repowered Project (which it does not), the DEC incorrectly extrapolated, based on reports, etc. from NYISO, that up to 800 MW of generation could be safely removed from Zone G (the energy capacity zone where the Danskammer Energy Center is located).

However, Council members have noted that there will be a continuing need for

dispatchable resources to maintain system reliability. This is because wind and solar generation are intermittent resources, and only generate electricity when the wind blows or the sun shines. Dispatchable resources, such as the Project here, will be necessary in some form to ensure adequate service. Thus, dispatchable generating resources will continue to be needed, and simply subtracting MW figures does not address the fundamental difference between renewable resources like wind and solar, and those generating sources like the project that can generate power at any time.

Indeed, Danskammer argues, the DEC dismissed all these conclusions without any meaningful analysis, instead concluding that Danskammer's proposed solutions, including the potential use of RNG, and shutting down the plant, were not feasible,

Further, the DEC, without any legal authority or actual expertise on grid reliability, wrongly concluded that the Project was not needed or justified.

Thus, Danskammer argues, the DEC's decision to deny the Title V permit application was arbitrary and capricious.

In sum, Danskammer asserts, the Court should (a) vacate the DEC's October 27, 2021 denial of Title V permit application; (b) issue a declaratory judgment stating that DEC does not have the authority to deny a Title V permit based on CLCPA § 7(2) or PSL § 66-p; (c) permanently enjoin DEC from taking any action to deny Danskammer's Title V permit pursuant to CLCPA Section 7(2) and PSL Section 66-p; (d) remand the matter to DEC and the Siting Board for further action consistent with the Court's order; and (e) award the Petitioners reasonable attorneys' fees incurred in the present challenge to this unlawful and unconstitutional action.

The State Respondents' Motion

The State Respondents move pursuant to CPLR 7804(f) and 3211(a) (2) and (7), to dismiss a portion of the first cause of action, and the entirety of the second, third, and fourth causes of action; and for an order, pursuant to CPLR 2201, staying the proceedings pending the determination of an administrative hearing.

In support of the motion, the State Respondents submit an affirmation from counsel, Jonathan Binder.

Binder notes that he also serves as Chief of the Bureau of Climate, Air and Energy within the DEC's Office of General Counsel. As such, he asserts, his professional responsibilities include, among other things, overseeing legal aspects of: (1) the Department's implementation of the CLCPA (the "Climate Law"); (2) the DEC's air permitting under the federal Clean Air Act and article 19 of the Environmental Conservation Law ("ECL"); and (3) the DEC's participation in administrative proceedings regarding proposed major energy projects, including before the DEC and the Siting Board pursuant to article 10 of the Public Service Law.

Further, he avers, he is familiar with: (1) the DEC's general handling of permit applications pursuant to the Uniform Procedures Act, ECL article 70, as implemented by the Department's Uniform Procedures regulation, 6 NYCRR part 621; (2) the DEC's administrative permit hearing proceedings pursuant to 6 NYCRR part 624 (Part 624); and (3) the specific ongoing DEC administrative proceeding under Part 624 regarding Danskammer's application for a Title V permit.

As background, he notes as follows.

On October 27, 2021, the DEC issued its notice of denial of Danskammer's application.

In the notice of denial, the DEC explicitly stated that, pursuant to 6 NYCRR 621.10 (a) (2), Danskammer had the right to request an administrative adjudicatory hearing regarding the denial of its Title V permit.

On November 23, 2021, the DEC received a written request from Danskammer for such an adjudicatory hearing. Part 624 sets forth the procedures for such a hearing.

On December 16, 2021, the DEC staff formally referred the matter to the DEC's Office of Hearings and Mediation Services ("OHMS"), which is the office principally responsible for conducting such adjudicatory hearings, and assigned a DEC administrative law judge ("ALJ") to oversee the hearing.

On January 12, 2022, notice appeared in the DEC's Environmental Notice Bulletin ("ENB") regarding the hearing. Among other things, the ENB notice set February 15, 2022, as the date for a legislative public comment hearing. The hearing was held virtually on that date and presided over by the DEC's assigned ALJ.

The January 12, 2022, ENB notice also established deadlines for other required elements of the Department's Part 624 proceeding, to wit: written public comments by February 22, 2022; and petitions for full party or amicus status by February 23, 2022. This was also the date by which Danskammer was to submit a proposed statement of issues.

March 10, 2022, was set as the date by which the DEC could submit a response to Danskammer's proposed statement of issues, and the DEC and Danskammer could respond to petitions for party/amicus status.

March 16, 2022, was set as the date for an issues conference before the ALJ.

On February 23, 2022, the DEC received three petitions for full party/amicus status, and

Danskammer's proposed Statement of Issues. Danskammer proposed ten separate issues for adjudication. They included what Danskammer described as seven issues of law and three mixed issues of law and fact. Danskammer also provided an offer of proof for certain issues, including a proposed panel of witnesses to provide testimony on behalf of Danskammer regarding certain factual issues.

Binder asserts that the legal and factual issues proposed by Danskammer are substantially similar to many of the claims in this litigation.

On January 10, 2022, Commissioner Seggos formally delegated all decision-making authority in the matter to Katharine J. Petronis, DEC Deputy Commissioner of Natural Resources. Thus, Petronis is the Department's final decision-maker in the administrative proceeding, including for purposes of any appeal of the ALJ's issues ruling.

Following the ALJ's issues ruling, and the resolution of any appeal by Petronis, the matter will proceed with discovery and an adjudicatory hearing before the assigned ALJ. The precise date for the ultimate adjudicatory hearing was not yet established.

After the adjudicatory hearing, and any written briefing by the parties, the ALJ will prepare a proposed decision outlining the findings of fact and conclusions of law. The ALJ or Petronis may provide an opportunity for parties to comment on the proposed decision. Petronis will then issue the DEC's final decision with respect to Danskammer's Title V application.

The final decision will be reviewable pursuant to CPLR article 78.

In sum, Binder asserts, there are pending administrative proceedings that will address various issues raised in this proceeding. Thus, those issues should not be addressed by the Court until such administrative remedies have been exhausted.

In a memorandum of law, the State Respondents argue as follows.

Danskammer's proposed new natural gas-fired generating station, if built, would be among the largest single emitters of climate-changing greenhouse gases in the state.

As a threshold issue, Danskammer argues, *inter alia*, that the DEC, in effect, promulgated a "rule" banning gas-fired power plants without taking the procedural steps required by SAPA; that the DEC violated Danskammer's due process rights by making a "standardless" determination; and that the DEC's determination is unsupported by the record.

However, the DEC argues, as to the first contention, the denial of Danskammer's Title V permit was not a *de facto* "rule," but was rather a case-specific determination for which no rule making procedures were required.

Further, the DEC asserts, it had no constitutional or statutory duty to promulgate additional rules of general applicability before engaging in a consistency analysis under the CLCPA.

In addition, it contends, to the extent that Danskammer challenges the factual basis for the DEC's determination, review of such arguments must await the completion of the ongoing administrative review (*supra*).

Thus, the State Respondents argue, the Court should dismiss the second and third causes of action for failure to state a cause of action, and the fourth cause of action (and a portion of the first) for failure to exhaust administrative remedies.

Separately, the DEC asserts, because the ongoing Siting Board and DEC hearing processes involve legal and factual issues that overlap significantly with this litigation, and because the outcome of the administrative proceedings may narrow or even moot the litigation

entirely, the Court should exercise its discretionary authority under CPLR §2201 to temporarily stay what remains of Danskammer's lawsuit pending completion of the administrative proceedings.

As relevant statutory and regulatory background, the DEC asserts as follows.

In New York, no entity may construct a new fossil fuel-fired major electric generating facility—that is, a power plant with a generating capacity of 25,000 kilowatts or more—without obtaining a certificate of environmental compatibility and public need from the New York State Board on Electric Generation Siting and the Environment *(see Public Service Law §§ 160 [2]–[5], [7]; 162 [1])*. To grant a certificate, the Siting Board must determine, among other things, that the proposed facility would be "a beneficial addition to . . . the electric generation capacity of the state"; that the "construction and operation of the facility [would] serve the public interest"; that "the adverse environmental effects of . . . the facility will be minimized or avoided to the maximum extent practicable"; and that "the facility is designed to operate in compliance with applicable state and local laws . . . concerning . . . the environment, public health[,] and safety" (*PSL § 168 [3] [a]–[c], [e]*).

Public Service Law Article 10 governs the Siting Board's review process.

As relevant here, disputed issues relating to completed applications are subject to adjudication before a panel of administrative law judges (*see* supra).

Further, while Article 10 largely centralizes decision-making authority in the Siting Board, it expressly reserves to the DEC the authority to issue air permits under the federal Clean Air Act and article 19 of the Environmental Conservation Law (*PSL §§ 167 [1] [a]; 172 [1]*).

Thus, here, Danskammer may not operate its proposed facility without a Title V air

permit from the DEC (*ECL 19-0311 [1] [a]*).

As discussed *supra*, in 2019, the Legislature enacted the CLCPA (*see L 2019, ch 106*), in which it recognized that "[t]he severity of current climate change and the threat of additional and more severe change will be affected by [New York's] actions . . . to reduce greenhouse gas emissions." As also discussed *supra*, the CLCPA charged a newly created Climate Action Council with developing a scoping plan, and directed "[a]ll state agencies" to consider whether any "permits, licenses, [or] other administrative approvals [or] decisions" would be "inconsistent with or [would] interfere with the attainment of the [Law's] statewide greenhouse gas emissions limits" *(L 2019, ch 106, § 7 [2])*.

Here, in 2019, Danskammer filed an application with the Siting Board seeking authorization to replace its existing facility (a four-unit natural gas-fired steam electric) with a new, 536-megawatt combined cycle natural gas-fired power plant.

Danskammer also applied to the DEC for a modification of its existing article 19/Title V permit to allow construction and operation of the proposed facility.

In October of 2021, based on all of the information before it, the DEC denied the permit.

Danskammer filed an administrative appeal (*supra)*.

Danskammer thereafter informed the Siting Board in the Article 10 proceeding as to the administrative appeal, and requested that the ALJ align the Article 10 proceeding with the DEC appeal. That request was granted. Accordingly, the Article 10 proceeding and the DEC adjudicatory hearing are to proceed essentially in parallel.

Concerning the proceeding/action at bar, the DEC notes that Danskammer's second and third causes of action allege, respectively, that the DEC violated the New York Constitution and

SAPA by promulgating a "rule" banning new natural gas-fired power generation without affording Danskammer its procedural due process rights.

However, the State Respondents argue, SAPA defines the term "rule" to mean, in pertinent part, an "agency statement, regulation[,] or code of general applicability that implements or applies law." *State Administrative Procedure Act § 102 [a] [i]*). Under the relevant case law, a "rule" for purposes of SAPA is a fixed, general principle to be applied without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers.

By contrast, where an agency renders a determination based on a case-by-case analysis of the facts, it need not publish its determination as a "rule."

Here, the State Respondents argue, the denial of the permit was the later. Indeed, they assert, as the notice of denial demonstrates, the DEC based its analysis on the application materials Danskammer submitted during the Article 10 and Title V processes, and the DEC's analysis responds only to the particular facts presented during the application process. It does not bind any entity other than Danskammer.

Thus, the State Respondents assert, the DEC did not promulgate a "rule" subject to the procedural requirements set forth in the New York Constitution or in SAPA.

In the third cause of action, Danskammer claims that the DEC's permitting determination was a "standardless" violation of its due process rights, and that DEC cannot deny a permit under CLCPA § 7 without promulgating source-specific regulations under ECL 75-0109.

However, the State Respondents argue, Danskammer has no protected property interest in a Title V permit, and the DEC has no constitutional or statutory obligation to promulgate

regulations where, as here, a statute is facially self-implementing.

Indeed, they assert, Danskammer does not allege that it has a protectable property interest in a Title V air permit such that a due process claim might lie. Rather, to establish such a protectable property interest, Danskammer must demonstrate a "legitimate claim of entitlement" to such a permit. A protectable property interest does not arise in benefits that are discretionary, unless the discretion of the governmental agency is so narrowly circumscribed that approval of a proper application is virtually assured. Thus, where it is clear that the law vests a state agency with considerable discretion in granting or denying a permit, there is no entitlement to the permit, and therefore, no protectable property interest and no viable due process claim.

Here, the State Respondents argue, Danskammer failed to demonstrate a protectable property interest in the Title V permit.

Further, the State Respondents assert, to the extent that Danskammer's constitutional claim is grounded in the separation of powers doctrine, the claim fares no better. That is, while the Legislature may not cede its fundamental policy-making responsibility to an administrative agency, it enjoys considerable leeway in delegating its regulatory powers.

Here, CLCPA section 7 easily meets the test set forth in *Boreali v. Axelrod* (71 N.Y.2d 1, 12–14), to wit: the statute explicitly directs all state agencies to "consider whether [any permitting decisions] are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in [*ECL 75-0107]" (L 2019, ch 106, § 7 [2]*).

Thus, there is no credible argument that the application of CLCPA section 7 violates the nondelegation rule.

Further, State Respondents argue, because there is no constitutional requirement that

legislative standards be translated by an agency into formal and detailed rules prior to their application to a particular case, there is no merit to the argument that the DEC was constitutionally obligated to promulgate additional regulations before determining whether issuance of the Title V air permit would be inconsistent with the CLCPA. That is, if the DEC wishes to proceed by the more flexible case-by-case method, the Constitution offers no obstacle. The DEC need only effect the statute's mandate in any particular instance in conformity with the statutory language and policy.

In addition, the State Respondents assert, any claim by Danskammer that the CLCPA itself requires the DEC to promulgate source-specific standards before engaging in a consistency analysis disregards the plain language of the statute. That is, although the CLCPA directs the DEC to promulgate, among other things, "emissions limits, performance standards, or . . . other requirements" as necessary to control greenhouse gas emissions (*ECL 75-0109 [2] [b]),* the statute does not direct the DEC, or any other agency, to promulgate such regulations before performing the consistency analysis required under CLCPA section 7. Rather, Section 7 simply directs state entities to evaluate whether a proposed project would impede the state's ability to meet its green house gas emissions limits.

Here, the State Respondents assert, as required under ECL 75-0107, and prior to acting on Danskammer's permit application, the DEC promulgated a rule translating the CLCPA's percentage-based greenhouse gas emissions limits into tonnage limits, to wit*: 6 NYCRR 496.4 [a]–[b]).* Equipped with these benchmark emissions figures, the DEC, or any other agency, may now determine, on a case-by-case basis, whether a proposed project is inconsistent with or will interfere with attainment of the state's emissions limits.

Further, the State Respondents contend, the general statutory scheme does not support Danskammer's arguments.

The primary consideration of the Courts in interpreting a statute is to ascertain and give effect to the intention of the Legislature, which requires examination of the statutory context of the provision as well as its legislative history. Here, as both the debates surrounding the CLCPA's enactment, and the statute's ultimate statement of findings and intent make clear, the Legislature was acutely concerned with the imminent and severe threats climate change poses to New York (*see L 2019, ch 106, § 1 [1]–[6]; NY Senate Debate on Senate Bill S6599, June 18, 2019 at 6371* ["Doing this today and not waiting for next year is pivotal, because we have no time. We don't."]).

Accordingly, the State Respondents argue, the statutory scheme contemplates an unprecedented, all-of-government effort to ensure the state meets the law's aggressive, near-term emissions limits. Indeed, the Legislature gave the Climate Action Council three years to finalize its scoping plan; and the DEC one additional year to develop a comprehensive regulatory scheme reflecting the findings in that plan (*see ECL 75-0103 [11]–[12]; 75-0109 [1]–[2]*).

Here, the State Respondents assert, it would be unreasonable to conclude that the Legislature intended state agencies to do nothing under Section 7 for four full years after its effective date, or nearly half the time period between the CLCPA's enactment and the statutory deadline, to meet the first statewide GHG emissions limit. Rather, they assert, a far better reading of the statute is that Section 7 applies now– or even especially now– to prevent state agencies from making permitting decisions that could lock in GHG emissions for decades and impede the state's ability to meet its emissions limits.

The State Respondents argue that Danskammer's "fact-dependent" fourth cause of action must be dismissed because Danskammer has admittedly failed to exhaust its administrative remedies.

Moreover, they assert, while Danskammer attempts to excuse this failure by invoking the futility exception, it presented no evidence that the ongoing administrative proceedings before the DEC are futile.

Danskammer also alleges that the DEC's permit determination was, for various reasons, factually unsupported. However, the State Respondents note, the same rational basis-type claims are pending currently before a DEC ALJ, and will eventually be reviewable in a proceeding under CPLR article 78.

Thus, they argue, until the DEC adjudicatory process concludes in a final decision or order, Danskammer has failed to exhaust its administrative remedies and so may not seek review in a court of law.

Of particular note, they assert, is that Danskammer, in a recently filed statement of issues in the administrative proceedings, identified various "mixed questions of law and fact" which are the same as those raised in the fourth cause of action herein. Moreover, Danskammer proposes to buttress those claims with testimony at the hearing– that is, new factual evidence– from a panel of expert witnesses.

Thus, the State Respondents argue, because the rationality arguments that Danskammer makes in the fourth cause of action are subject to further factual development in the adjudicatory hearing process, the exhaustion rule requires that Danskammer first complete that process before petitioning this Court for relief.

Further, they assert, that 6 NYCRR part 621 is permissive does not lessen the exhaustion requirement. Rather, until Danskammer completes the adjudicatory hearing process, the DEC's permit denial is– at least with respect to the fourth cause of action– is nonfinal and, therefore, not subject to judicial review.

Similarly, the State Respondents argue, Danskammer must also exhaust at least so much of its first cause of action as alleges that the DEC unlawfully considered the statewide renewable power generation requirements codified at Public Service Law § 66-p. Those arguments challenge the basis for the DEC's permitting determination, and must be presented to the agency for review in the first instance.

Moreover, they assert, again, exhaustion would not be futile, as there is no evidence that the DEC is exercising some long-held agency policy, or has taken a position which effectively predetermines the outcome of the administrative process in a manner adverse to Danskammer.

Rather, Danskammer, relying on public statements made by Commissioner Seggos after the permit denial, claims that the DEC has "articulated a policy . . . that new or repowered generating plants . . . were banned in New York State." However, the State Respondents argue, no such policy exists here, and the statement identified by Danskammer simply summarizes the basis for DEC's permit denial. The statement makes no claim that the denial was based on anything other than the specific facts of the application before the DEC, and cannot reasonably be interpreted as a blanket agency policy mandating a finding of inconsistency for– let alone denial of a permit for– any fossil fuel-fired electric generation project.

Similarly, the State Respondents assert, to the extent Danskammer's argument is that the DEC Commissioner's statement proves he has prejudged the outcome of the adjudicatory

hearing, the statement, without more, is insufficient to establish futility.

Indeed, they note, in order to avoid even the appearance of bias, Commissioner Seggos has delegated decision-making authority in the ongoing adjudicatory proceedings to a DEC deputy commissioner. Thus, even assuming that the Commissioner's public statement was evidence of alleged bias– which it is not– the delegation of his decision-making authority cured the defect and defeats Danskammer's futility claim.

Further, the State Respondents contend, in addition to and separate from Danskammer's legal obligation to exhaust administrative remedies, the Court should exercise its discretion to stay the proceedings pending the outcome of the ongoing DEC and Public Service Law administrative proceedings, as either or both may narrow or even entirely moot this litigation.

Here, State Respondents assert, as Danskammer's issues statement in the administrative proceedings makes clear, Danskammer intends to raise legal and factual issues in that proceeding which are essentially identical to the issues raised in this lawsuit.

Similarly, they note, in the Article 10 proceeding, the Siting Board may deny the requested certificate under section 7 (which applies equally to the board), or in the exercise of its authority under the Public Service Law for reasons wholly unrelated to DEC staff's (or its own) consistency analysis *(see Public Service Law § 168 [3])*. Such a determination would be subject to administrative and judicial review, including through a petition directly to the Appellate Division following a board decision on rehearing (*PSL § 170 [1]*). Indeed, because Danskammer cannot build the Project without a certificate from the Siting Board, any legal dispute related to DEC's air permitting determination will be academic if the board ultimately denies Danskammer's application.

In sum, the State Respondents argue, because future developments in the ongoing administrative proceedings may substantially impact numerous issues raised herein, the matter should be stayed pending the outcome of those proceedings.

Danskammer's Opposition to the Motion

In opposition to the motion, Danskammer asserts that, when the DEC wrongly denied a permit based only on CLCPA § 7(2), its Commissioner (and the Governor who appoints him) made statements to the press lauding the denial, even taking personal credit for the decision, "thereby sealing the fate" of any future administrative proceeding challenging DEC's erroneous determination.

Further, it argues, in an apparent attempt to delay this Court's inevitable determination that the DEC overstepped the bounds set by the Legislature when enacting the CLCPA, the State Respondents seek a partial dismissal of the proceeding, "and, remarkably, a stay of these proceedings for an indeterminate time." Danskammer asserts that the Court should reject this "attempt to evade judicial review."

First, Danskammer argues, the State Respondents's claim that the second cause of action, alleging violations of the SAPA and the New York Constitution, should be dismissed because the DEC's determination was "case-specific" is contradicted by the fact that, on the very same day that the DEC denied its application, it also denied– on virtually identical grounds– a Title V permit application for a different power plant (NRG Energy, Inc.) seeking to repower, using the same boilerplate language and identical reasoning as its denial of Danskammer's permit application. Danskammer asserts that "the denials boil down to a blanket policy that any new or repowered power plant that emits any amount of GHGs is, by definition, inconsistent with the

CLCPA and cannot be issued a Title V permit.

Further, it contends, that the decision was anything but case-specific is further demonstrated by the DEC's recently proposed guidance which essentially requires the denial of a permit based on the same *de facto* rule; which is a *post hoc* attempt at justifying its unsupported decision (without undertaking the necessary SAPA procedures).

Indeed, Danskammer notes, at the same time this was going on, the Legislature introduced bills that would establish a ban on certain fossil fuel power plants. However, none have yet been signed into law. Danskammer argues that this clearly establishes both that the Legislature intends to occupy the field, and that it is not yet ready to impose a ban on new fossil fuel generation.

Thus, Danskammer asserts, the DEC's "attempt to color its power grab as a case-specific permitting decision does not pass any logical test, and this Court should reject it."

Second, Danskammer argues, the State Respondents' argument that Danskammer cannot assert a due process claim because it has no property interest in a permit application also fails.

Danskammer owns the property upon which the plant sits, and has an interest in a permitted use of the property which otherwise meets all of the DEC's Title V permitting criteria.

Here, the DEC's sole reason for denying the permit was CLCPA Section 7(2), which, as a matter of law, provides no such authority.

Moreover, Danskammer asserts, CLCPA Section 7(2) is not self-implementing.

Further, it argues, to the extent that the DEC claims reliance on Part 496– the one regulation it has issued setting forth general, statewide limits on the emission– the DEC's own statements in promulgating the regulation (discussed *supra*) made clear that it created no

compliance obligations. Danskammer asserts that the DEC cannot promulgate a rule which expressly states that it imposes no compliance obligations, and then enforce compliance of the rule by denying a permit based on the same. Indeed, it contends, this would be the very definition of "standardless decision-making," and New York law on due process requires more.

Third, Danskammer argues, the State's contention that Danskammer has failed to exhaust its administrative remedies, and that the present case should be stayed pending resolution of the same, is similarly unavailing. Rather, exceptions to the exhaustion rule apply.

For example, the issue of whether the DEC has authority under CLCPA Section 7(2) to deny a Title V permit can be decided now, and would guide any further DEC proceedings.

Similarly, the DEC had no legally cognizable power to even make a CLCPA § 7(2) determination here. Rather, the permit application arose in the context of Article 10 of the PSL, which reserves to the Siting Board all permitting decisions, other than a narrow class of federally delegated or approved permitting programs, such as Title V air permitting program. Thus, as a CLCPA section 7(2) "consistency" determination is not part of any federally delegated or approved permitting program, the DEC acted outside its delegated jurisdiction in making any such determination.

As to those causes of action alleging that the DEC's decision was arbitrary and capricious, Danskammer argues that, "if ever there were a textbook case of futility, it is when, as here, the State's highest elected official, the Governor, and her appointed DEC Commissioner Basil Seggos, both issued simultaneous press statements lauding DEC's decision prior to notifying Danskammer." Indeed, it asserts, in the case of Commissioner Seggos's statement, he even went so far as to tout his personal involvement in the decision-making.

Moreover, Danskammer contends, that the DEC delegated all further decision-making in the case to an "underling subordinate of the Commissioner, who serves at his pleasure and is also appointed by the Governor, hardly cures this fatal flaw and demonstrates the fundamental purpose of the Judicial Branch serving as a check on Executive overreach."

As to factual issues, Danskammer notes that the State Respondents claim that Danskammer is seeking "to replace" its currently operating power plant. However, it argues, this is a material misstatement of fact. Danskammer is seeking to replace its existing turbines at the plant with more efficient, cleaner burning, combined cycle turbines that could operate as a baseload power station (with the ability to operate continuously). The existing turbines would be retired once the combined cycle plant was complete. Thus, the Project would not simply "replace" the current power station, but instead would upgrade the plant's turbines to allow for more efficient operation.

Similarly, Danskammer argues, the State Respondents also incorrectly assert that the issues in both the DEC administrative hearing and the Article 10 Siting Board process "overlap significantly" with the issues in this litigation."

Danskammer asserts that Article 10 of the PSL serves as a "one-stop shop" for permitting major electric generating facilities, with jurisdiction vested in the Siting Board. The only exception is for permits required by federal law, where permitting authority has been delegated by the federal government to a specific state agency, in this case, the DEC. *(PSL § 172(1))*. Thus, the DEC is the only state agency with authority to issue Title V permits under the federal Clean Air Act, and it retains limited jurisdiction to issue such permits in Article 10 proceedings.

However, Danskammer argues, Article 10 circumscribes the authority of DEC in deciding

such permits by requiring the DEC Commissioner to "follow procedures established in this article to the extent they are consistent with Federally-delegated or approved environmental permitting authority."

Article 10 makes clear that the Siting Board retains the final say in evaluating the anticipated health and environmental impacts relating to a project, and that if the Siting Board denies certification, then the DEC permit shall be deemed null and void.

Thus, here, by denying the Title V permit based solely on a state law consideration that is not part of its delegated, limited authority, the DEC acted outside its limited jurisdiction in Article 10 proceedings.

Moreover, Danskammer contends, at the same time, the DEC effectively prevented the Siting Board from fulfilling its statutory mandate, and exercising its jurisdictional primacy in all matters related to power plant siting, by including a consistency determination in its denial of the permit under the CLCPA. Indeed, Danskammer asserts, this argument, which is set forth in its principal brief, was not addressed in the State Respondents's motion to dismiss.

Accordingly, Danskammer argues, determination of the legal questions clouding the legitimacy of DEC's permit denial must be decided by the Court before either the DEC permit hearing or the Article 10 Siting Board process may effectively move forward.

Danskammer notes that the State Respondents also move to dismiss the second and third causes of action for failure to state a cause of action. In the main, the State Respondents argue that the DEC did not promulgate a "rule," but rather issued a fact specific, discrete determination.

However, Danskammer argues, this contention is "wrong on several grounds."

First, it asserts, reduced to its essence, the State Respondents are arguing, in effect, that

the DEC can never create an unpromulgated rule in the context of a determination made in an individual case because, as a technical matter, it is only binding on that particular applicant. However, it contends, acceptance of this argument would nullify the entire body of case law which holds that an administrative agency cannot, in an individual case, apply a fixed principle that has the attributes of a rule unless that principle has been duly promulgated through the SAPA rule-making process.

Further, Danskammer asserts, the issue here is not whether the challenged principle is applied in the context of particular facts, but rather whether the principle was applied without regard to other facts and circumstances relevant to the regulatory scheme of the statute that it administers. Where a factor upon which an individual determination is made is a rigid, numerical policy invariably applied across-the-board to all applicants, without regard to individualized circumstances or mitigating factors, it falls plainly within the definition of a "rule" for SAPA.

Here, Danskammer argues, the DEC has created and applied a fixed principle– that any repowered natural gas plant is inconsistent with the CLCPA and cannot be permitted. Indeed, the DEC premised its permit denial entirely on its erroneous administration of CLCPA § 7(2), and in so doing effectively imposed a ban on repowerings and improved efficiency at existing natural gas-fired power plants like Danskammer.

As noted *supra*, proof of the same can be found in the fact that, on the same day as the DEC denied Danskammer's permit, it denied another, similar permit application made by NRG Energy, Inc., using virtually identical language, and simultaneously issued identical press statements.

Moreover, Danskammer asserts, "[p]roviding the final imprimatur of gubernatorial approval of this de facto rule, Governor Kathy Hochul then issued a single statement applauding DEC's decisions in both cases. The message to the public and the regulated community was clear: DEC will deny requests like Danskammer's and NRG's, and the Governor approves of this new rule."

Further, Danskammer agues, it is no answer that the DEC's determination does not bind any other entity. It is binding on DEC as a matter of *stare decisis*.

In sum, it asserts, the result is that the DEC has determined, without notice under SAPA or compliance with the State Constitution, that it will deny a permit if the permit is for a repowered natural gas power plant that would result in a substantial new source of GHG emissions. Further, this principle of general applicability is not set forth in any law, rule, or regulation; and was not provided to the regulated community and the public for comment.

Thus, Danskammer argues, even if the CLCPA authorized the agency to unilaterally implement such a ban (which it does not), this goal could not be accomplished legally without the benefit of formal rule making under SAPA.

Accordingly, it asserts, the Court should not dismiss Danskammer's second cause of action, but instead immediately vacate the DEC's fatally flawed ruling and remand this matter to DEC for further action consistent with the Court's ruling.

In response to the third cause of action, alleging that the DEC's decision to deny the permit violated the New York State Constitution, art. I, § 6, the State Respondents argue that Danskammer has no protectable property interest in its Title V permit because DEC has discretion to deny such as permit. However, it asserts, this argument is "misdirected."

The State Respondents' argument does not address the crux of Danskammer's due process claim, to wit: that the DEC does not have the discretion to deny a Title V permit under CLCPA § 7(2). Thus, the DEC's permit denial exceeded its jurisdiction, and violated Danskammer's constitutional rights.

Further, the State Respondents's contention that Danskammer did not adequately allege a property interest also ignores that Danskammer owns the existing power plant and the underlying real property upon which it is located.

Further, Danskammer asserts, the DEC's reliance upon 6 NYCRR Part 496 does not salvage its argument. Rather, as discussed *supra*, Part 496, by the DEC's own public statements, is not an enforceable regulation and has no relation to individual Title V permits at all.

Indeed, Danskammer argues, the State Respondents' attempt "to waive away these statements as immaterial" only highlights the DEC's disregard for due process. That is, the State Respondents "would have this Court accept a duplicitous understanding of the constitutional protection: on the one hand, DEC is free to mislead the regulated community and public in promulgating a regulation that ostensibly imposes no compliance obligation at all; at the same time, DEC may rely on the purportedly non-existent compliance obligation to determine that a project fails to comply with it and therefore cannot be permitted. Such tautology at best encourages borderline fraudulent public statements by state agencies, and, at worst, as illustrated here, attempts to justify unconstitutional state actions without regard to due process of the law. In either event, such actions in no way support dismissal of Danskammer's Petition. For all the reasons stated in Danskammer's Petition and supporting memorandum of law, DEC's standardless, arbitrary, and irrational decision was in flagrant violation of Danskammer's due

process rights."

Danskammer argues that the State Respondents effort to rely on the CLCPA as "the font of an all-encompassing power to deny permits for natural gas power plant repowerings" is also unavailing. Rather, it asserts, as noted *supra,* nothing in CLCPA § 7 provides the DEC with such broad authority, and the bills introduced in the Legislature, which would provide the DEC with such authority, have not been signed into law. Indeed, it argues, had the Legislature intended to empower agencies to deny project-specific permits, it could have done so by plainly stating that an agency "shall not grant" or "shall deny" such a permit.

Danskammer asserts that the Court should also reject the State Respondents' argument that, despite the rigorous process set forth in detail in the CLCPA for the promulgation of regulations establishing permit-specific GHG emissions limits to govern permits like those issued under Title V, the DEC need not promulgate such regulations before denying such permits because CLCPA § 7(2) alone is sufficient. Rather, it argues, it is a well-settled principle of statutory construction that a statute or ordinance must be construed as a whole and that its various sections must be considered together and with reference to each other. All parts of a statute are to be harmonized, giving effect and meaning to all provisions. Here, it asserts, as noted *supra*, CLCPA § 7(2) does not authorize any state agency to deny a permit, but rather sets forth a detailed scheme for the promulgation of such regulations. This detailed scheme cannot be rationally harmonized with the State Respondents's reading of CLCPA § 7(2), to wit: that the DEC may deny a permit because DEC has determined that the grant of the same is inconsistent with the overall goals of the CLCPA, or with a general statewide emission limit that, by its terms, creates neither a compliance obligation nor any indication on how it should be applied to

individual sources of GHGs. Under such a reading, it contends, the Council, the scoping plan, the public hearings, the public comment periods, and the entire rule making process would be "mere window dressing" because state agencies would have been delegated the authority to grant or deny permits without any governing standard under CLCPA § 7(2). Rather, Danskammer argues, the only reading of CLCPA which gives effect to all of its component parts is that Section 7(2) of the CLCPA requires only that state agencies consider whether issuance of a permit or approval would be inconsistent with or would interfere with the attainment of the ECL Article 75 statewide emission reduction requirements for 2030 and 2050, and identify alternatives or GHG mitigation measures to be required where such project is located. "To read more into that provision would render ECL § 75-0109 meaningless and would distort the plain meaning of the language of CLCPA § 7(2)."

Concerning exhaustion, Danskammer argues that its first cause of action raises only questions of law and statutory construction which may be reached without exhausting administrative remedies.

In the fourth cause of action, it is alleged that the DEC's permit denial was arbitrary and capricious due to numerous legal and factual errors, including, among other things, its reliance on CLCPA § 7(2), its usurpation of powers reserved to the PSC or Siting Board for determining the need for electric generating facilities, and its apparent misunderstanding of and reliance upon cherry-picked portions of reports by the NYISO. Danskammer asserts that these arguments also fall within well-established exceptions to the exhaustion requirement.

Accordingly, it argues, the Court should decide these threshold legal issues before the pending administrative proceeding proceeds.

Danskammer notes that the State Respondents also claim that the ongoing article 10 proceeding has the potential to narrow or even moot the litigation because Danskammer cannot build the plant without a certificate from the Siting Board.

However, Danskammer asserts, the State Respondents misunderstand Public Service Law Article 10.

A project needs both an Article 10 Certificate and a Title V air permit in order to operate, but under black letter law (as well as Siting Board decisions), the Siting Board cannot issue a decision on the Article 10 application until the DEC issues a decision on the Title V air permit. *See Public Service Law § 172* ("The commissioner of environmental conservation shall provide such permits [issued pursuant to federally delegated or approved authority] to the board prior to its determination whether or not to issue a certificate.")

Further, Danskammer asserts, another equally compelling reason for the Court to deny the State Respondents's request to dismiss or stay the proceeding is that both the DEC Commissioner and the Governor, at whose leisure the Commissioner serves, made statements to the press prejudging any outcome of an administrative proceeding (*supra*). Thus, the futility doctrine is applicable.

In sum, Danskammer argues, the State Respondents' motion should be denied.

The State Respondents' Reply

In reply, the State Respondents note that they are not moving to dismiss so much of Danskammer's first cause of action as alleges that the DEC exceeded the scope of its authority under either the CLCPA or the Public Service Law.

Further, they assert, to the extent that Danskammer argues that the DEC somehow

promulgated a rule by misinterpreting the scope of its authority under the CLCPA, such an argument merely restates Danskammer's first cause of action. Moreover, they contend, even if true, this alleged error of law would not convert the DEC's fact-specific permit determination into a "rule" of general applicability and future effect.

Similarly, they argue, it is irrelevant that the DEC's separately denied the NRG permit. Rather, there, as here, the DEC made that determination based on its application of the analysis prescribed by section 7 to the specific facts and circumstances of the application. The State Respondents argue that it makes no difference that both *ad hoc* reviews resulted in permit denial; as in neither case did a pre-formulated standard or rule determine the result of DEC's analysis. Indeed, they note, the DEC's denial of the NRG permit is the subject of a separate adjudicatory proceeding before a DEC administrative law judge; as, unlike Danskammer, NRG has not sought premature judicial review of the decision.

In addition, the State Respondents assert, Danskammer concedes that it lacks a protectable property interest in the permit. Rather, Danskammer argues that it has a cognizable property interest by virtue of its ownership of the existing plant and the underlying property. However, the State Respondents argue, in order to establish a vested right in such circumstances, Danskammer would need to show, among other things, that it possessed "a legally issued permit" and that it had already "effect[ed] substantial changes and incurr[ed] substantial expenses" in reliance on that permit. Here, this is not the case.

Moreover, the State Respondents assert, even assuming, *arguendo*, that Danskammer could show a cognizable property interest, it failed to demonstrate that there is a due process claim arising from the allegation that the DEC misinterpreted the scope of its authority under the

CLCPA. That is, the denial of a permit– even if arbitrary– is not tantamount to a constitutional violation.

Further, the State Respondents argue, Danskammer's "continued fixation" on part 496 is "perplexing," given that the DEC never relied on part 496 as a basis for denying the permit. Rather, it denied the permit under section 7(2) of the Climate Law. Part 496 is relevant to DEC's CLCPA- mandated consistency analysis only insofar as it expresses the statute's percentage-based emissions limits in tons of carbon dioxide- equivalent emissions.

Moreover, they contend, Section 7 does not require that the DEC first promulgate the emissions figures now found in part 496 or any other rule. Rather, they argue, absent an express mandate from the Legislature, the DEC is under no obligation– and certainly no constitutional obligation– to promulgate rules implementing Section 7 before engaging in the analysis that section requires, and Danskammer identifies no authority to the contrary.

In addition, they note, in general, Danskammer does not dispute that it failed to exhaust administrative remedies as to certain causes of action before commencing this lawsuit. Rather, it argues that it needn't exhaust its remedies here because it raises pure questions of law and/or because exhaustion would be futile.

As to the first cause of action, the State Respondents note, Danskammer is correct. Indeed, they note, they did not move dismiss the bulk of that cause of action.

However, the State Respondents argue, the remaining causes of action raise various legal or factual issues that may be resolved in the pending administrative proceedings.

Thus, both in the interest of judicial economy and to avoid issuing what could amount to an advisory opinion, the Court should exercise its broad discretion under CPLR 2201 and 7805 to

stay what remains of Danskammer's lawsuit pending completion of the ongoing DEC and Siting Board administrative proceedings.

Discussion/Legal Analysis

As is clear from the nature of the proceeding, and made express by CLCPA§ 12, review of the determination by the DEC at bar is to be made pursuant to CPLR article 78. *See also, ECL § 19-0511; Stop-The-Barge ex rel. Gilrain v. Cahill*, 1 N.Y.3d 218 (2003); *Sutherland v. New York State Dept. of Environmental Conservation*, 122 A.D.3d 759 [2nd Dept. 2014].

The core questions raised include whether the DEC proceeded without, or in excess of, jurisdiction; and whether a 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(2) & (3).*

As to the later question, the court is required to examine whether the action taken by the agency has a rational basis, and will only overturn such action where it is taken without a sound basis in reason or without regard to the facts, or where it is arbitrary and capricious. *Save America's Clocks, Inc. v. City of New York*, 33 N.Y.3d 198 (2019); *JP & Associates Corp. v. New York State Div. of Housing and Community Renewal*, 122 A.D.3d 739 [2nd Dept. 2014]. The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified, and whether the administrative action is without a foundation in fact. *Pell v. Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 N.Y.2d 222 (1974). Action is deemed arbitrary when it is taken without a sound basis in reason and taken without regard to the facts. *Pell v. Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 N.Y.2d 222

(1974). Rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard. *Pell v. Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 N.Y.2d 222 (1974).

However, such review is deferential, as it is not the role of the courts to weigh the desirability of any action or choose among alternatives. *Save America's Clocks, Inc. v. City of New York*, 33 N.Y.3d 198 (2019). Rather, the courts must sustain a determination if it is supported by a rational basis, even if the court would have reached a different result. *Save America's Clocks, Inc. v. City of New York*, 33 N.Y.3d 198 (2019); *Deerpark Farms, LLC v. Agricultural and Farmland Protection Bd. of Orange County*, 70 A.D.3d 1037 [2nd Dept. 2010].

Further, in general, a party who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law. *Baywood, LLC v. Office of Medicaid Inspector General*, 188 A.D.3d 1193 [2nd Dept. 2020]; *Kaneev v. City of New York Environmental Control Bd.*, 149 A.D.3d 742 [2nd Dept. 2017]; *Nazir v. Charge & Ride, Inc.*, 95 A.D.3d 1215 [2nd Dept. 2013]. However, this rule is not inflexible. Exhaustion of administrative remedies is not required where an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or when resort to an administrative remedy would be futile, or when its pursuit would cause irreparable injury. *Friedman v. Rice*, 30 N.Y.3d 461 (2017); *Baywood, LLC v. Office of Medicaid Inspector General*, 188 A.D.3d 1193 [2nd Dept. 2020]; *Kaneev v. City of New York Environmental Control Bd.*, 149 A.D.3d 742 [2nd Dept. 2017]; *Nazir v. Charge & Ride, Inc.*, 95 A.D.3d 1215 [2nd Dept. 2013].

The doctrine of exhaustion of administrative remedies applies to actions for declaratory judgments, with the same exceptions. *Enlarged City School Dist. of Middletown v. City of*

Middletown, 96 A.D.3d 840 [2nd Dept. 2012].

Here, as a threshold issue, it does not appear disputed that Danskammer has failed to exhaust administrative review. Rather, according to the parties, there is currently pending an administrative appeal of the DEC's decision, raising many of the issues raised herein, which has been joined with issues raised in Danskammer's Article 10 application.

Rather, Danskammer argues that this does not preclude review, as exceptions to the exhaustion rule are present.

The Court agrees that such an exception is presented by Danskammer's allegations that the DEC, in denying the permit pursuant to CLCPA § 7, acted either unconstitutionally or wholly beyond its grant of power. These allegations, *inter alia*, raise issues necessitating statutory construction.

It is a fundamental and well settled principle that the primary consideration of the courts, in the interpretation and construction of a statute, is to ascertain and give effect to the legislative intent as expressed in the statute and that in ascertaining such intent the statutory language so utilized is to be construed in accordance with its ordinary and natural meaning without resort to artificial or forced construction. *See, Mckinney's Consolidated Laws,* Statutes §§ 76, 92 and 94; *See also, Avella v. City of New York*, 29 N.Y.3d 425 (2017); *In re Shannon*, 25 N.Y.3d 345 (2015); *Shoram-Wading River Central School District v. Town of Brookhaven,* 107 A.D.2d 219 [2nd Dept. 11985]. Because the clearest indicator of legislative intent is the statutory text, the starting point must always be the language of the statute itself, giving effect to the plain meaning thereof. And, while it is true that statutes are to be strictly construed, it is equally true that in determining legislative intent, statutory provisions are to be construed in such a manner so as to

avoid conflict and to preserve the intent of the legislature, with the statute being construed as a whole, with its various sections considered together and with reference to each other. *Avella v. City of New York*, 29 N.Y.3d 425 (2017); *In re Shannon*, 25 N.Y.3d 345 (2015). All parts of a statute must be given effect, and a construction which renders any part meaningless should be avoided. *Avella v. City of New York*, 29 N.Y.3d 425 (2017). Where the language is ambiguous, a court may (and in this Court's view compelled to) examine the statute's legislative history. *Avella v. City of New York*, 29 N.Y.3d 425 (2017); *In re Shannon*, 25 N.Y.3d 345 (2015).

In sum, it is the duty of the court to read and construe all parts of a statute as a whole and, where possible, harmonize and reconcile the provisions contained therein and endeavor to give effect to every word contained in the statute or legislative act. *See,* Statutes §§97, 98; *Carney v. Phillipone,* 1 N.Y.3d 333 (2004).

Here, the relevant language of the statute provides as follows.

§ 7. Climate change actions by state agencies.

1. All state agencies shall assess and implement strategies to reduce their greenhouse gas emissions.

2. In considering and issuing permits, licenses, and other administrative approvals and decisions, * * * all state agencies, offices, authorities, and divisions 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. Where such decisions are deemed to be inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits, each agency, office, authority, or division 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.

Relevant to the case at bar, the Introducer's Memorandum in Support of the legislation states: "Sections 7 through 12 would provide for additional authority for state agencies to

promulgate greenhouse gas regulations and require the Department of Environmental Conservation to consider climate change in permitting decisions." *New York Bill Jacket, 2019 S.B. 6599, Ch. 106.*

Here, it is not, and cannot reasonably be denied that the statutory provisions *supra* expressly require the DEC to consider the furtherance of the goals of the CLCPA in determining permit applications.

Rather, Danskammer argues that the language, while requiring such review, does not grant the DEC the authority, expressly or otherwise, to deny a permit that would be inconsistent with or interfere with the attainment of the statewide greenhouse gas emissions limits. Indeed, Danskammer notes, the CLCPA sets forth an extensive scheme for the future promulgation of rules, etc. concerning the same by the Council and others, including the DEC. Thus, Danskammer argues, the statute does not grant the DEC the authority to deny a permit application based on a conclusion that the grant of the same would be inconsistent with or interfere with the attainment of the statewide greenhouse gas emissions limits; at least, at a minimum, until the relevant rules, etc. are promulgated by the Council and others.

However, the Court notes, while Danskammer is correct that the language of Section 7(2) does not expressly authorize the DEC to deny a permit based on application of the same, it also does not expressly preclude the same, or otherwise limit the DEC's authority thereunder until the promulgation of the rules, etc. provided for thereunder; although the Legislature could have readily provided for either, which brings into play yet another aspect of statutory interpretation.

In ascertaining legislative intent, the court cannot, in the discharge of its interpretative function, and by implication, supply a provision which it is reasonable to assume the legislature

intentionally sought to omit. Such failure of the legislature to include such a provision within the scope of an act, by virtue of its omission, may not be construed as one of oversight, but be construed as an indication that its exclusion or omission was intentional. *See,* Statutes §§74, 240; *Pajak v. Pajak,* 56 N.Y.2d 394 (1982); *Bayshore Family Partners v. Foundation,* 239 A.D.2d 373 [2nd Dept. 1997]; *City of New York v. New York Telephone,* 108 A.D.2d 372 [1st Dept.1985]. Thus, if it was the intent of the legislature, in enacting the legislation, to specifically preclude the DEC from possessing the requisite authority to deny such a permit, it could have, and should have, included such a statutory prohibition; it did not.

Relevant to the same, to adopt Danskammer's position would be to ignore the entire thrust, purpose and legislative history of the statute.

The Court further notes, the section at issue, by its plain language, is of immediate effect. Indeed, in enacting the legislation, the Legislature found that "[c]limate change is adversely affecting economic well-being, public health, natural resources, and the environment of New York," and that such adverse affects would continue and worsen if GHG emissions were not reduced. That is, the Legislature identified a currently existing, urgent problem that was worsening; not a developing or potential problem that might arise if appropriate action was not taken in the future.

Thus, there is immediacy to the legislation and language used, and the reasonable inference and conclusion to be drawn from the language used, in order to give it meaning and effect, is that the DEC is authorized to deny a permit based upon application of the same.

Further, and significantly so, the Court notes, Danskammer's proposed interpretation of Section 7(2) would render it meaningless.

First, by Danskammer's proffered interpretation, the Legislature has mandated that the DEC engage in an ultimately pointless exercise; that is, the DEC must consider the goals of the CLCPA in determining whether to grant a permit, but may not deny the permit even if the proposed project does not meet the goals and cannot otherwise be justified or mitigated. The Court notes that, under such circumstances, the required review serves no practical or meaningful purpose.

Second, such an interpretation would render the Legislature's expressed mandate to reduce GHG emissions, despite its immediacy and urgency, completely toothless for years to come, and would relegate the DEC to essentially spectator/advisor status until such time. Such a reading is not supported by the plain language of Section 7, by the articulated goals of the CLCPA in general, or its legislative history.

Finally, as noted by the DEC, a permit granted prior to the promulgation of such further rules, etc. may extend into and beyond the promulgation of the same. If the permit does not ultimately comply with the rules, etc. as enacted, the grant of a permit would actually undermine the legislative goals.

Thus, the Court rejects Danskammer's proffered interpretation.

Rather, to give Section 7 meaning, the Court finds that the plain language of the statute must be interpreted to grant the DEC the requisite authority to deny a permit when the grant of the permit would be inconsistent with or interfere with the attainment of the goals of the CLCPA, and the grant cannot otherwise be justified or the adverse effects mitigated.

As corollary arguments, Danskammer argues that the DEC usurped a legislative function in denying the permit, and that the DEC violated its due process rights under the New York State

Constitution and SAPA by promulgating a *de facto* "rule" prohibiting all gas-fired power plants in New York. However, these arguments also lack merit.

To determine whether an administrative agency has usurped the power of the Legislature, the courts must consider whether the agency: (1) operated outside of its proper sphere of authority by balancing competing social concerns in reliance solely on its own ideas of sound public policy; (2) engaged in typical, interstitial rulemaking or wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance; (3) acted in an area in which the Legislature has repeatedly tried– and failed– to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions; and (4) applied its special expertise or technical competence to develop the challenged regulations. *Boreali v. Axelrod*, 71 N.Y.2d 1, 12–14; *Argudo v. New York State Dept. of Motor Vehicles*, 149 A.D.3d 830 [2nd Dept. 2017].

Here, none of these factors are present.

Rather, the Legislature, not the DEC, determined that New York State is currently suffering adverse affects from climate change, and that a stated legislative goal is the reduction and ultimate elimination of GHG emissions from anthropogenic sources. Further, the Legislature expressly directed the DEC to consider such goals in determining permit applications. Thus, the DEC was not operating outside of its proper sphere of authority and balancing competing social concerns in reliance solely on its own ideas of sound public policy. Nor was it writing on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance, or acting in an area in which the Legislature has repeatedly tried– and failed– to reach agreement. Nor did it apply it owns expertise or technical competence to develop the challenged regulations.

Rather, the DEC was implementing the Legislature's policies as set forth in the CLCPA. *Argudo v. New York State Dept. of Motor Vehicles*, 149 A.D.3d 830 [2nd Dept. 2017].

Further, the Court does not find that the DEC promulgated a *de facto* "rule" concerning gas-fired power plants.

Section 102(2)(a)(i) of the State Administrative Procedure Act ("SAPA") defines a "rule" as "the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency." In general, a "rule" for purposes of SAPA is a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers. *Cubas v. Martinez*, 8 N.Y.3d 611 (2007); *Schwartfigure v. Hartnett*, 83 N.Y.2d 296 (1994).

There is a distinction to be drawn between *ad hoc* decision making based on individual facts and circumstances (which are not subject to SAPA) and rulemaking. Choosing to take an action based on individual circumstances is significantly different from implementing a standard or procedure that directs what action should be taken regardless of individual circumstances. *Medical Society of State v. Serio*, 100 N.Y.2d 854 (2003); *Alca Industries, Inc. v. Delaney*, 92 N.Y.2d 775 (1999). Rulemaking, in other words, sets standards that substantially alter or, in fact, can determine the result of future agency adjudications. *Medical Society of State v. Serio*, 100 N.Y.2d 854 (2003); *Alca Industries, Inc. v. Delaney*, 92 N.Y.2d 775 (1999); *Rye Psychiatric Hosp. Center, Inc. v. New York State Office of Mental Health*, 65 A.D.3d 689 [2nd Dept. 2009][challenged rule was "not an inflexible rule removing that agency's discretion"].

Here, on the record presented, it cannot be reasonably found that the DEC, in effect,

enacted a *de facto* "rule" that all permit applications involving gas fired power plants will be denied regardless of the facts and circumstances. Rather, the DEC's denial was based on the individual circumstances of the application. Indeed, Section 7(2) mandates that the DEC consider not only the consistency of the application with the goals of the CLCPA, but also whether, if inconsistent, the grant of a permit is nonetheless justified, and its adverse affects can be mitigated.

Further, that the DEC also allegedly denied a permit to NRG for a similar plant on the same grounds cannot be reasonably found as evidence to the contrary. That gas fired power plants are being subjected to greater scrutiny under the CLCPA is consistent with the stated goals of the legislation.

Thus, there was no violation of Danskammer's rights under SAPA.

Further, there was no violation of Danskammer's constitutional due process rights.

The requirements of procedural due process preclude the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. The range of interests protected by procedural due process is not infinite. *Medicon Diagnostic Laboratories, Inc. v. Perales*, 74 N.Y.2d 539 (1989).

In order to establish a procedural due process claim, a plaintiff must first establish that he or she possesses a protected property right or interest. *Raynor v. Landmark Chrysler*, 18 N.Y.3d 48 (2011); *Meyers v. City of New York*, 208 A.D.2d 258 [2nd Dept. 1995].

As it concerns a permit in general, a plaintiff must demonstrate a legitimate claim of entitlement to the permit. *Huntington Yacht Club v. Incorporated Village of Huntington Bay*, 1 A.D.3d 480 [2nd Dept. 2003]. The mere expectation of obtaining a permit will not suffice. A

protectable property interest does not arise in benefits that are discretionary unless the discretion of the governmental agency is so narrowly circumscribed that approval of a proper application is virtually assured. *Huntington Yacht Club v. Incorporated Village of Huntington Bay*, 1 A.D.3d 480 [2nd Dept. 2003].

Here, Danskammer did not demonstrate that it had a protectable property interest in a Title V permit. That is, it did not demonstrate that it was entitled to such a permit, or that the DEC's discretion in granting the same was so narrowly circumscribed that approval of a permit was virtually assured.

Moreover, as discussed *supra*, the denial of the permit was not based on a *de facto* "rule" promulgated by the DEC without affording Danskammer procedural due process. Rather, the DEC was fulfilling its obligations under Section 7, based on a statute enacted by the Legislature.

In sum, on the record presented, Danskammer did not demonstrate that the denial of the permit violated its constitutional right to procedural due process.

By contrast, the Court does not decide the significant, fact driven substantive issues arising from the challenge to the DEC's determination that the Project would be inconsistent with or interfere with the attainment of the goals of the CLCPA, and that the Project was not otherwise justified.

Rather, a determination on these issues is properly barred by Danskammer's failure to exhaust its administrative remedies concerning the same. As noted *supra*, there is currently pending an administrative appeal that will address such issues, in conjunction with other issues raised by Danskammer in its Article 10 proceeding. Indeed, the Court notes, many of the arguments made by Danskammer in this proceeding concern the factual record (or lack thereof)

before the DEC; a record which Danskammer has repeatedly indicated an intent to supplement and expand significantly.

Contrary to Danskammer's contentions, the Court does not find any exception to the exhaustion rule applicable to these issues.

For example, the Court does not find that the quoted statements from Commissioner Seggos or Governor Hochul demonstrate that further administrative proceedings will be futile.

Further, nothing in the record demonstrates that the DEC has developed a "rule" or policy to deny all permits for gas fired power stations regardless of the specific circumstances of the application and applicant.

Finally, as to the (seven) motions for leave to file amicus briefs, the courts of New York have not adopted guidelines for determining whether to accept *amicus* briefs.

In *New York State Senator Kruger v. Bloomberg* (1 Misc.3d 192 [2003; Ling-Cohan, J.], the Supreme Court, New York County, summarized the law as follows.

> Amicus curiae has been defined as "one who, as a stander by, when a judge is in doubt or mistaken in a matter of law, may inform the court. "[T]he function of an 'amicus curiae' is to call the court's attention to law or facts or circumstances in a matter ... that might otherwise escape its consideration; it is a privilege and not a right; he [or she] is not a party, and cannot assume the functions of a party; he [or she] must accept the case before the court with issues made by the parties, and may not control the litigation."
>
> There are few cases addressing such applications in the trial court, in part because the parties may stipulate to amicus curiae status. Certainly, where the trial court needs to obtain the advice of a disinterested expert on the law applicable to a proceeding before the court, it can invite the expert to file a brief amicus curiae, provided that it gives notice to the parties of the person consulted and a copy of such advice, and afford the parties reasonable opportunity to respond. *22 NYCRR 100.3(B)(6)(b)*. "In cases involving questions of important public interest leave is generally granted to file a brief as amicus curiae." "Unlike the typical intervenor, amici are quite often large organizations or associations that represent a particular interest group." *8 NYPRAC. § 8:4 [1996]*.

Even when intervention is denied, the party seeking to intervene may still be permitted to appear as amicus curiae. Where the movant "begs leave of the court to intervene as a party in this action" but "asserts no right against anyone, nor claims no duty owing by anyone," he may nevertheless "be of assistance to the court as amicus curiae" and "allowed to introduce argument, authority or evidence to protect his interests." Where a person is uniquely qualified to give relevant testimony, the court, in the exercise of its discretion, may call the amicus curiae to give testimony.

Where all possible points of view were represented by counsel, the application to appear as amicus will be denied, as nothing would be served by allowing additional appearances. The same considerations which persuaded a court to deny intervention by permission may come to play in denying a request for amicus status. If the granting of amicus curiae status might delay the case, the court could deny the application in its discretion.

Furthermore, the amicus curiae is "not a party, and cannot assume the functions of a party; he [or she] must accept the case before the court with issues made by the parties, and may not control the litigation." The court can set conditions on the granting of amicus status, such as limiting or denying oral argument, and even has the discretion, in an appropriate case, to allow the amicus to ask questions of a witness.

The Court of Appeals is the only court that has promulgated a rule specifying the standard for granting a motion for amicus curiae status. *22 NYCRR 500.11(e)*. The rule provides: A brief may be filed only by leave of court granted on motion, or upon the court's own request. Motions for amicus curiae relief, when appropriately made on notice to all of the parties and sufficiently in advance of the argument of the appeal to allow adequate court review of the motion and the proposed brief, must include consideration of and satisfaction to the court of at least one of the following criteria:

> (1) a showing that the parties are not capable of a full and adequate presentation and that movants could remedy this deficiency;
> (2) that movants would invite the court's attention to the law or arguments which might otherwise escape its consideration; or
> (3) that amicus curiae briefs would otherwise be of special assistance to the court.

The Appellate Division, Second Department has promulgated a rule which addresses the method for seeking amicus curiae status: "Permission to file an amicus curiae brief shall be obtained by persons who are not parties to the action or proceeding by motion on notice to each of the parties." *22 NYCRR 670.11(a)*. The Second Department does not permit oral argument, unless ordered by the court. *22 NYCRR 670.11(b)*.

The Appellate Division, Fourth Department rule provides that a person must "make a motion to serve and file a brief amicus curiae. An affidavit in support shall briefly set forth the issues to be briefed and the movant's interest in the issues. The proposed brief

> may not duplicate arguments made by a party to the appeal or proceeding.... A person granted permission ... shall not be entitled to oral argument." *22 NYCRR 1000.13(k).*
>
> After distilling the information contained in the rules promulgated by the appellate courts and trial court cases addressing amicus curiae, the court has considered the following criteria in evaluating the within orders to show cause for amicus curiae status: (1) whether the movant seeking amicus curiae status moves by order to show cause; a motion by order to show cause seeking amicus is the preferable procedure as the trial court can then set an expeditious return date and procedure for providing notice by specifying how the parties are to be served, so as not to interfere with the main action; (2) whether the affidavit/affirmation in support indicates the movant's interest in the issues to be briefed and sets forth the issues, with a proposed brief attached; (3) whether the affidavit/affirmation in support indicates: (a) a showing that the parties are not capable of a full and adequate presentation and that movant could remedy this deficiency; or (b) that movant would invite the court's attention to the law or arguments which might otherwise escape its consideration; or (c) that its amicus curiae brief would otherwise be of special assistance to the court; and (4) whether the amicus curiae application or status would substantially prejudice the rights of the parties, including delaying the original action/proceeding; and (5) whether the case concerns questions of important public interest.

New York State Senator Kruger v. Bloomberg, 1 Misc.3d 192 [internal citations omitted]; *see also, 8 N.Y.Prac., Civil Appellate Practice § 8:4 (3d ed.).*

Here, applying this standard, and in light of the limited issues decided herein, the Court denies all motions for leave to file amicus briefs.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, ADJUDGED and DECREED, that the petition and the motions are decided as set forth herein; and it is further,

ORDERED, ADJUDGED and DECREED, that the Department of Environmental Conservation has authority under Section 7(2) of the Climate Leadership and Community Protection Act to deny a permit application, if warranted, based upon application of the same; and it is further,

ORDERED, ADJUDGED and DECREED, that in conformity with the foregoing, the proceeding is hereby dismissed.

The foregoing constitutes the decision and order of the court.

Dated: June 8, 2022
Goshen, New York

ENTER

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