

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of

VERIFIED PETITION

TOWN OF PALM TREE, NEW YORK,
VILLAGE OF KIRYAS JOEL, NEW YORK,
MAYOR ABRAHAM WIEDER, VILLAGE
ADMINISTRATOR GEDALYE SZEGEDIN,
VILLAGE TRUSTEE MOSES GOLDSTEIN,
VILLAGE TRUSTEE JACOB FREUND,
VILLAGE TRUSTEE SAMUEL LANDAU,
and VILLAGE TRUSTEE JACOB REISMAN,
each in their individual capacities and in their
capacities as Trustees of the Village of Kiryas
Joel,

Index No.:

Date Filed:

Petitioners,

- against -

THE CLIMATE JUSTICE WORKING
GROUP OF THE NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL
CONSERVATION, and THE NEW YORK
STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,

Respondents,

For a Judgment Pursuant to Article 78 of the New
York Civil Practice Law and Rules

Petitioners Town of Palm Tree, New York, Village of Kiryas Joel, New York (collectively,
the “Village”), Mayor Abraham Wieder, Village Administrator Gedalye Szegedin, Village Trustee
Moses Goldstein, Village Trustee Jacob Freund Trustee, Village Trustee Samuel Landau, and
Village Trustee Jacob Reisman by and through their attorneys, Whiteman Osterman & Hanna,
LLP, as and for their verified petition herein allege as follows:

PRELIMINARY STATEMENT

1. This is a CPLR Article 78 proceeding in which Petitioners challenge the New York State Department of Environmental Conservation’s (“NYSDEC”) and the Climate Justice Working Group’s (“CJWG”) exclusion of the Village from the List of Disadvantaged Communities promulgated by Respondents under the Climate Leadership and Community Protection Act (“CLCPA” or the “Act”) (L. 2019, ch 106) (ECL § 75-0111). Petitioners further seek annulment of the disadvantaged communities criteria approved and adopted by Respondents NYSDEC and the CJWG on or about March 27, 2023 and an order directing that the Village be included on the List of Disadvantaged Communities. Copies of the List of Disadvantaged Communities and the Technical Documentation on the Draft Disadvantaged Communities Criteria are attached as **Exhibits A and B**, respectively (collectively, the “DAC Criteria”) and are incorporated by reference herein.

2. The CLCPA is the State’s comprehensive response to the climate change crisis that sets forth a rigorous agenda for reducing statewide Greenhouse Gas (“GHG”) emissions from all anthropogenic sources 100% over 1990 levels by the year 2050, while prioritizing the safety and health of disadvantaged communities as defined therein (see CLCPA §1).

3. In enacting the CLCPA, the State found and declared that “[c]limate change especially heightens the vulnerability of disadvantaged communities, which bear environmental and socioeconomic burdens as well as legacies of racial and ethnic discrimination” (see id.).

4. The DAC Criteria will be used by State entities to direct clean energy and energy efficiency investments—including \$4.2 billion made available under the New York State

Environmental Bond Act—in “a manner to ensure that disadvantaged communities receive no less than 35% of benefits, with a goal of 40% of benefits” (see Ex. B, p. 5).

5. In accordance with the State’s efforts to direct critical environmental investments to communities bearing a higher burden of environmental impacts, communities excluded from the List of Disadvantaged Communities, like the Village, will be ineligible to receive a significant portion of funds available for projects aimed at reducing existing environmental harms in the community.

6. Indeed, based on NYSDEC’s and the CJWG’s arbitrary weighing of certain indicators of community vulnerability over others, the Village will lose out on funding for projects for safeguarding drinking water sources and reducing water pollution—projects which the Village desperately needs to address existing water supply shortages.

7. NYSDEC’s and the CJWG’s arbitrary exclusion of the Village from the List of Disadvantaged Communities is contrary to the plain language of the statute, which clearly encompasses communities like the Village.

8. NYSDEC and the CJWG’s failure to consider important indicators such as the population of children, childhood poverty, access to clean water, and population density and crowding, among others, was also arbitrary and capricious, and irrational under the law.

9. In applying the DAC Criteria to the Village, NYSDEC arbitrarily departed from previous determinations made in other programmatic contexts that the Village is a disadvantaged community.

10. NYSDEC failed to provide any rational justification or explanation for its departure or its inconsistent treatment of the Village as a disadvantaged community under some programs but not others.

11. Furthermore, in promulgating the DAC Criteria, NYSDEC failed to follow the necessary procedures for adoption of a new rule under the State Administrative Procedure Act (“SAPA”). Not only did NYSDEC fail to publish notice of the proposed rule in the New York State Register, in violation of SAPA, it did not prepare or file a regulatory impact statement or file the final rule with the Department of State.

12. NYSDEC also failed to comply with the procedural and substantive requirements of the State Environmental Quality Review Act (ECL Art. 8) (“SEQRA”), by failing to take the requisite hard look at relevant areas of environmental concern.

13. Based on the foregoing, Respondents’ determination to exclude the Village from the List of Disadvantaged Communities should be annulled, with a directive that NYSDEC and the CJWG include the Village on the List of Disadvantaged Communities.

PARTIES AND VENUE

14. Petitioner the Town of Palm Tree is a municipal corporation within the State of New York, and the municipality in which the census tracts that are the subject of this proceeding exist. The Town of Palm Tree has coterminous boundaries with the Village of Kiryas Joel and is governed together with the Village.

15. Petitioner the Village of Kiryas Joel is a municipal corporation within the state of New York, and the municipality in which the census tracts that are the subject of this proceeding exist.

16. Petitioner Abraham Wieder is the Mayor of the Village of Kiryas Joel.

17. Petitioner Gedalye Szegedin is the Village Administrator and Village Clerk of the Village of Kiryas Joel.

18. Petitioner Moses Goldstein is a Trustee and resident of the Village of Kiryas Joel.

19. Petitioner Jacob Freund is a Trustee and resident of the Village of Kiryas Joel.

20. Petitioner Samuel Landau is a Trustee and resident of the Village of Kiryas Joel.

21. Petitioner Jacob Reisman is a Trustee and resident of the Village of Kiryas Joel.

22. Respondent the Climate Justice Working Group is a group situated within NYSDEC which is comprised of representatives from environmental justice communities, NYSDEC, the NYS department of health, the NYS energy and research development authority, and the NYS department of labor, and which is required to establish criteria to identify disadvantaged communities in consultation with NYSDEC, the departments of health and labor, the New York state energy and research development authority, and the environmental justice advisory group, pursuant to ECL § 75-0111.

23. Respondent New York State Department of Environmental Conservation is a governmental agency authorized to establish criteria to identify disadvantaged communities for purposes of co-pollutant reductions, greenhouse gas emissions reductions, regulatory impact statements, and the allocation of investments pursuant to ECL § 75-0111.

24. Venue is properly within the County of Albany pursuant to CPLR 506(b) and 7804(b).

THE CLIMATE LEADERSHIP AND COMMUNITY PROTECTION ACT

25. The Climate Leadership and Community Protection Act, which was signed into law in 2019, amends the Environmental Conservation Law, Public Service Law, Public Authorities Law, Labor Law, and the Community Risk and Resiliency Act to address the imminent risks of climate change (see L 2019, ch 106).

26. In addition to creating the Climate Action Council (“CAC”)—the entity tasked with preparing and approving a scoping plan outlining the recommendations for attaining the statewide

GHG emissions limits—the Act created the Climate Justice Working Group to establish criteria to identify disadvantaged communities for the purposes of reducing GHG and co-pollutant emissions in and directing funding to those areas (see ECL §75-0103 and §75-0111).

27. Both the Climate Action Council and the Climate Justice Working Group are situated within NYSDEC (see id.).

28. The Act defines disadvantaged communities as “communities that bear burdens of negative public health effects, environmental pollution, impacts of climate change, and possess certain socioeconomic criteria, or comprise high-concentrations of low- and moderate- income households, as identified pursuant to section 75-0111 of [the Act]” (see ECL § 75-0101).

29. Section 75-0111 establishes the Climate Justice Working Group, “comprised of representatives from: environmental justice communities, the department [of environmental conservation], the department of health, the New York state energy and research development authority, and the department of labor.” Under ECL § 75-0111(1)(a), “[e]nvironmental justice representatives shall be members of communities of color, low-income communities, and communities bearing disproportionate pollution and climate change burdens, or shall be representatives of community-based organizations with experience and a history of advocacy on environmental justice issues.”

30. ECL § 75-0111 also sets out the role of the Climate Justice Working Group in administering State funding:

The working group, in consultation with the department, the departments of health and labor, the New York state energy and research development authority, and the environmental justice advisory group, will establish criteria to identify disadvantaged communities for the purposes of co-pollutant reductions, greenhouse gas emissions reductions, regulatory impact statements, and the allocation of investments related to this article. Disadvantaged communities shall be identified based on geographic, public

health, environmental hazard, and socioeconomic criteria, which shall include but are not limited to:

i. areas burdened by cumulative environmental pollution and other hazards that can lead to negative public health effects;

ii. areas with concentrations of people that are of low income, high unemployment, high rent burden, low levels of home ownership, low levels of educational attainment, or members of groups that have historically experienced discrimination on the basis of race or ethnicity; and

iii. areas vulnerable to the impacts of climate change such as flooding, storm surges, and urban heat island effects.

31. Prior to finalizing the criteria for identifying disadvantaged communities, NYSDEC is required to publish draft criteria and a draft list of disadvantaged communities and make such information available on its website (see *id.*).

32. The CAC is required to “hold at least six regional public hearings on the draft criteria and the draft list of disadvantaged communities” “allow at least one hundred twenty days for the submission of public comment” and “ensure that there are meaningful opportunities for public comment for all segments of the population that will be impacted by the criteria...” (see *id.*).

33. The CJWG is required to meet “no less than annually” to review its criteria and methodology for identifying disadvantaged communities and make necessary modifications to “incorporate new data and scientific findings” (see *id.*)

34. The Act specifically directs funding to disadvantaged communities as identified by Respondents:

State agencies, authorities and entities, in consultation with the environmental justice working group and the climate action council, shall, to the extent practicable, invest or direct available and relevant programmatic resources in a manner designed to achieve a goal for disadvantaged communities to *receive forty percent of overall benefits of spending on clean energy and energy efficiency programs, projects or*

investments in the areas of housing, workforce development, pollution reduction, low income energy assistance, energy, transportation and economic development, provided however, that disadvantaged communities shall receive no less than thirty-five percent of the overall benefits of spending on clean energy and energy efficiency programs, projects or investments and provided further that this section shall not alter funds already contracted or committed as of the effective date of this section

(see ECL §75-0117) (emphasis added).

NYSDEC'S AND THE CJWG'S DEVELOPMENT OF THE DISADVANTAGED COMMUNITIES CRITERIA

35. On December 13, 2021, the CJWG voted to release the draft disadvantaged communities criteria for public comment, in addition to an interactive map and a list of disadvantaged communities statewide.

36. NYSDEC subsequently held eleven public hearings (four in-person hearings and seven virtual hearings) to receive public input on the draft criteria.

37. Upon information and belief, NYSDEC did not publish notice of the draft disadvantaged communities criteria in the State Register, as required by SAPA.

38. The draft disadvantaged communities criteria consisted of the set of Census tract level indicators and rules to identify draft disadvantaged communities, including the approach for scoring the data and indicators, and the process for using those scores to identify communities (see Ex. B, p. 6).

39. Under the draft disadvantaged communities criteria, two of the four census tracts that make up the Village met the criteria for and were listed as disadvantaged communities.

40. On March 27, 2023, the CJWG voted to approve and adopt the final DAC Criteria, which contained substantial revisions.

41. Under the final DAC Criteria, all four census tracts that make up the Village were excluded from the List of Disadvantaged Communities.

42. Upon information and belief, NYSDEC did not submit notice of the revised DAC Criteria to the Secretary of State for publication the State Register, as required by SAPA.

43. The final DAC Criteria contains forty-five indicators, selected by the CJWG “to represent the presence, direction, or magnitude of a characteristic or circumstance of interest” (see id.).

44. The forty-five selected indicators are grouped into the following categories (referred to as factors) for purposes of “bundl[ing] similar concepts for weighting purposes: (1) Potential Pollution Exposures, (2) Land Use associated with historical discrimination or disinvestment, (3) Potential Climate Change Risks, (4) Income, (5) Race/Ethnicity, (6) Health Impacts & Burdens, and (7) Housing, Energy, and Communications” (see id.).

45. The Race/Ethnicity factor contains the following six indicators: “Percentage Latino/a or Hispanic, Percentage Black or African American, Percentage Asian, Percentage Native American or Indigenous, Limited English Proficiency, and Historical Redlining Score” (see Ex. B, p. 9.).

46. According to CJWG meeting materials, within the Race/Ethnicity factor, Percentage Latino/a or Hispanic and Percentage Black or African American were given 2x weight.

47. The Limited English Proficiency indicator, which “serves to identify groups of people excluded from race and ethnicity indicators due to insufficient resolution” was not given additional weight. (see Ex. B, p. 45.)

48. The CJWG’s decision to give 2x weight to some Race/Ethnicity indicators but not to Limited English Proficiency resulted in the exclusion of many communities with significant limited English proficiency, including the Village (see Technical Documentation Appendix:

Disadvantaged Communities Indicators Workbook, available at <https://climate.ny.gov/Resources/Disadvantaged-Communities-Criteria>).

49. Indicators in the Health Impacts & Burdens factor include Asthma and COPD Emergency Department Visits, Myocardial Infarction (heart attack) Hospitalizations, Premature Deaths, Low Birthweight, Percentage without Health Insurance, Percentage with Disabilities and Percentage of Adults age 65+ (see Ex C, p. 9).

50. An indicator notably absent from this factor is percentage of children under the age of 18, despite numerous references in the DAC Criteria to the vulnerability of that demographic.

51. Notwithstanding the record before it on the risks to children from health, environmental, and climate change factors, the CJWG concluded that the inclusion of percentage of children as an indicator “may not be necessary after including single-parent households” (see id. at 71).

52. The CJWG further concluded that the inclusion of a child poverty rate is “not necessary after including population poverty rate and single-parent households (see id. at 66).

53. While basic infrastructural indicators such as homes built before 1960 (associated with lead-based paint risk in un-remediated homes) and percentage of homes without internet access (associated with services like telehealth, accessing medical records, and emergency communication for resilience to natural disasters) and environmental indicators such as proximity to wastewater discharge were selected, no consideration was given to community access to clean water (see id. at 9).

54. Indeed, the DAC Criteria contains no discussion whatsoever about access to clean water or drinking water infrastructure.

55. While housing-related indicators such as percentage of single-parent households and percentage of renter-occupied homes were selected, no consideration was given to crowding or percentage of homes with more occupants than rooms.

**THE TOWN AND THE VILLAGE IS, BY ALL ACCOUNTS, A
DISADVANTAGED COMMUNITY**

56. The Village is primarily populated by Satmar Hasidic Jews, the majority of whom are first, second, and third generation Holocaust survivors, speak Yiddish as their primary language, and have limited English proficiency. For a description of the unique characteristics of the Village, see Board of Educ. of Kiryas Joel Vil. School Dist. v Grumet, 512 US 687 (1994).

57. Given that the Village is comprised largely of Satmar Hasidic Jews, the Village and its residents are clearly “members of groups that have historically experienced discrimination on the basis of race or ethnicity” within the meaning of the CLPCA (ECL § 75-0111(1)(c)(ii)).

58. The Village is densely populated with more than 32,000 people residing within the Village’s 1.4 square-mile area, mostly within multi-unit apartment building (see Memorandum from Laberge Group re. Key Community Attributes dated December 13, 2022, attached hereto as **Exhibit C** and incorporated by reference herein).

59. Over 60% of the Village’s 32,000 residents are children under the age of 18 (see id.).

60. Many of the Village’s residents are disadvantaged by poverty, language barriers, educational attainment, and access to work.

61. The Village’s poverty rate is 41% (over 3.5 times higher than in Orange County) with roughly 46% of adults and 48% of children considered to be living in poverty (see id.).

62. 62% of households in the Village have a total income of less than \$50,000 (see id.).

63. In recent years, the Village has begun to face recurring water-supply issues caused by a deficit between the average daily demand and the available supply.

64. Since 2017, the Village has been in a declared water emergency causing it to operate multiple water supply wells on an emergency basis through emergency approvals from the State and forcing it truck in drinking water to meet the needs of its residents due to the unavailability of drinking water to serve the Village's growing population. The Village has spent hundreds of thousands of dollars on the trucking of millions of gallons of water since that time.

65. As a result of the deficit between the average daily demand and the available supply, periods of pressure loss in the distribution system occur, which in turn threatens public health and safety by impacting firefighting capabilities and basic sanitary necessities, and causing an increased risk of contamination of the existing water supply.

66. Multiple federal and state agencies, including the U.S. Environmental Protection Agency ("EPA") and the New York State Department of Health ("NYSDOH") have determined that the Village is a disadvantaged community.

67. For example, on April 12, 2023, just weeks after the CJWG's vote on the final DAC Criteria, EPA issued a Decision Memorandum finding that the Village's request for a waiver from the cost share requirement demonstrates that it meets certain criteria which, for purposes of the Community Grants Program, defines it as a "disadvantaged community." A copy of the letter is attached as **Exhibit D** and incorporated by reference herein.

68. Similarly, the Village is considered a disadvantaged community under the Federal Government's Justice 40 Initiative, which directs 40% of overall benefits of certain Federal investments to communities that are marginalized, underserved, and overburdened by pollution

(see Climate and Economic Justice Screening Tool, available at <https://screeningtool.geoplatform.gov/en/#12.85/41.34029/-74.16722>).

69. Finally, NYSDOH recently awarded the Village the highest number of points available (25) in the Financial Needs category for purposes of administering funds through the Drinking Water State Revolving Fund (“DWSRF”) (see Correspondence from NYSDOH dated June 14, 2022, attached as **Exhibit E** and incorporated by reference herein).

PETITIONERS’ PARTICIPATION IN NYSDEC’S RULEMAKING PROCESS

70. At a public hearing held on June 30, 2022, the Village provided testimony recommending changes to the draft criteria. A copy of the hearing transcript is attached as **Exhibit F** and incorporated by reference herein.

71. The Village also submitted comments in writing to the CJWG on July 6, 2022. A copy of the Village’s comment letter is attached as **Exhibit G** and incorporated by reference herein.

72. Included among the Village’s comments was the recommendation that a multiplier be applied to the Limited English Proficiency indicator, similar to the one applied to the Percentage of Hispanic and African American indicators.

73. With respect to this recommendation, the Village provided testimony that the Village of Kiryas Joel is populated by Satmar Hasidic Jews and that the majority of residents are disadvantaged by poverty, language barriers, educational attainment, and access to work (see Ex. F, p. 25).

74. The Village provided additional testimony that most of the community speaks Yiddish and is non-English speaking, which is a significant barrier for moving out of poverty (see id.).

75. In written comments, the Village extensively detailed how limited English proficiency is known to limit educational advancement and ability to move out of poverty, and that as a result an indicator weight of 2x should be applied (see Ex. G p. 4).

76. The Village also provided testimony that nearly 60% of its 32,000 residents are children, and more than half of those children live at or below the poverty line (see Ex. F, p. 25).

77. The Village's written comments detailed how, just like individuals over 65 years of age, children are more vulnerable to health and environmental risks than the general population and therefore the draft criteria should factor in the percentage of children under the age of 18 and/or the rate of childhood poverty (see Ex. G, p. 1).

78. Finally, the Village recommended that the CJWG include other important indicators, including households without a vehicle; crowding/percentage of occupied housing units with more people than rooms; housing in structures with 10 or more units; percentage of public assistance cases; and population density (see Ex. G).

79. The Village received no response to date from NYSDEC or the CJWG with respect to its testimony and comments on the DAC Criteria. Neither NYSDEC nor the CJWG appears to have responded to, addressed, or commented on the Village's testimony and comments.

80. Upon information and belief, neither NYSDEC nor the CJWG has made available to the public any materials containing responses to public comments on the draft criteria, or indicated such responses are forthcoming, as required by SAPA.

81. The CJWG's meeting materials make reference to 3,124 public comments received on the draft criteria; however, upon information and belief, none of these comments were made available to the public and no responses to these comments were prepared.

**NYSDEC'S USE OF OTHER DEFINITIONS FOR DISADVANTAGED
COMMUNITIES**

82. The Federal Infrastructure Investment and Jobs Act (the “Infrastructure Act”) was passed in 2021 to address concerns that low-income and minority communities are unable to make necessary improvements to their water infrastructure, threatening their access to clean, safe drinking water (see PL 117-58, November 15, 2021, 135 Stat 429).

83. The Infrastructure Act allocates over \$50 billion across five years to fund water infrastructure projects nationwide, with the majority of funding delivered through the DWSRF and the Clean Water State Revolving Fund (“CLWRF”) (see id.).

84. The EPA administers these funds to states, who establish their own programs and criteria to fund projects within their borders.

85. Under a memorandum of understanding with NYSDEC, the New York State Environmental Facilities Corporation (“EFC”), along with NYSDEC, is responsible for administering the CWSRF.

86. The MOU states that EFC and NYSDEC shall work cooperatively to develop terms and conditions governing the design, construction, operation, and maintenance of CWSRF projects (see Oversight of the Clean Water State Revolving Fund, available at <https://www.osc.state.ny.us/state-agencies/audits/2021/12/30/oversight-clean-water-state-revolving-fund>).

87. A key priority of the Infrastructure Act is to ensure that disadvantaged communities benefit equitably from the historic investment in water infrastructure, with the law mandating up to fifty percent additional subsidy up to a maximum amount of \$25 million to be offered to CWSRF eligible projects that serve disadvantaged communities (see Final Intended Use Plan Clean Water State Revolving Fund Federal Fiscal Year 2023, available at <https://efc.ny.gov/system/files/documents/2022/10/2023-iup-final-a.pdf>) (“FIUP 2023”).

88. As a result, EFC and NYSDEC modified the CWSRF affordability criteria to better identify disadvantaged communities, the result of which was a hardship eligibility policy which became effective September 30, 2022 and sets forth the specific criteria for determining disadvantaged communities (see CWSRF Hardship Financing and Additional Subsidy Eligibility Policy, attached as **Exhibit H** and incorporated by reference herein).

89. According to EFC and NYSDEC, for purposes of the CWSRF “hardship communities” are the same as “disadvantaged communities” (see FIUP, p. 14).

90. Under NYSDEC and EFC’s hardship eligibility policy, municipalities are eligible for financing if they meet the following criteria:

1. The municipal population must be less than 300,000; or if the municipal population is greater than 300,000, the population served by and responsible for the debt incurred by the project is less than 300,000.

2. The MHI of the municipality must be: less than 80% of the regionally adjusted MHI presented in Appendix 1; or 80% to less than 100% of the regionally adjusted MHI presented in Appendix 1 and the Poverty of the municipality must be greater than the 2019 statewide Poverty of 10.4%.

91. NYSDEC has determined that the Village meets the criteria for disadvantaged communities for purposes of the CWSRF, as evidenced by the 2023 CWSRF Intended Use Plan Annual List (attached as **Exhibit I** and incorporated by reference herein) in which the Village appears above the Hardship Funding Line. Yet, NYSDEC has now determined that the Village is not a disadvantaged community for purposes of the CLCPA.

92. NYSDEC’s departure from the CWSRF definition and inconsistent application of the term “disadvantaged communities” across programs is arbitrary and capricious, and creates an unworkable standard going forward.

AS AND FOR A FIRST CAUSE OF ACTION
(NYSDEC and the CJWG Arbitrarily Excluded the Village from the List of
Disadvantaged Communities)

93. Petitioners repeat and reallege all of the foregoing allegations set forth in this Petition with the same force and effect as though set forth at length herein.

94. NYSDEC and the CJWG's exclusion of the Village from the List of Disadvantaged Communities is arbitrary and capricious and unsupported by substantial evidence in the record.

95. The CJWG gave 2x weight to some Race/Ethnicity indicators but not to Limited English Proficiency, notwithstanding the evidence before it that the Limited English Proficiency indicator serves to identify groups excluded from the other Race/Ethnicity indicators.

96. NYSDEC's and the CJWG's arbitrary weighing of certain Race/Ethnicity indicators over others was arbitrary and capricious.

97. NYSDEC and CJWG included the percentage of adults of the age of 65 as an indicator of health vulnerability of a community, but not percentage of children under the age of 18, despite numerous references in the record before it about the vulnerability of that demographic.

98. NYSDEC's and the CJWG's exclusion of children as a vulnerable population in the DAC Criteria was arbitrary and capricious.

99. NYSDEC and the CJWG's failure to include other important indicators of community vulnerability, including childhood poverty, access to clean water, and population density and crowding, was arbitrary and capricious.

100. The Village is objectively disadvantaged, with its dense population, high rates of poverty, limited English proficiency, and difficulties supplying water to its residents.

101. Respondents have proffered no rationale for the promulgation of their criteria or for their exclusion of the Village from the List of Disadvantaged Communities. Nor is there any basis in the record to justify the Village's exclusion therefrom.

102. Notably, Respondents rendered no findings whatsoever prior to their promulgation of the List of Disadvantaged Communities.

103. NYSDEC's and the CJWG's exclusion of the Village from the List of Disadvantaged Communities is contrary to the plain language of the statute, which clearly encompasses communities like the Village, and therefore must be annulled.

AS AND FOR A SECOND CAUSE OF ACTION
(NYSDEC Arbitrarily Departed from its Prior Characterizations of the Village as a Disadvantaged Community)

104. Petitioners repeat and reallege all of the foregoing allegations set forth in this Petition with the same force and effect as though set forth at length herein.

105. In applying the DAC Criteria to the Village, NYSDEC arbitrarily departed from its own designation of the Village as a disadvantaged community for purposes of administering other programs.

106. The Village has been designated a disadvantaged communities for purposes of the CWSRF.

107. NYSDEC's departure from the CWSRF definition and inconsistent application of the term "disadvantaged communities" across programs, with no rational justification or explanation, was arbitrary and capricious.

AS AND FOR A THIRD CAUSE OF ACTION
(Failure to Comply with SAPA and the NY Constitution)

108. Petitioners repeat and reallege all of the foregoing allegations set forth in this Petition with the same force and effect as though set forth at length herein.

109. Article IV, section 8 of the New York State Constitution requires that:

No rule or regulation made by any state department, board, bureau, officer, authority or commission, except such as relates to the organization or internal management of a state department, board, bureau, authority or commission shall be effective until it is filed in the office of the department of state. The legislature shall provide for the speedy publication of such rules and regulations by appropriate laws.”

110. This provision is implemented by the State Administrative Procedure Act (“SAPA”).

111. Section 102(2)(a) of 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, including the amendment, suspension or repeal thereof.

112. The definition excludes “forms and instructions, interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory” (SAPA § 102(2)(b)(iv); however, blanket requirements and fixed standards that are to be generally applied in the future, regardless of individual circumstances, are rules subject to the SAPA rule-making procedures.

113. NYSDEC is an administrative agency subject to the provisions of SAPA.

114. The DAC Criteria is a “rule” subject to the requirements under SAPA because it sets blanket requirements and fixed standards for what qualifies as a disadvantaged community and contains standards that substantially alter or can determine the result of future agency adjudications.

115. The DAC Criteria define which communities across the State will be eligible for funding for critical environmental infrastructure and applies the same requirements for what constitutes disadvantaged “across the board” to every census tract across the State.

116. Therefore, DEC was required to follow the procedures set forth in SAPA before adopting the DAC Criteria.

117. In order for a purported “rule” to have legal effect, it must be promulgated in accordance with the procedures set forth in SAPA and the New York State Constitution. The promulgating agency must provide notice of proposed rule-making with the Secretary of State for publication in the State Register, afford the public an opportunity to submit comments on the proposed rule, and file the final rule with the Department of State for publication in the State Register.

118. SAPA requires that notice of proposed rulemaking appear in the State Register at least sixty (60) days prior to either the first public hearing on the proposed rule if a hearing is required or from the adoption of the rule if no hearing is required.

119. Upon information and belief, NYSDEC did not submit any notice of proposed rule-making to the Secretary of State for publication in the New York State Register in violation of SAPA.

120. SAPA § 202 (5)(b) also requires that each agency publish and make available to the public an assessment based upon any written comments submitted to the agency and any comments presented at any public hearing which contains the following: (i) a summary and an analysis of the issues raised and significant alternatives suggested by any such comments, (ii) a statement of the reasons why any significant alternatives were not incorporated into the rule and (iii) a description of any changes made in the rule as a result of such comments.

121. Upon information and belief, NYSDEC did not adhere to the requirement that it prepare an assessment of public comment.

122. After receiving public comments on the draft DAC Criteria—comments which were not made available to the public, NYSDEC substantially revised the DAC Criteria.

123. NYSDEC's promulgation of the DAC Criteria was not necessary for the preservation of the public health, safety, or general welfare such that the agency could adopt the program on an emergency basis without complying with the notice and public comment requirements set forth under SAPA.

124. Additionally, SAPA mandates that administrative agencies submit a regulatory impact statement with each rule that it proposes.

125. The regulatory impact statement must include: the statutory authority for the rule; the needs and benefits for the rule; projected costs associated with the rule; reporting requirements resulting from the rule; a description of mandates on local governments under the rule; a statement identifying rules that may duplicate, overlap, or conflict with the rule; a statement regarding alternative approaches, if any, considered by the agency and detailed reasons why those alternatives were not included; a statement identifying if the rule exceeds minimum federal standards for the same or similar subjects; and a compliance schedule for regulated entities. (SAPA § 202-a (1)).

126. Upon information and belief, NYSDEC failed to file a regulatory impact statement in violation of SAPA § 202-a.

127. SAPA § 203, article IV, § 8 of the New York Constitution, and Executive Law § 102 (1) (a) provide that no administrative rule is effective until it is filed with the Secretary of State.

128. Upon information and belief, NYSDEC failed to file the DAC Criteria with the Department of State in accordance with New York Constitution, article IV, § 8, SAPA § 203, and Executive Law § 102 (1) (a).

129. Accordingly, NYSDEC's failure to strictly comply with the notice requirements and substantially comply with public comment, regulatory impact statement, and filing requirements under SAPA and the New York Constitution warrant the annulment of the DAC Criteria.

AS AND FOR A FOURTH CAUSE OF ACTION
(NYSDEC Failed to Comply with SEQRA)

130. Petitioners repeat and reallege all of the foregoing allegations set forth in this Petition with the same force and effect as though set forth at length herein.

131. Pursuant to NYSDEC's regulations implementing SEQRA, "actions" subject to SEQRA are defined to include "agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions" and "adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that may affect the environment." (6 NYCRR § 617.2(b)(2) and (3)).

132. Actions that require SEQRA review are classified as either Type I, Type II, or Unlisted (6 NYCRR §§ 617.2(b), (aj), (ak), (al)).

133. Type I actions refer to those actions that are more likely to have a significant adverse environmental impact (as identified in § 617.4); Type II actions are exempt from review under SEQRA (see id. § 617.5); and Unlisted actions are those that are neither Type I nor Type II (see id. § 617.2(al)).

134. For Type I and Unlisted actions, at the determination of significance phase, the lead agency must: "(1) consider the action as defined in sections 617.2(b) and 617.3(g) of this Part; (2)

review the EAF, the criteria contained in subdivision (c) of this section and any other supporting information to identify the relevant areas of environmental concern; (3) thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and (4) set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation” (6 NYCRR § 617.7(b)).

135. Upon information and belief, NYSDEC did not complete an environmental assessment form to evaluate whether the draft or final List of Disadvantaged Communities has potentially significant adverse impacts.

136. A review of the publicly available postings by Respondents in connection with the promulgation of the DAC Criteria does not reveal any materials referencing or incorporating any SEQRA review by Respondents.

137. Therefore, NYSDEC utterly failed, at the initial determination phase, to identify relevant areas of environmental concern for the List of Disadvantaged Communities, as required by SEQRA.

138. In addition, upon information and belief, NYSDEC failed set forth its determination of non-significance for the List of Disadvantaged Communities in a written form containing a reasoned elaboration and providing reference to any supporting documentation (see 6 NYCRR § 617.7(b)).

139. In short, even though the promulgation of the List of Disadvantaged Communities and the DAC Criteria constitutes an “action” within the plain meaning of NYSDEC’s own SEQRA regulations, upon information and belief, Respondents did not comply with any of SEQRA’s procedural or substantive mandates.

140. Furthermore, any negative declaration issued by Respondents would have been unsupported by any identification of relevant environmental impacts, any hard look, or any reasoned elaboration as required by SEQRA since no SEQRA Environmental Impact Statement was prepared.

141. Respondents should thus be enjoined from promulgation of the List of Disadvantaged Communities until such time as an Environmental Impact Statement is completed in accordance with SEQRA. Petitioners are plainly environmentally impacted in a manner different in kind and degree from the public at large by Respondents' failure to comply with SEQRA because they will be unable to provide for environmental improvement and climate change mitigation infrastructure projects, such as drinking water infrastructure, by virtue of their exclusion from the List of Disadvantaged Communities.

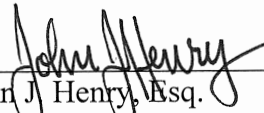
142. Accordingly, NYSDEC failed to take the requisite hard look at these relevant areas of environmental concern, in derogation of SEQRA.

143. **WHEREFORE**, Petitioners respectfully request that this Court enter judgment as follows: (1) annulling Respondents' determination, made on or about March 27, 2023, excluding Petitioners Town of Palm Tree and Village of Kiryas Joel from the List of Disadvantaged Communities promulgated pursuant to the Climate Leadership and Community Protection Act; (2) ordering Respondents to include Petitioners Town of Palm Tree and Village of Kiryas Joel on the List of Disadvantaged Communities promulgated pursuant to the Climate Leadership and Community Protection Act; (3) awarding Petitioners the costs, disbursements, and attorney's fees incurred in connection with this proceeding; and (4) awarding Petitioners such other relief as this Court deems just, proper, or equitable.

Dated: July 26, 2023
Albany, New York

WHITEMAN OSTERMAN & HANNA LLP

By: _____



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VERIFICATION

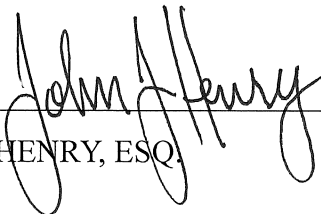
STATE OF NEW YORK :

: ss.:

COUNTY OF ALBANY :

JOHN J, HENRY, ESQ., being duly sworn, deposes and says as follows:

1. I am a member of Whiteman Osterman & Hanna LLP, attorneys for Petitioners in this matter.
2. I have read the foregoing Verified Petition and the same is true to my own knowledge, except those matters stated to be upon information and belief, and as to those matters, I believe them to be true. The source of my belief is my review of the pertinent documents and information provided by my client.
3. The reason why this verification is made by me and not Petitioners is that Petitioners do not reside within the County of Albany.



 JOHN J. HENRY, ESQ.

Subscribed and affirmed to before me this
26 day of July, 2023.



 Notary Public

Sarah Elliott
Notary Public, State of New York
 No. 01EL6392088
 Qualified in Albany County
 Commission Expires May 20, 2027