

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

In the Matter of the Application of

SIERRA CLUB, CONCERNED CITIZENS OF
ALLEGANY COUNTY, INC., PEOPLE FOR A
HEALTHY ENVIRONMENT, INC., JOHN CULVER,
AND BRIAN AND MARYALICE LITTLE,

Petitioners,

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

–against–

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, BASIL SEGGOS,
COMMISSIONER, TOWN OF CAMPBELL, AND HAKES
C&D DISPOSAL INC.,

Respondents.

ORAL ARGUMENT
REQUESTED

AMENDED VERIFIED
PETITION

Index No. E2019-0441CV

Hon. Patrick F. McAllister

PLEASE TAKE NOTICE that upon the accompanying amended verified petition of Sierra Club, Concerned Citizens of Allegany County, Inc., People for a Healthy Environment, Inc., John Culver, and Brian and Maryalice Little, dated February 12, 2020, the affidavit of Kathryn Bartholomew, dated April 9, 2019, and the exhibits thereto, the affidavit of Kathryn Bartholomew, dated February 12, 2020, and the exhibits thereto, the affidavit of Raymond Vaughan dated February 13, 2020 and the exhibits thereto, and the accompanying memorandum of law dated February 14, 2020, Petitioners will move this court, on May 15, 2020, at 1:30 pm or as soon thereafter as counsel may be heard, at the Steuben County Courthouse at 3 East Pulteney Square, Bath, New York for an order and judgment pursuant to Article 78 of the Civil Practice

Law and Rules for the relief demanded in the petition and for such other and further relief as this court may deem just and proper.

DATED: Hammondsport, New York
February 14, 2020

Respectfully submitted,

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Petitioners Sierra Club, Concerned Citizens of Allegany County, Inc., People for a Healthy Environment, Inc., John Culver, and Brian and Maryalice Little (collectively “Petitioners”), for their amended verified petition for judgment pursuant to Article 78 of the New York Civil Practice Law and Rules, by their undersigned attorneys, allege as follows.

I. PRELIMINARY STATEMENT

1. This proceeding challenges the actions of Respondent New York State Department of Environmental Conservation (“Respondent DEC”) (1) in issuing three permits to Respondent Hakes C&D Disposal Inc. (“Respondent HCDD”) on December 19, 2019, authorizing an expansion of Respondent HCDD’s Hakes C&D Landfill located at 4376 Manning Ridge Road, in the Town of Campbell, Steuben County, New York (collectively the “DEC Permits”), (2) in issuing a positive findings statement pursuant to the State Environmental

Quality Review Act, ECL Article 8 (“SEQRA”) and the SEQRA regulations, 6 NYCRR Part 617 on Respondent HCDD’s landfill expansion project on December 19, 2019 (the “DEC Findings Statement”), (3) in conducting an environmental review process pursuant to SEQRA and issuing a Final Supplemental Environmental Impact Statement for the landfill expansion project on December 5, 2018 (the “Hakes FSEIS”) and (4) in issuing a supplement to the Hakes FSEIS on December 19, 2019. Petitioners also challenge the actions of Respondent Town of Campbell (“Respondent Town”) (1) in approving a zoning change and a zoning law amendment for the benefit of Respondent HCDD, one by the Town Planning Board on January 16, 2019 and one by the Town Board on March 11, 2019 (the “Town Zoning Changes”), (2) in issuing two findings statements on the proposed zoning changes, one by the Town Planning Board on January 16, 2019 and one by the Town Board on March 11, 2019 (the “Town Findings Statements”), and (3) for the town’s role as an involved agency in issuing the Hakes FSEIS.

2. The DEC Permits, the DEC Findings Statement, the Hakes FSEIS, the Town Zoning Changes and the Town Findings Statements are legally deficient because Respondent DEC and Respondent Town failed to comply with the requirements of SEQRA and the SEQRA regulations when they approved the Hakes Landfill expansion project without taking a “hard look” at the evidence provided by Petitioners from the landfill’s own leachate test results regarding the presence of high levels of radium and radon in the landfill and the ineffectiveness of the landfill’s entrance monitors, and without testing for radioactivity in the landfill, requiring the installation of effective entrance monitors or taking any other measures to mitigate radioactivity risks in the landfill.

3. Petitioners seek a judgment and order and injunctive relief pursuant to Sections 7803(3), 7806, 3001 and 6301-6303 of the Civil Practice Law and Rules (“CPLR”) and Section

267-c of the Town Law vacating and annulling the DEC Permits, the DEC Findings Statement, the Hakes FSEIS, the Town Zoning Changes and the Town Findings Statements on the ground that they were issued in violation of lawful procedures, were affected by errors of fact and law, were arbitrary and capricious, were not supported by substantial evidence, and their issuance constituted an abuse of discretion, and enjoining Respondent DEC and Respondent Town from approving any future applications by Respondent HCDD relating to its proposed expansion of the Hakes landfill until Respondents have complied with all applicable federal and state laws.

II. PARTIES

4. Petitioner Sierra Club is a national grassroots conservation organization. It is a not-for-profit corporation organized under the laws of the State of California. Sierra Club is the oldest and largest grassroots environmental organization in the country. It was founded in 1892. Its purposes include practicing and promoting the responsible use of earth's ecosystems and resources, and protecting and restoring the quality of the natural and human environment. The protection of air, soil and water resources is a key aspect of Sierra Club's work. Sierra Club has more than 783,000 members nationwide, including approximately 50,000 members in New York State, many of whom live in the vicinity of the Hakes Landfill or downriver from the Village of Bath Wastewater Treatment Plant ("Bath WWTP"). All leachate from the Hakes Landfill is sent to the leachate pre-treatment plant at the Steuben County landfill, which pipes all its discharges to the Bath WWTP. The Bath WWTP discharges into the Cohocton River, which is upstream from the cities of Corning and Elmira, and a source of drinking water for each city.

5. The interests of the Sierra Club and its members are injured by the actions of Respondent DEC and Respondent Town in allowing the expansion of the Hakes Landfill without requiring the installation of effective radiation monitors at the entrance to the landfill or

otherwise mitigating the risks of radioactivity in the landfill, which will increase the exposure of those living in the area of the landfill to radon and other harmful substances being emitted into the atmosphere by the landfill, will increase the exposure of those living downstream from the landfill to radioactive leachate from the landfill and will increase the adverse health impacts of the landfill. Petitioner Sierra Club and its members have suffered an informational injury by the actions of Respondent DEC and Respondent Town in failing to take a hard look at the evidence of radioactivity in the Hakes Landfill leachate and in failing to conduct additional testing at the Hakes Landfill to determine more about the types and amounts of radionuclides present in the landfill, and by the actions of Respondent DEC in failing to conduct an administrative proceeding on radioactivity issues at the Hakes Landfill and in discontinuing requirements for measurement of gamma radioactivity in the landfill leachate. Petitioner Sierra Club and its members participated at every stage in Respondent DEC's and Respondent Town's proceedings related to the Hakes FSEIS, the DEC Findings Statement, the DEC Permits, the Town Findings Statements, and the Town Zoning Change.

6. Petitioner Concerned Citizens of Allegany County, Inc. ("CCAC") is a New York State not-for-profit corporation formed in 1996. Its purposes include providing educational support to citizens of Allegany County and the Southern Tier region working to examine and mitigate environmental impacts. The protection of soil, air and water resources from radiological contamination is a key aspect of CCAC's work. CCAC formed in connection with the efforts to stop a proposed low-level radioactive waste disposal site in Allegany County in the late 1980's, as described in the documentary film, "My Name is Allegany County," and the book "Linked Arms." More recently, CCAC has worked on radioactivity and other issues involved in the disposal of shale gas drilling wastes in the Hyland landfill in the Town of Angelica. The

Hyland Landfill is one of only three landfills in New York still accepting shale gas drilling wastes from Pennsylvania. The membership of CCAC is centered in Allegany County.

7. The interests of CCAC and its members are injured by the actions of Respondent DEC and Respondent Town in allowing the expansion of the Hakes Landfill without requiring the installation of effective radiation monitors at the entrance to the landfill or otherwise mitigating the risks of radioactivity in the landfill, which will increase the exposure of those living in the area of the landfill to radon and other harmful substances being emitted into the atmosphere by the landfill, will increase the exposure of those living downstream from the landfill to radioactive leachate from the landfill and will increase the adverse health impacts of the landfill. Petitioner CCAC and its members have suffered an informational injury by the actions of Respondent DEC and Respondent Town in failing to take a hard look at the evidence of radioactivity in the Hakes Landfill leachate and in failing to conduct additional testing at the Hakes Landfill to determine more about the types and amounts of radionuclides present in the landfill, and by the actions of Respondent DEC in failing to conduct an administrative proceeding on radioactivity issues at the Hakes Landfill and in discontinuing requirements for measurement of gamma radioactivity in the landfill leachate. Petitioner CCAC and its members participated at every stage in Respondent DEC's and Respondent Town's proceedings related to the Hakes FSEIS, the DEC Findings Statement, the DEC Permits, the Town Findings Statements, and the Town Zoning Change.

8. Petitioner People for a Healthy Environment, Inc. ("PHE") is a New York State not-for-profit corporation formed in 2009. The members of PHE organized to advocate for the strengthening and effective enforcement of environmental and land use laws and regulations, and to assist communities, groups and individuals whose land, air, water, health, and quality of life

may be subject to degradation by resource extraction activities. Aquifer protection is a key focus of PHE activities. PHE's first project was to bring a lawsuit challenging the siting of a regional gas field services facility for Schlumberger, Inc. over the primary aquifer in the Village of Horseheads. PHE was a co-petitioner with Sierra Club in the litigation challenging the failure of the Village of Painted Post to do an environmental impact review of its decision to sell water from its municipal water system to a subsidiary of Shell Oil for hydrofracking in Pennsylvania. The members of PHE have worked extensively on the radioactivity issues presented by the acceptance of shale gas drilling wastes at the Chemung County Landfill. The Chemung County Landfill, the Hakes Landfill and the Hyland landfill are the only three landfills in New York still accepting shale gas drilling wastes from Pennsylvania. The membership of PHE is centered in the Chemung River valley, and the drinking water of the Chemung River valley may be adversely affected by the actions complained of in this Petition.

9. The interests of PHE and its members are injured by the actions of Respondent DEC and Respondent Town in allowing the expansion of the Hakes Landfill without requiring the installation of effective radiation monitors at the entrance to the landfill or otherwise mitigating the risks of radioactivity in the landfill, which will increase the exposure of those living in the area of the landfill to radon and other harmful substances being emitted into the atmosphere by the landfill, will increase the exposure of those living downstream from the landfill to radioactive leachate from the landfill and will increase the adverse health impacts of the landfill. Petitioner PHE and its members have suffered an informational injury by the actions of Respondent DEC and Respondent Town in failing to take a hard look at the evidence of radioactivity in the Hakes Landfill leachate and in failing to conduct additional testing at the Hakes Landfill to determine more about the types and amounts of radionuclides present in the

landfill, and by the actions of Respondent DEC in failing to conduct an administrative proceeding on radioactivity issues at the Hakes Landfill and in discontinuing requirements for measurement of gamma radioactivity in the landfill leachate. Petitioner PHE and its members participated at every stage in Respondent DEC's and Respondent Town's proceedings related to the Hakes FSEIS, the DEC Findings Statement, the DEC Permits, the Town Findings Statements, and the Town Zoning Change.

10. Petitioner John Culver resides at 9938 Woodcock Road in the Town of Campbell, New York. Petitioner Culver is one of the closest neighbors to the landfill on the northern side of the landfill. His home is on one of two adjoining properties in which he has an ownership interest. These properties, totaling 72 acres, border the northern section of the Hakes Landfill property. This section of the landfill, which is currently undeveloped, is the location of the landfill expansion. The draft supplemental environmental impact statement for the Hakes Landfill expansion project, (the "Hakes DSEIS") says that the new landfill disposal cells can be built as close as 50 feet from the adjoining property lines. There are ongoing boundary disputes between Hakes and Mr. Culver. Mr. Culver regularly experiences horrible smells coming from the landfill that make him sick to his stomach. Because of the hazardous traffic conditions created by numerous large tractor-trailer trucks bringing waste to the landfill on the steep winding curves of Manning Ridge Road, he no longer travels that road even though it is the shortest route to major highways.

11. Petitioner Culver is injured by the actions of Respondent DEC and Respondent Town in allowing the expansion of the Hakes Landfill which will increase his exposure to hazardous truck travel on Manning Ridge Road, will increase his exposure to radon and other harmful substances being emitted into the atmosphere by the landfill, and will increase his

adverse health impacts from living near the landfill. Petitioner Culver has suffered an informational injury by the actions of Respondent DEC and Respondent Town in failing to take a hard look at the evidence of radioactivity in the Hakes Landfill leachate and in failing to conduct additional testing at the Hakes Landfill to determine more about the types and amounts of radionuclides present in the landfill, and by the actions of Respondent DEC in failing to conduct an administrative proceeding on radioactivity issues at the Hakes Landfill and in discontinuing requirements for measurement of gamma radioactivity in the landfill leachate. Petitioner Culver participated at every stage in Respondent DEC's and Respondent Town's proceedings related to the DEC Findings Statement, the Hakes FSEIS, the DEC Permits, the Town Findings Statements and the Town Zoning Change.

12. Petitioners Brian and Maryalice Little reside at 9949 Woodcock Road in the Town of Campbell, New York. They are members of the Sierra Club. Their home is on one of two adjoining properties totaling 40 acres they own on Woodcock Road. The southern border of their properties is approximately 1,500 feet north of the northern boundary of the Hakes Landfill property. They are among the closest neighbors to the landfill on the north. The northern section of the Hakes Landfill property, which is currently undeveloped, is the location of the landfill expansion. The Littles experience disturbing noises and noxious air emissions from the landfill on their property on a regular basis. Because of the hazardous traffic conditions created by numerous large tractor-trailer trucks bringing waste to the landfill on the steep winding curves of Manning Ridge Road, they no longer travel that road even though it is the shortest route to major highways. The Littles participated at every stage in Respondent DEC's and Respondent Town's proceedings related to the DEC Findings Statement, the Hakes FSEIS, the DEC Permits, the Town Findings Statements and the Town Zoning Change. The Littles are injured by

allowing the expansion of the operations of the Hakes Landfill which will increase their exposure to noise from the landfill, will increase their exposure to hazardous truck travel on Manning Ridge Road, will increase their exposure to radon and other harmful substances being emitted into the atmosphere by the landfill, and will increase their adverse health impacts from living near the landfill. The Littles have suffered an informational injury by the actions of Respondent DEC and Respondent Town in failing to take a hard look at the evidence of radioactivity in the Hakes Landfill leachate and in failing to conduct additional testing at the Hakes Landfill to determine more about the types and amounts of radionuclides present in the landfill, and by the actions of Respondent DEC in failing to conduct an administrative proceeding on radioactivity issues at the Hakes Landfill and in discontinuing requirements for measurement of gamma radioactivity in the landfill leachate.

13. Respondent New York State Department of Environmental Conservation (“Respondent DEC”) is the administrative agency of the State of New York performing some of the actions at issue in this case. Respondent DEC assumed the role of lead agency for the EIS process on the Hakes landfill expansion project. Respondent DEC is the governmental body responsible for environmental protection in the state of New York and for the protection of New York’s natural resources. Respondent DEC administers New York’s C&D landfill permitting program. Basil Seggos is the Commissioner of DEC.

14. Respondent Town of Campbell (“Respondent Town”) is an incorporated town located in Steuben County, New York. Respondent Town has the responsibility to assure that all actions taken by the Town are taken in accordance with the laws of the State of New York and the United States, including the New York State Constitution, the New York State General Municipal Law and the New York State Environmental Conservation Law.

15. Respondent Hakes C&D Disposal Inc. (“Respondent HCDD”) is a New York business corporation with its principal executive office at Casella Waste Systems Inc., 25 Greens Hill Lane, Rutland, Vermont. Respondent HCDD operates the Hakes Landfill located at 4376 Manning Ridge Road, Painted Post, New York in the Town of Campbell. Respondent HCDD is a wholly-owned subsidiary of Casella Waste Systems, Inc.

III. FACTUAL BACKGROUND

16. On December 19, 2019, Respondent DEC issued the DEC Findings Statement, the DEC Permits and a Permit Application Responsiveness Summary supplementing the Hakes FSEIS. The DEC Findings Statement determined that the proposed Hakes Landfill expansion “will include measures that avoid, minimize, and mitigate adverse environmental impacts to the maximum extent practicable.”

17. Previously, as the lead agency under SEQRA for the Hakes Landfill expansion project, Respondent DEC determined that Respondent HCDD’s applications to expand the Hakes Landfill might have a significant adverse impact on the environment and required the preparation of a Draft Supplemental Environmental Impact Statement. Respondent DEC announced its SEQRA determination and the preparation of a draft scoping document on April 5, 2017, issued a final scoping document on August 2, 2017, and accepted a Draft Supplemental Environmental Impact Study (the “Hakes DSEIS”) on January 10, 2018. Respondent DEC held a SEQRA public hearing on the Hakes DSEIS on February 13, 2018, and accepted the Hakes FSEIS on December 5, 2018.

18. Respondent Town participated as an involved agency in the SEQRA review of the Hakes Landfill expansion project and participated in accepting the Hakes DSEIS and the Hakes FSEIS. Appendix 5 to the Hakes FSEIS contained Respondent Town’s response to comments

on the FSEIS. Attached as an exhibit to the Town response was a May 2018 report prepared by CoPhysics Corporation (the “CoPhysics Report”) and provided to the Town by Casella Waste Systems, Inc., the parent company of Respondent HCDD.

19. Because of widespread concerns that the impacts of radioactivity from the shale gas drilling wastes in the Hakes Landfill might be exacerbated by the expansion, Petitioners and many others submitted comments on the draft scope for the Hakes Landfill expansion project objecting to the failure of the draft scope to include radioactivity issues in the outline for the Hakes DSEIS.

20. Petitioners pointed out that the records of the Pennsylvania Department of Environmental Protection showed that the Hakes Landfill had accepted the second highest levels of shale gas drilling waste from Pennsylvania of any landfill in New York, second only to the Chemung Landfill.

21. In their comments on the draft scope, Petitioners pointed out the high levels of radioactive isotopes reported in the landfill’s 2013 leachate testing results, expressed concern that the landfill’s drive-through entrance monitors were not detecting radium and radon in wastes entering the landfill, and pointed out that without consideration of these issues the potential risks posed to health and the environment by the landfill expansion project would not be correctly evaluated in the Hakes DSEIS.

22. On August 2, 2017, Respondent DEC released the final scope. The final scope stated that the majority of the comments on the draft scope addressed issues with radioactivity in the drilling wastes being accepted at the landfill. Nevertheless, the final scope rejected these comments and determined that the Hakes DSEIS would not address radioactivity issues.

23. Following receipt of the final scope, Petitioners filed Freedom of Information Law requests for the Hakes landfill leachate radionuclide analytical reports for the years after 2013 and engaged experts to review the reports obtained.

24. Based upon the evaluations of its experts, Petitioners filed an Article 78 proceeding on November 30, 2017 in Steuben County Supreme Court challenging Respondent DEC's failure to include radioactivity issues in the Final Scope. The case was captioned *Sierra Club v. NYS DEC*, Index No. E2017-1384CV.

25. Petitioners' experts, Dr. David Carpenter, Dr. Raymond Vaughan, and Mr. Dustin May, detailed their evaluations of the levels of radionuclides shown in the Hakes Landfill leachate radionuclide test reports and the environmental and health risks presented in three affidavits Petitioners filed in the Article 78 proceeding on January 19, 2018.

26. Before Petitioners' filed their expert affidavits on January 19, 2018, Respondent DEC published notice on January 10, 2018 that it had accepted the Hakes DSEIS and had scheduled a legislative public hearing on the DSEIS on February 13, 2018.

27. When Petitioners reviewed the Hakes DSEIS and saw that radioactivity issues were mentioned in the Hakes DSEIS, even though not adequately addressed, Petitioners agreed to withdraw their Article 78 proceeding challenging the final scope and to raise their radioactivity concerns in their comments on the DSEIS. A stipulation of discontinuance was filed in *Sierra Club v. NYS DEC* on February 9, 2018.

28. On March 19, 2018, the Petitioners Sierra Club, CCAC and PHE submitted a comment letter on the Hakes DSEIS. As exhibits to their comments, Petitioners submitted the January 2018 affidavits of Dr. Carpenter, Dr. Vaughan and Mr. May, together with Dr.

Vaughan's February 10, 2018 presentation on "Unresolved Issues for Disposal of Radium-bearing Wastes at Hakes Landfill."

29. Dr. David Carpenter is Director of the Institute for Health and the Environment at the University at Albany and a former Director of the Wadsworth Center for Laboratories and Research of the New York State Department of Health. Dr. Raymond Vaughan is a professional geologist and consultant with extensive experience researching radioactivity issues. Mr. Dustin May is supervisor of the radiochemistry department of the State Hygienic Laboratory at the University of Iowa, the State of Iowa's public health laboratory and a co-author of several papers investigating radioactivity in gas drilling wastes from the Marcellus shale formation.

30. The key evidence identified by Petitioners' experts in their affidavits is that the Hakes Landfill leachate test results show that several of the leachate samples tested contained extremely high levels of the radionuclides Lead-214 and Bismuth-214, while all the leachate samples tested showed consistently low levels of Radium-226.

31. The discrepancy between the low levels of Radium-226 and the intermittently high levels of Lead-214 and Bismuth-214 is significant because Radium-226, Radon-222, Lead-214, and Bismuth-214 are all part of a well-known radioactive decay chain that starts with Uranium-238. Each radionuclide in the decay chain is transformed at a predictable rate into its immediate decay product. Radium-226 is transformed into Radon-222, which in turn is transformed into Polonium-218 which is transformed into Lead-214, which is transformed into Bismuth-214. This radioactive transformation process follows mathematical rules that have been recognized for more than a century, allowing useful comparisons among radionuclides and their concentrations in air, water, soil, and leachate.

32. Because Lead-214 and Bismuth-214 are radioactive decay products of Radium-226 and Radon-222, Petitioners' experts explained that the presence of high levels of Lead-214 and Bismuth-214 in the leachate test samples shows that the parent radionuclides Radium-226 and Radon-222 are also present at high levels in the landfill, either within the leachate itself or in close enough proximity to the leachate that their decay products Lead-214 and Bismuth-214 end up in the Hakes leachate.

33. Although the test results show only intermittently high levels of the radionuclides Lead-214 and Bismuth-214, Petitioners' experts explained that the fact that these high levels are ever reached provides a basis for calculating radon levels in Hakes leachate ranging up to 270,000 pCi/L and radon levels in landfill gas ranging up to ~1.05 million pCi/L. The best explanation for the discrepancy between the high levels of Radon-222 in the landfill gas and the low levels of Radium-226 in the leachate, according to Petitioners' experts, is that the parent Radium-226 remains relatively "high and dry" in the landfill, immersed primarily in landfill gas rather than any hydrologically connected pool or stream of leachate, so that the constant decay of Radium-226 into Radon-222 occurs mainly within the landfill gas. Then Radon-222 migrates across the landfill gas/leachate interface and dissolves into the leachate.

34. Petitioners' experts explained that the low levels of Lead-214 and Bismuth-214 in many of the test samples may be the result of the difficulty in keeping the radon gas from escaping from the bottles used to contain the test samples between the collection process and the testing process, which is conducted approximately 21 days after sample collection. If the radon gas escapes before the testing is completed, the levels of Lead-214 and Bismuth-214 in the test results will be much lower than if all the radon present in the leachate is contained in the samples.

35. Petitioners' expert Dr. Vaughan explained in his affidavit why the type of radiation detection alarm used at the Hakes Landfill cannot be relied upon to detect waste entering the landfill. This is because the detector measures the gamma radiation emissions from Lead-214 and Bismuth-214. Just as in the case of the leachate sample collection bottles, if radon gas is allowed to escape from the truck loads of waste entering the landfill before the loads pass through the entrance monitors, the levels of Lead-214 and Bismuth-214 will be low and the waste load will not trigger the entrance monitors. The half-lives of Lead-214 and Bismuth-214 are each less than 30 minutes.

36. Petitioners' expert, Dr. Carpenter, explained that in the decay process of Uranium 238, the greatest health risk comes from alpha decay, and most of the progeny of Uranium 238 are alpha emitters. He said that Radon-222 is the form of greatest concern because it is a gas. He explained that while Radon-222 has a relatively short half-life of 3.8 days, its decay by alpha emission and its decay products are not gases, but are also alpha emitters with short half-lives. He said that when radon is inhaled and decays in the lung, its progeny deposit in the lung and undergo further decay, causing damage.

37. Dr. Carpenter concluded that: (a) there are substantial and significant risks to human health posed by the current procedures used at the Hakes Landfill and approved by Respondent DEC, (b) while the greatest threat to human health comes from inhalation of radon-222, other naturally occurring radioactive material (NORM) and the progeny of these elements pose significant threats to human health, and (c) inhalation is the route of exposure of greatest concern but other routes (ingestion, dermal absorption) are also possible. He stated that the net effect of New York accepting drill cuttings and de-watered mud from Pennsylvania fracking sites will be the New Yorkers will have an increased risk of cancer, especially lung and

gastrointestinal cancers, an increased risk of birth defects coming from DNA damage and increased risk of a shortened life span.

38. Petitioners' comment letter on the Hakes DSEIS outlined the failures of the Hakes DSEIS to adequately evaluate radioactivity issues and asserted that: (1) the DSEIS failed to evaluate the high levels of radioactivity shown in the landfill's leachate test results, (2) the DSEIS failed to evaluate the adequacy of the landfill's entrance monitors, (3) the DSEIS failed to evaluate the presence of radon gas in the landfill's air emissions, gas collection system emissions, and emissions from flaring, (4) the DSEIS failed to evaluate the possible presence of radium, radon and their breakdown products in the landfill's stormwater discharges, groundwater suppression system discharges or liner leakage discharges, (5) the DSEIS failed to evaluate the adequacy of the landfill's liner system and groundwater suppression system to protect against the radium, radon and their breakdown products present in the landfill from entering groundwater and surface water supplies adjoining the landfill, (6) the DSEIS failed to evaluate the risk that opening up the landfill to tie-in the proposed expansion will create new pathways for radon and radium in the landfill to be released to the environment, (7) the DSEIS failed to evaluate the risk that the fires that have been occurring at the landfill have damaged the landfill's liner system, gas collection system or leachate collection system and have created or will create new pathways for radon and radium in the landfill to be released to the environment, and (8) the DSEIS failed to evaluate the health impacts of the landfill expansion project.

39. On December 5, 2018, Respondent DEC released the Hakes FSEIS. The Hakes FSEIS and the response to public comments included in the FSEIS dismissed the significance of Petitioners' evidence of high levels of radium and radon in the landfill. The Hakes FSEIS did not mitigate any of the risks identified by Petitioners in their comments on the Hakes DSEIS and

did not indicate that any investigations of radioactivity in the landfill or of the landfill's entrance monitors had been conducted.

40. On January 14, 2019, Petitioner Sierra Club filed a letter with Respondent Town's Planning Board asking them to delay consideration of Respondent HCDD's zoning application until Sierra Club could have its expert Dr. Vaughan respond to the Hakes FSEIS and the CoPhysics Report.

41. On January 16, 2019, Respondent Town Planning Board issued a positive findings statement on the Hakes FSEIS, certified that the requirements of 6 NYCRR Part 617 had been met, and adopted a site plan approval relative to the establishment of a Non-Residential Planned Development District ("NRPDD") and recommended that the Town Board approve an amendment to the Town Zoning Law to establish a NRPDD for the benefit of the Hakes Landfill Expansion Project.

42. On February 21, 2019, Petitioners Sierra Club, CCAC and PHE filed a letter with Respondent Town and copied to Respondent DEC enclosing a memorandum from Dr. Vaughan explaining why the various points offered by Respondent DEC and Respondent Town in the Hakes FSEIS and the CoPhysics Report as grounds for disputing the scientific calculations of Petitioners' experts do not provide substantial evidence to rebut the evidence provided by Petitioners. The letter pointed out that Respondent Town's host agreement with Respondent HCDD prohibits the deposit of radioactive wastes in the Hakes Landfill. A copy of the letter and Dr. Vaughan's memorandum are attached as Exhibit D to the April 9, 2019, affidavit of Kathryn Bartholomew ("Bartholomew Aff. 1"). Dr. Vaughan summarizes the points in his 2019 memorandum in his affidavit of February 13, 2020.

43. Dr. Vaughan's February 21, 2019, memorandum explained in detail why the points made in the Hakes FSEIS and the CoPhysics Report regarding testing methodologies, methods of calculating equilibrium and radioactive decay, landfill modeling studies and the possible effects of local geology are not valid, why the continued reliance on the entrance monitors is unwarranted, and why additional radiological testing must be done at the landfill to properly characterize radioactivity in the landfill.

44. Dr. Vaughan explained why use of a test methodology promulgated by the US Environmental Protection Agency for the testing of gamma-emitting radionuclides, EPA Methodology 901.1 is valid and why Respondent DEC's decision in mid-2018 to discontinue requiring the use of this methodology in testing Hakes leachate is resulting in a radiological blind spot in understanding radioactivity in the Hakes Landfill because testing of Lead-214 and Bismuth-214 will no longer be required.

45. Dr. Vaughan explained that the methods used by Petitioners' experts to calculate equilibrium and radioactive decay are standard scientific principles and the concerns expressed in the Hakes FSEIS and the CoPhysics Report were based on obfuscations of these principles.

46. Dr. Vaughan pointed out that, although the Hakes FSEIS and the CoPhysics Report refer to the local geology as a possible source for the radioactivity in the landfill, they offer no explanation or support for how radon levels as high as ~270,000 pCi/L in the landfill leachate and as high as ~1 million pCi/L in the landfill gas could possibly be derived from the local geology.

47. Dr. Vaughan explained that neither of the Argonne landfill modeling studies relied upon in the Hakes FSEIS and the CoPhysics Report to show that impacts from radioactivity are minimal, even from a modeled landfill that accepts radium-bearing waste up to

50 pCi/g radium, which is twice the nominal limit for Hakes landfill, provides a quantitative assessment of radon levels within the landfill, and that neither study addresses or provides a quantitative assessment of radon emissions through the cap of the modeled landfill. Thus, Dr. Vaughan explained neither study provides enough scientific detail to refute Petitioners' evidence of high radon levels in Hakes landfill. Dr. Vaughan described a more relevant landfill modeling study, the Walter study, that was not cited or acknowledged in the Hakes FSEIS and the CoPhysics Report. The landfill modeled by the Walter study, contained 50 pCi/g radium in its waste. Dr. Vaughan calculated based on the landfill gas emission rates and radon emission rates described in the Walter study, that the Walter landfill would have 300 to 20,000 pCi/L of radon in its landfill gas. Radon activities of 300 to 20,000 pCi/L in the Walter model are far less than 1 million pCi/L which Dr. Vaughan has calculated for radon in the Hakes landfill gas. (In his February 13, 2020 affidavit, Dr. Vaughan expands on this point and notes that his calculations of the levels of radon in the Walter landfill provide a basis for calculating the amount of radium in the Hakes Landfill because the level of radium in landfill waste will be roughly proportional to the level of radon in landfill gas, other factors being equal. Dr. Vaughan makes a rough estimate that if radon levels of 300 to 20,000 pCi/L can be produced by waste containing 50 pCi/g radium, then the Hakes Landfill would need to contain about 2500 to 175,000 pCi/g radium in its waste to produce ~1 million pCi/L of radon in its landfill gas. This range of 2500 to 175,000 pCi/g radium is far beyond the Hakes Landfill's nominal acceptance limit of 25 pCi/g.)

48. On February 26, 2019, Respondent Town Board held a public hearing on the proposed zoning law amendment. A number of Petitioners' members spoke at the hearing.

49. On March 11, 2019, Respondent Town Board issued a findings statement and approved an amendment to the Town Zoning Law establishing the Hakes NRPDD.

50. On March 6, 2019, Petitioners filed a letter with Respondent Town asking the Town to seek implementation of relatively simple radon testing of the Hakes landfill gas (LFG) and reinstatement of the testing protocols of the Hakes landfill leachate to maintain testing for Lead-214 and Bismuth-214. This letter is attached as Exhibit E to Bartholomew Aff. 1.

51. On March 11, 2019, Respondent Town Board issued a positive SEQRA findings statement on the Hakes Landfill expansion project, certified that the requirements of 6 NYCRR Part 617 had been met, and approved the Town Zoning Changes. The Town findings statement dismissed the significance of Petitioners' evidence of high levels of radioactivity in the landfill.

52. On April 9, 2019, less than 30 days after Respondent Town issued its findings statement and approved the Town Zoning Change, Petitioners filed the current Article 78 proceeding in Steuben County Supreme Court. The proceeding challenged Respondent DEC's action in issuing the Hakes FSEIS and Respondent Town's actions in issuing the Town Findings Statements and the Town Zoning Changes.

53. Petitioners filed their evidence regarding radioactivity in the landfill's leachate test results, the ineffectiveness of the landfill's entrance monitors and the need for more radioactivity testing at the landfill with the verified petition as exhibits to Bartholomew Aff. 1. This evidence included the affidavits of Dr. Carpenter, Dr. Vaughan and Mr. May attached to Petitioners' March 19, 2018 comment letter on the Hakes DSEIS, Dr. Vaughan's February 10, 2018 presentation on "Unresolved Issues for Disposal of Radium-bearing Wastes at Hakes Landfill," and Dr. Vaughan's February 21, 2019 memorandum, "Hakes FSEIS does not rebut the evidence presented by Sierra Club." The evidence contained in these documents is summarized above.

54. After the case was filed, the parties agreed to put the case on hold until Respondent DEC issued its findings statement on the Hakes Landfill Expansion Project and issued the necessary DEC permits to Respondent HCDD.

55. On May 29, 2019, Respondent DEC announced that Respondent HCDD had filed applications for three permits for operation of the Hakes Landfill: an Article 19 Air State Facility permit, a modified Article 27 Title 7 Solid Waste Management permit and a Section 401 - Clean Water Act Water Quality Certification. Respondent DEC announced that it would hold a legislative public hearing on the permit applications on June 27, 2019, and would accept written comments on the permit applications through June 28, 2019.

56. Many of Petitioners' members testified at the hearing on June 27, 2019, as did Sierra Club's expert, Dr. Vaughan. Petitioners Sierra Club, CCAC and PHE filed a comment letter on the permit applications on June 28, 2019, with Dr. Vaughan's comments attached as an exhibit. These comments are attached to the accompanying affidavit of Kathryn Bartholomew dated February 12, 2010 in support of the amended verified petition ("Bartholomew Aff. 2").

57. In their written comments and in comments made at the hearing, Petitioners requested that Respondent DEC conduct a DEC administrative proceeding to address disputed issues of fact related to radioactivity in the landfill. The disputed facts identified by Petitioners included: (1) Whether there are deficiencies with EPA test methodology 901.1 for measuring radioactivity in drinking water that invalidate the use of that method to test for the presence of Lead-214 and Bismuth-214 in landfill leachate? (2) What is the correct method of back-calculation (decay-correction) to determine radon levels in the landfill's leachate based on the Lead-214 and Bismuth-214 test results? (3) Whether recent tests of Lead-210 in the landfill leachate invalidate earlier test results measuring high levels of Lead-214 and Bismuth-214 in the

landfill leachate? (4) Whether it is possible that the high levels of radium breakdown products in the landfill leachate test results are measuring radiation coming from area geology? (5) Whether the presence of high levels of radium breakdown products in the landfill leachate demonstrates that the landfill's entrance monitors are not able to detect radium-bearing wastes entering the landfill? and (6) Whether the levels of radium and radon in the landfill pose significant health risks to workers at the landfill, the neighbors of the landfill, those living downwind and downstream and the environment?

58. Widespread public concern over radioactivity issues at the Hakes Landfill resulted in large numbers of comments being submitted to Respondent DEC and Respondent Town on the Hakes Landfill expansion project. Petitioners estimate that at least 2500 comments were filed at different stages of the project.

59. Respondent DEC did not respond to the requests for an administrative proceeding addressing radioactivity issues in the landfill.

60. On December 19, 2019, Respondent DEC issued the DEC Findings Statement, a Permit Responsiveness Summary and a modified Part 360 Series Solid Waste Management Permit, an Air State Facility Permit, and a 401 Water Quality Certification to Respondent HCDD.

61. The DEC Findings Statement dismissed the significance of the radioactivity evidence submitted by Petitioners in their comments on the Hakes DSEIS. It certified that the requirements of 6 NYCRR Part 617 and determined that "the proposed Hakes C&D Debris Landfill Expansion will include measures that avoid, minimize, and mitigate adverse environmental impacts to the maximum extent practicable. Therefore, the SEQR record for this project supports the Department's approval of the necessary DEC permits for the project."

62. The discussion of radioactivity impacts in the DEC Findings Statement asserted that radioactive wastes and fracking waste are not accepted at the facility, and that the drill cuttings accepted at Hakes from oil & gas wells that are vertically drilled are not fracking waste. Respondent DEC also asserted that “[t]he Department considers the disposal of drill cuttings in the landfill to be safe for the environment and for the public. All incoming waste must pass through permanent fixed radiation monitors to ensure continuous monitoring of compliance with the applicable standards. The Environmental Monitoring Plan requires semi-annual monitoring of leachate for radiological content.”

63. The DEC Findings Statement did not address Petitioners’ evidence that large quantities of radioactive wastes have entered the landfill and will continue to enter unless effective mitigation measures are adopted. The DEC Findings Statement did not address the fact that Petitioners’ evidence of high radioactivity in the landfill demonstrates that the landfill’s entrance monitors are ineffective, and did not mention the fact that after the Hakes DSEIS was issued and after Petitioners filed their comments on the DSEIS providing their expert witness statements regarding the evidence of radium and radon in the landfill, Respondent DEC altered the radiological testing requirements for the Hakes Landfill’s leachate to remove the requirement for testing of the gamma-emitting radionuclides Lead-214 and Bismuth-214 that constituted the basis for Petitioners’ evidence of radioactivity in the landfill.

64. The DEC Findings Statement states that “All questions pertaining to drill cuttings including analytical methods, levels of radiation in leachate, portal monitor accuracy, groundwater contamination and the Corning Aquifer, stormwater, worker exposure to radioactivity in buried waste, TENORM, drinking water, radioactive dust, and other radiological issues were addressed in the FSEIS.”

65. The permit responsiveness summary prepared as a supplement to the FSEIS by Respondent DEC and issued on December 19, 2019 did not report any new investigations or provide any significant new information in response to the deficiencies in the Hakes FSEIS identified by Dr. Vaughan in his February 21, 2019 memorandum.

IV. FIRST CAUSE OF ACTION:
RESPONDENT DEC VIOLATED SEQRA WHEN IT FAILED TO TAKE A HARD
LOOK AT SCIENTIFIC EVIDENCE OF HIGH LEVELS OF RADIUM AND RADON IN
THE HAKES LANDFILL

66. Petitioners repeat and reallege the allegations in paragraphs 1 through 65 as though fully set forth herein.

67. Respondent DEC violated its responsibilities as “lead agency” under SEQRA in issuing the DEC Findings Statement and certifying that the requirements of ECL 8-0109 (8) and 6 NYCRR Part 617 had been met for the Hakes Landfill expansion project without taking a hard look at the scientific evidence Petitioners presented that high levels of radon and radium are present in the landfill, that the landfill’s entrance monitors are ineffective in detecting radium and radon in wastes entering the landfill and that the health impacts of the levels of radium and radon identified by Petitioners are significant.

68. The hard look standard requires that Respondent DEC (1) Identify all areas of relevant environmental concern; (2) Thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and (3) Present a reasoned elaboration for why these identified environmental impacts will not adversely affect the environment. Respondent DEC failed to meet this standard.

69. Respondent DEC failed to investigate the scientific evidence provided by Petitioners and provided no substantial evidence to support its dismissal of Petitioners’ evidence.

70. Instead of conducting investigations, Respondent DEC reduced the radiological testing requirements for the landfill's leachate by removing the requirement that gamma-emitting radionuclides such as Lead-214 and Bismuth-214 be tested, thus reducing its ability to monitor and understand radioactivity in the landfill.

71. For these reasons, Respondent DEC's actions in issuing the DEC Permits, the DEC Findings Statement, and the Hakes FSEIS were made in violation of lawful procedures, were affected by errors of fact and law, were arbitrary and capricious, were not supported by substantial evidence, and their issuance constituted an abuse of discretion.

**V. SECOND CAUSE OF ACTION:
RESPONDENT DEC VIOLATED SEQRA WHEN IT FAILED TO MITIGATE THE
RISKS OF RADIOACTIVITY IN THE HAKES LANDFILL**

72. Petitioners repeat and reallege the allegations in paragraphs 1 through 71 as though fully set forth herein.

73. Respondent DEC violated its responsibilities as "lead agency" under SEQRA and the SEQRA regulations in issuing the DEC Findings Statement and certifying that the requirements of ECL 8-0109 (8) and 6 NYCRR Part 617 had been met for the Hakes landfill expansion project without mitigating the health and environmental effects of high levels of radium and radon in the landfill or the ineffectiveness of the landfill's entrance monitors in detecting radium and radon in wastes entering the landfill.

74. Petitioners identified a number of risks to health and the environment from having high levels of radium and radon in the Hakes Landfill in their March 19, 2018, comment letter on the DSEIS and in the affidavit of Dr. Carpenter attached to the comment letter. Respondent DEC certified the expansion project without mitigating any of these risks, instead reducing the monitoring requirements for radionuclides in the Hakes Landfill leachate.

75. Respondent DEC's reliance on the current landfill entrance monitors to protect against radium and radon entering the landfill is without foundation given the evidence Dr. Vaughan has presented regarding the inability of the detectors to measure radium breakdown products if radon has been allowed to off-gas from a waste load, the monitors will not detect the radium in the load. Other mitigation measures, including more effective entrance monitors, should have been evaluated and were not.

76. For these reasons, Respondent DEC's actions in issuing the DEC Permits, the DEC Findings Statement, and the Hakes FSEIS were made in violation of lawful procedures, were affected by errors of fact and law, were arbitrary and capricious, were not supported by substantial evidence, and their issuance constituted an abuse of discretion.

VI. THIRD CAUSE OF ACTION:
RESPONDENT TOWN VIOLATED SEQRA WHEN IT FAILED TO TAKE A HARD
LOOK AT SCIENTIFIC EVIDENCE OF HIGH LEVELS OF RADIUM AND RADON IN
THE HAKES LANDFILL

77. Petitioners repeat and reallege the allegations in paragraphs 1 through 76 as though fully set forth herein.

78. Respondent Town violated its responsibilities as an "involved agency" under SEQRA and the SEQRA regulations in issuing the Town Findings Statements and certifying that the requirements of ECL 8-0109 (8) and 6 NYCRR Part 617 had been met for the Hakes landfill expansion project without taking a hard look at the scientific evidence Petitioners presented that high levels of radon and radium are present in the landfill, that the landfill's entrance monitors are ineffective in detecting radium and radon in wastes entering the landfill and that the health impacts of the levels of radium and radon identified by Petitioners are significant.

79. The hard look standard requires that Respondent Town (1) Identify all areas of relevant environmental concern; (2) Thoroughly analyze the identified relevant areas of

environmental concern to determine if the action may have a significant adverse impact on the environment; and (3) Present a reasoned elaboration for why these identified environmental impacts will not adversely affect the environment. Respondent Town failed to meet this standard.

80. Respondent Town failed to investigate the scientific evidence provided by Petitioners and provided no substantial evidence to support its dismissal of Petitioners' evidence.

81. Respondent Town's obligation to investigate the evidence provided by Petitioners is independent from the obligation of Respondent DEC, and Respondent DEC's failure to conduct an investigation or provide substantial evidence to support its dismissal of Petitioners' evidence does not excuse the Town from its obligation to ensure that the requirements of ECL 8-0109 (8) and 6 NYCRR Part 617 were met for the Hakes landfill expansion project.

82. For these reasons, Respondent Town's actions in issuing the Town Findings Statements and approving the Town Zoning Changes were made in violation of lawful procedures, were affected by errors of fact and law, were arbitrary and capricious, were not supported by substantial evidence, and their issuance constituted an abuse of discretion.

VII. FOURTH CAUSE OF ACTION:
RESPONDENT TOWN VIOLATED SEQRA WHEN IT FAILED TO MITIGATE THE
RISKS OF RADIOACTIVITY IN THE HAKES LANDFILL

83. Petitioners repeat and reallege the allegations in paragraphs 1 through 82 as though fully set forth herein.

84. Respondent Town violated its responsibilities as an "involved agency" under SEQRA and the SEQRA regulations in issuing the Town Findings Statements and certifying that the requirements of ECL 8-0109 (8) and 6 NYCRR Part 617 had been met for the Hakes landfill expansion project without mitigating the health and environmental effects of high levels of

radium and radon in the landfill or the ineffectiveness of the landfill's entrance monitors in detecting radium and radon in wastes entering the landfill.

85. Petitioners identified a number of risks to health and the environment from having high levels of radium and radon in the Hakes Landfill in their March 19, 2018, comment letter on the DSEIS and in the affidavit of Dr. Carpenter attached to the comment letter. Respondent Town certified the expansion project without ensuring that any of these risks were mitigated.

86. Respondent Town's reliance on the current landfill entrance monitors to protect against radium and radon entering the landfill is without foundation given the evidence Dr. Vaughan has presented regarding the inability of the detectors to measure radium breakdown products if radon has been allowed to off-gas from a waste load, the monitors will not detect the radium in the load. Other mitigation measures, including more effective entrance monitors, should have been evaluated and were not.

87. Respondent Town had an independent obligation to ascertain that the requirements of SEQRA were complied with in the environmental review of the Hakes landfill expansion project, and the appropriate mitigation measures were imposed. Respondent DEC's failure to require appropriate mitigation measures to protect the environment and the health and safety of the people, animals and plants living near the landfill does not excuse the Town from its obligation to ensure that the requirements of ECL 8-0109 (8) and 6 NYCRR Part 617 had been met for the Hakes landfill expansion project.

88. For these reasons, Respondent Town's actions in issuing the Town Findings Statements and approving the Town Zoning Changes were made in violation of lawful procedures, were affected by errors of fact and law, were arbitrary and capricious, were not supported by substantial evidence, and their issuance constituted an abuse of discretion.

VIII. RELIEF REQUESTED

WHEREFORE, Petitioners respectfully request that this Court enter judgment against Respondent DEC and Respondent Town as follows:

A. Annuling the DEC Permits issued by Respondent DEC on December 19, 2019, on the basis that they were issued in violation of lawful procedures, were affected by errors of fact and law, were arbitrary and capricious, were not supported by substantial evidence, and their issuance constituted an abuse of discretion;

B. Annuling the DEC Findings Statement issued by Respondent DEC on December 19, 2019, and the Hakes FSEIS, on the basis that they were issued in violation of lawful procedures, were affected by errors of fact and law, were arbitrary and capricious, were not supported by substantial evidence, and their issuance constituted an abuse of discretion;

D. Annuling the Town Zoning Changes made by Respondent Town on January 16, 2019 and March 11, 2019, on the basis that they were issued in violation of lawful procedures, were affected by errors of fact and law, were arbitrary and capricious, were not supported by substantial evidence, and their issuance constituted an abuse of discretion;

C. Annuling the Town Findings Statements issued by Respondent Town on January 16, 2019, and on March 11, 2019, on the basis that they were issued in violation of lawful procedures, were affected by errors of fact and law, were arbitrary and capricious, were not supported by substantial evidence, and their issuance constituted an abuse of discretion

E. Enjoining Respondent DEC and Respondent Town from approving any future applications by Respondent HCDD relating to its proposed expansion of the Hakes landfill until Respondents have complied with all applicable federal and state laws;

F. Granting Petitioners the costs and disbursements of this action; and

G. Granting such other and further relief as the Court deems just and proper.

DATED: Hammondsport, New York
February 12, 2020

Respectfully submitted,

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Attorneys for Petitioners

VERIFICATION

State of New York,
County of Tompkins, ss.:

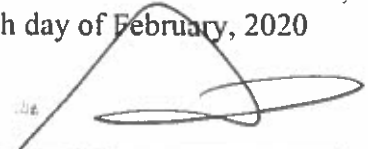
Kathryn Bartholomew, being duly sworn, deposes and says:

I am the chair of the Atlantic Chapter of the Sierra Club, a petitioner in the above-captioned proceeding.

I have read the foregoing Amended Verified Petition and know the contents to be true to my own knowledge, except as to those matters alleged on information and belief, and as to those matters, I believe them to be true.



Sworn to and subscribed before me,
this 12 th day of February, 2020



(Notary Public)

