STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK
and the NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,

Plaintiff,

DECISION AND ORDER
Index No.: 907689-22

-against-

NORLITE, LLC,

Defendant.

(Supreme Court, Albany County, All Purpose Term)

(Justice Kimberly A. O'Connor, Presiding)

APPEARANCES:

HON. LETITIA JAMES
Attorney General of the State of New York
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Attorneys for Proposed Intervenor Plaintiffs and
Proposed Intervenor Cross-Plaintiffs
(Todd D. Ommen, Esq., of Counsel,
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O'CONNOR, J.:

Plaintiffs the People of the State of New York ("State") and the New York State Department of Environmental Conservation ("DEC") (collectively "plaintiffs") commenced this action to protect the public health, welfare, and environment of New York, to enforce Article 19 of the Environmental Conservation Law ("ECL"), and to compel compliance with ECL Article 19 and its implementing rules and regulations at a facility owned and operated by defendant Norlite, LLC ("Norlite") in the City of Cohoes, Albany County, New York. Plaintiffs claim, among other things, that "Norlite has emitted fugitive dust containing air contaminants at concentrations significantly increasing the risk of adverse health effects in the surrounding communities." Plaintiffs further claim that "[t]he quantity, characteristic and/or duration of emissions of air contaminants migrating from the [f]acility are injurious to human life."

Plaintiffs have brought causes of action against Norlite, alleging that Norlite's emissions of air contaminants are in violation of 6 NYCRR § 211.1, condition 24 of Nortlite's air permit, and ECL Article 19, and constitute a public nuisance, and that Nortlite has engaged in repeated and persistent illegal conduct in violation of Executive Law § 63(12). By their action, plaintiffs seek an order: (1) permanently enjoining Norlite from further violations of ECL Article 19 and its implementing regulations, and permits; (2) directing Nortlite to promptly take all steps necessary or appropriate to comply with ECL Article 19 and its implementing regulations, and permits; (3) awarding the State civil penalties for each violation of ECL Article 19 and its implementing regulations, and permits; and (4) permanently enjoining Norlite from operating its facility in a manner that endangers health, safety or comfort and constitutes a substantial interference with rights of the public.

Lights Out Norlite ("LON"), Green Education and Legal Fund ("GELF"), Bradford Blauhut, Deborah Lindley, Karen Robinson, and Mark Belokopitsky (collectively "intervenors")

move for an order, pursuant to CPLR § 1013, granting them leave to intervene as plaintiffs and cross-plaintiffs in the action. Plaintiffs oppose the motion only as it relates to the cross-claim against them. Norlite opposes the motion in its entirety. Intervenors have replied to plaintiffs' and Norlite's respective opposition.

According to the proposed intervenors' complaint, LON is an organization formed and operating under GELF, its fiscal sponsor, to raise awareness about the Norlite facility and to educate the surrounding community about the facility's associated dangers. There are over eighty individuals who are members of LON and a significant number of LON's members own property and reside less than or approximately one mile from the facility, including the individual intervenors, who allege that their "lives and properties have been and continued to be adversely impacted by persistent, noxious, offensive [f]ugitive [e]missions being released from [Norlite's] [f]acility." By their proposed complaint, intervenors challenge "Norlite's repeated and continued emissions of harmful air contaminants," asserting causes of action for public nuisance and negligence. Intervenors also seek a declaratory judgment against the DEC that permitting and allowing the Norlite facility to operate in a manner that results in fugitive dust emissions violates their rights to clean air and a healthful environment under Article I, § 19 of the New York State Constitution ("Green Amendment"). Among other relief, intervenors request an injunction permanently enjoining Norlite from operating the facility, directing its immediate closure, and directing the DEC to vacate or rescind its current hazardous waste and air permits and to not permit the facility to resume operations.

As relevant here, "[i]ntervention may be permitted by the court 'when the person's claim or defense and the main action . . . have a common question of law or fact'" (*Matter of Global Cos. LLC v. New York State Dep't of Envtl. Conservation*, 155 A.D.3d 93, 96-97 [3d Dep't 2017]; *see* CPLR § 1013; *see Matter of Pier v. Bd. of Assessment Review of Town of Niskayuna*, 209

A.D.2d 788, 789 [3d Dep't 1994]). "The resolution of a motion to intervene is a matter reserved for the sound discretion of the trial court" (*Matter of Global Cos. LLC v. New York State Dep't of Envtl. Conservation*, 155 A.D.3d at 97; *see* CPLR § 1013; *Matter of Pace-O-Matic, Inc. v. New York State Liq. Auth.*, 72 A.D.3d 1144, 1145 [3d Dep't 2010]; *see also Borst v. Int'l Paper Co.*, 121 A.D.3d 1343, 1346 [3d Dep't 2014]). Consequently, "when deciding whether to grant [permission to intervene], a court may properly balance the benefit to be gained by intervention, and the extent to which the proposed intervenor may be harmed if refused, against other factors, such as the degree to which the proposed intervention will delay and unduly complicate the litigation" (*Matter of Pier v. Bd. of Assessment Review of Town of Niskayuna*, 209 A.D.2d at 789; *see People v. Schofield*, 199 A.D.3d 5, 9 [3d Dep't 2021]), "and whether any party would be prejudiced" (*People v. Schofield*, 199 A.D.3d at 9; *see* CPLR § 1013; *Jones v. Town of Carroll*, 158 A.D.3d 1325, 1327 [4th Dep't 2018]). Guided these standards, upon review of the record, and for the reasons that follow, the Court, in its discretion, grants leave to intervene.

Initially, the intervenors "have established common questions of law and fact" between their proposed action and the main action (*Matter of Global Cos. LLC v. New York State Dep't of Envtl. Conservation*, 155 A.D.3d at 97). Both plaintiffs and intervenors allege that Norlite has caused or allowed fugitive dust emissions to migrate off site and raise the same significant health-related concerns associated with those emissions for the individuals in the surrounding communities. Plaintiffs and intervenors also rely on the same history of Norlite's failures to comply with the terms and conditions of its air permit and DEC environmental regulations, and to control off-site dust migration, and focus on the same actions taken by the DEC to address those compliance failures. In addition, plaintiffs and intervenors similarly seek to enjoin Norlite from operating the facility in a manner that endangers health, safety or comfort and constitutes substantial interference with the rights of the public.

Next, the intervenors have "a direct and substantial interest in the outcome of [this litigation]" (*Matter of Pier v. Bd. of Assessment Review of Town of Niskayuna*, 209 A.D.2d at 789). A significant number of LON's members, including the individual intervenors, live within one mile of the Norlite facility and they allege in their proposed complaint that the dust emissions from Norlite's facility have interfered with the comfortable enjoyment of their lives and properties (*see Town of North Elba v. Grimditch*, 93 A.D.3d 1305, 1306 [3d Dep't 2012] ["the proposed intervenors have an interest in the litigation by virtue of their status as owners of adjoining premises"]). Intervenor Karen Robinson, who resides next to the eastern entrance to the Norlite facility, avers that she has lost ten pets in the three years she has lived at the property, that she could not leave the windows open at any time because of the constant amount of dust in the air, and that there is always a dust film on the cars and any toys left in the yard for any extended period. Additionally, intervenor Deborah Lindley, who owns and resides on property less than 2,000 feet northeast of Norlite's facility, alleges that her husband has issues sleeping and there is dust on the car daily. Intervenor Brad Blauhut, who owns and resides on property less than 2,000 feet southeast of the Norlite facility, claims that the filth and dust from the facility are a non-stop issue, that he has to keep the windows shut all the time because of it, and that the smell from the facility is unbearable, especially at night.

Consistent with the claims in plaintiffs' complaint, intervenors also allege that Norlite's fugitive dust emissions are known to contain dangerous and hazardous materials and substances, including sharp crystalline silica quartz particles and baghouse dust, placing LON's members and other nearby residents at risk or at heightened risk of adverse health effects from exposure to those emissions.[1] They allege that inhalation of crystalline silica can affect lung structure and long-term

[1] According to plaintiffs' complaint, there are residential properties to the east and north of the Norlite facility fence line and several homes and a 70-unit public housing complex within 100 feet of the facility fence line, which includes

exposure can lead to irreversible fibrotic lung damage; can cause lung disorders, including the development of silicosis, an incurable lung disease that leads to disability and death, increased risk of lung infection, mineral dust-induced small airway disease, chronic obstructive pulmonary disease (COPD), and kidney disease; and is related to the development of autoimmune disorders, cardiovascular impairment, and lung cancer. They further allege that along with silica particles, DEC's own monitoring has measured higher levels of arsenic, mercury, and lead downwind of Norlite and that DEC testing of Norlite's emissions near the facility reveals elevated concentrations of particle pollution that are injurious to human life.[2]

Furthermore, the benefits to be gained by intervention and the extent to which the intervenors may be harmed if leave to intervene is denied outweighs any resulting delay or complication and prejudice to the plaintiffs (*cf. Matter of Pier v. Bd. of Assessment Review of Town of Niskayuna*, 209 A.D.2d at 790). Plaintiffs claim that "granting proposed intervenors' intervention to assert a Green Amendment claim against DEC would prejudice the rights of the [State] and DEC by introducing novel issues of law and distinct issues of fact, thereby confusing the issues and unduly delaying the ultimate outcome of the governmental enforcement action grounded in environmental statutes and regulations, not the Green Amendment to the State Constitution." In that regard, plaintiffs contend that that there has only been one substantive decision construing a Green Amendment claim, namely the Monroe County Supreme Court decision in *Fresh Air for the Eastside, Inc. v. State of New York* (Ark, J., Dec. 7, 2022, index No.

a playground and basketball court. The complaint alleges that of the approximately 150 individuals residing in the public housing complex in May 2022, approximately 60 are children and approximately 25 are individuals with disabilities.

[2] Plaintiffs and intervenors allege that exposure to elevated levels of particle pollution, such as those measured by the DEC near the Norlite facility, can, among other things, cause hospitalization for cardiovascular or respiratory disease, emergency room and urgent care visits, asthma exacerbation, acute and chronic bronchitis, restrictions in activity, work loss, school absenteeism, respiratory symptoms, and decrements in lung function, and has a disproportionate effect on the elderly, children, and infants.

E2022000699), and that the plaintiffs and two defendants in that case have filed notice of appeal, which plaintiffs assert "are indicative of the novel nature and potential delay in resolving cases that require construing the application of the Green Amendment to activities, like Norlite's operations at issue in this case, that are comprehensively regulated under existing environmental statutes and regulations."

While the intervenor's Green Amendment claim might raise some issues of first impression, the Court is not persuaded that it will unduly complicate the factual issues and delay resolution of this case. The Green Amendment, ECL and its implementing rules and regulations, and the State's environmental policies are all aimed at providing a healthful environment. Given Norlite's alleged history of violations and non-compliance with the ECL, its implementing rules and regulations, and the conditions of its air permit, as well as Norlite's alleged failures to control off-site dust migrations, despite DEC's enforcement actions and settlement efforts, together with the State's claims that the fugitive dust emissions migrating off-site to the surrounding communities are injurious to human health make this an appropriate forum to determine whether the Green Amendment's constitutional protection is required here together with or instead of the enforcement remedies plaintiffs are seeking under the ECL and the associated rules and regulations.

Moreover, this case is in its early stages and plaintiffs' claims of delay caused by possible appeals or by potential discovery are speculative. Also, the fact that plaintiffs brought an application for preliminary injunctive relief, which they claim "already seeks to protect the rights of the intervenors to clean air and a healthful environment" cannot be considered an adequate substitute for the intervenors' Green Amendment claim, especially in light of DEC's enforcement history against Norlite, and certainly cannot be a basis upon which this Court denies their intervention. Further, intervenors are not required, on the present application, to provide

evidentiary support for their position that compliance with the Green Amendment can only be achieved by shuttering the Norlite facility. Finally, on the record presented, there is no discernible prejudice to any substantial right of the plaintiffs by allowing the intervention.

Similarly unavailing is Norlite's assertion that intervention is not warranted here because the DEC has asserted and is exercising its enforcement authority and, as such, only the State and Norlite should be parties to the action. Norlite contends that the central issue in this case is whether the State can establish that Nortlite violated the terms and conditions of its DEC-issued operating permits, that only the DEC can enforce those permits, and that intervenors seek to interject themselves in a matter where the DEC is capably acting under its authority. The Court disagrees. Intervenors submit and a reading of the proposed intervenors' complaint makes clear that the intervenors' claims are rooted in tort law as against Norlite and the Green Amendment as against plaintiffs. Although violations of Norlite's permits may arguably show negligent conduct or evidence the effectiveness of the DEC's prior enforcement efforts, they may not be necessary to establish the intervenors' claims. Additionally, allowing intervention would in no way impair or infringe upon the DEC's ability to enforce those permits. And as previously stated, both the intervenors' proposed complaint and plaintiffs' complaint share common questions of law and fact making intervention appropriate here.

Nor should intervention be denied because intervenors could be considered members of the proposed class in a class action lawsuit pending in federal court, namely, *Hill v. Norlite, LLC* (U.S. Dist. Ct., NDNY, 21 Civ 439, Sannes, J., 2021). Intervenors have not self-identified or opted into any class and are under no obligation to litigate as members of the proposed class in the federal litigation. In addition, intervenors have a directed and substantial interest in the outcome of this litigation and, therefore, they should be given an opportunity be heard on the relief sought by the plaintiffs. Moreover, Norlite has not alleged or shown that intervention would cause undue delay

or prejudice (*see* CPLR § 1013; *Town of North Elba v. Grimditch*, 93 A.D.3d. at 1306; *Matter of Rent Stabilization Ass'n of New York City v. New York State Div. of Hous. & Community Renewal*, 252 a.d.2D 111116 [3D Dep't 1998]). Finally, the Court rejects Nortlite's claim that intervention is premature as the relief sought by the intervenors, specifically, rescinding its operating permits, could be afforded in Norlite's permit renewal proceedings.

For all of these reasons, intervenors' application is granted. Any remaining arguments not specifically addressed herein have been considered and found to be lacking in merit or need not be reached in light of this determination. Accordingly, it is hereby

ORDERED, that intervenors' application for leave to intervene as plaintiffs and cross-plaintiffs in this action is granted; and it is further

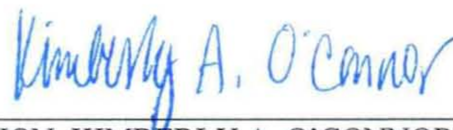
ORDERED, that intervenors shall serve and file their complaint within thirty (30) days of the date of this Decision and Order.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being uploaded to the NYSCEF system for filing and entry by the Albany County Clerk. The signing of this Decision and Order and uploading to the NYSCEF system shall not constitute filing, entry, service, or notice of entry under CPLR 2220 and § 202.5-b(h)(2) of the Uniform Rules for the New York State Trial Courts. Counsel is not relieved from the applicable provisions of those rules with respect to service and notice of entry of the Decision and Order/Judgment.

SO ORDERED.

ENTER.

Dated: June 20, 2023
Albany, New York



HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

Papers Considered:

1. Summons, dated October 11, 2022; Verified Complaint, dated October 11, 2022;
2. Notice of Motion to Intervene, dated December 20, 2022; Affirmation of Todd D. Ommen in Support of Motion to Intervene, dated December 20, 2022, with Exhibits A-B; Memorandum of Law in Support of Motion to Intervene, dated December 20, 2022;
3. Plaintiffs' Memorandum in Partial Opposition to Motion to Intervene, dated February 10, 2023;
4. Defendant's Memorandum of Law in Opposition to Proposed Intervenor Plaintiffs' Motion to Intervene, dated February 10, 202[3]; *and*
5. Reply Memorandum of Law in Support of Motion to Intervene, dated February 28, 2023.