

SUPREME COURT OF THE STATE OF NEW YORK  
ALBANY COUNTY

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

Plaintiffs,

- against -

Index No. 907689-22

NORLITE, LLC,

Defendant.

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A  
PRELIMINARY INJUNCTION**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
PRELIMINARY STATEMENT .....	1
STATEMENT OF FACTS .....	3
I. Norlite’s Facility and Operations .....	3
II. The Community Surrounding Norlite .....	5
III. Crystalline Silica and PM <sub>10</sub> .....	7
IV. Norlite Has Caused or Allowed Emissions Containing C-Silica and PM <sub>10</sub> to Migrate Off-Site at Concentrations that Are Injurious to Human Life .....	12
<b>A. Fugitive Dust Plan</b> .....	12
<b>B. Emissions Monitoring</b> .....	13
V. Actual and Imminent Harm to Human Health Caused by Norlite.....	17
ARGUMENT .....	25
THE STATE IS ENTITLED TO A PRELIMINARY INJUNCTION DIRECTING NORLITE TO IMMEDIATELY CEASE VIOLATING THE ECL AND TO ABATE HARM .....	25
A. The State Is Authorized by Statute to Seek the Relief at Issue and It Has Made a <i>Prima Facie</i> Showing that Norlite Is Violating the ECL.....	25
B. The Equities Favor Promptly Protecting the Citizens of New York from Harm by Issuing a Preliminary Injunction Compelling Compliance with the ECL.....	29
CONCLUSION.....	31

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>Adirondack Park Agency v. Hunt Bros. Contrs., Inc.</i> , 234 A.D.2d 737 (3d Dep’t 1996) .....	25, 30
<i>City of Albany v. Feigenbaum</i> , 204 A.D.2d 842 (3d Dep’t 1994) .....	25
<i>Destiny USA Holdings, LLC v. Citigroup Global Mkts. Realty Corp.</i> , 69 A.D.3d 212 (4th Dep’t 2009) .....	29
<i>J.A. Preston Corp. v. Fabrication Enters., Inc.</i> , 68 N.Y.2d 397 (1986) .....	26
<i>Lew Beach Co. v. Carlson</i> , 57 A.D.3d 1153 (3d Dep’t 2008) .....	26
<i>Metro. Package Store Ass’n v. Koch</i> , 80 A.D.2d 940 (3d Dep’t 1981) .....	29
<i>Peterson v. Corbin</i> , 275 A.D.2d 35 (2d Dep’t 2000) .....	26
<i>Seitzman v. Hudson River Assocs.</i> , 126 A.D.2d 211 (1st Dep’t 1987) .....	30
<i>Town of Thompson v. Braunstein</i> , 247 A.D.2d 753 (3d Dep’t 1998) .....	26
<i>Tucker v. Toia</i> , 54 A.D.2d 322 (4th Dep’t 1976) .....	26
<b>STATE STATUTES</b>	
<b>ECL</b>	
§ 3-0301(1) .....	30
§ 71-2107 .....	26

**STATE REGULATIONS**

**6 NYCRR**

§ 211.1 .....1, 2, 3, 13, 21, 22, 25, 26

## PRELIMINARY STATEMENT

The People of the State of New York and the New York State Department of Environmental Conservation (DEC) (collectively, the State) commenced a civil action to protect the public health, welfare and environment of New York by enjoining Norlite, LLC (Norlite) from continuing violations of Environmental Conservation Law (ECL) Article 19 and the rules and accompanying regulations at and in the vicinity of its facility located in the City of Cohoes (the Facility).

In March 2021, DEC began sampling for air contaminants—including crystalline silica (c-silica) (a known human carcinogen) and particulate matter (PM) (a criteria pollutant)—at Saratoga Sites, a public housing complex adjacent to Norlite. This air monitoring data revealed that Norlite has caused and continues to cause emissions of c-silica and PM<sub>10</sub> of such quantity, characteristic or duration that are injurious to human life in violation of 6 NYCRR § 211.1, including dramatic spikes in emissions. The major health impacts associated with c-silica include silicosis and lung cancer, while PM<sub>10</sub> at the levels observed at Norlite is known to result in increases in hospital admissions, ischemic heart disease, and chronic obstructive pulmonary disease (COPD), among many other health endpoints. This pollution is particularly harmful to vulnerable populations, such as those with asthma, impaired respiratory function and respiratory diseases, cardiac conditions, and those with an impaired immune system, as well as the elderly, cancer patients, pregnant women, infants, and children. Epidemiological reviews and toxicological profiles unequivocally demonstrate that Norlite's emissions of air contaminants are harmful to people living in the vicinity of the Facility. Both acute and chronic health

effects are associated with the quantity, characteristic and duration of Norlite's emissions, with impacts ranging from sinus irritation to exacerbation of asthma, COPD, cardiac arrhythmias, other cardiac events such as heart attack, and increases in mortality.

The State has repeatedly advised Norlite that it must implement measures to abate the emission of air contaminants injurious to human life. In early 2022, Norlite began monitoring PM concentrations at the Facility boundary adjacent to Saratoga Sites, providing Norlite with data in real-time that would enable it to adjust operations to prevent concentrations from reaching problematic levels. However, Norlite has failed to sufficiently curtail or adjust plant operations in response to real-time monitoring. The State therefore seeks a preliminary injunction requiring Norlite to immediately cease and desist from emitting air pollution that is injurious to human life and expressly prohibited by 6 NYCRR § 211.1.

The State's authority to enforce New York's environmental protection laws and regulations and its *prima facie* showing that Norlite continues to violate 6 NYCRR § 211.1 entitle the State to a preliminary injunction requiring Norlite to take certain actions to curtail emissions of pollutants causing harm to people living in the surrounding communities. In particular, the State seeks implementation of a program that will require Norlite to: (1) monitor its air emissions; (2) report its emission levels and notify the public if emission levels reach certain thresholds; and (3) not exceed emission thresholds that are designed to protect the public. The

motion also seeks an order requiring Norlite to obtain an independent engineer's report identifying technically feasible measures for achieving compliance with 6 NYCRR § 211.1 by reducing emissions of air contaminants to levels that are not injurious to human life. This requested relief is narrowly tailored to stem the harm caused by Norlite's persistent violations of the ECL without posing an unnecessary burden upon Norlite. In addition, balancing the equities in this matter dictates that issuance of the requested preliminary injunction is necessary for abating irreparable harm to human health, including to a particularly sensitive population.

## STATEMENT OF FACTS

### I. Norlite's Facility and Operations

Norlite operates the Facility in the City of Cohoes, New York. It is in a mixed-use neighborhood that includes a Cohoes Housing Authority housing complex approximately 100 feet east of Norlite's eastern property line. Affidavit of Clint DuMoulin, dated October 21, 2022 (DuMoulin Aff.), ¶ 4. The Facility manufactures aggregate by mining shale on-site and adding it to rotary industrial furnaces fueled by hazardous waste and nonhazardous industrial and commercial waste. Affidavit of Benjamin Potter, dated November 3, 2022 (Potter Aff.), ¶ 11. The Facility further processes the heat-treated aggregate from the kiln operation by operation of a finish plant. *Id.* at ¶ 12. The Finish Plant utilizes mechanical crushing, screening, and conveying of finished aggregate into specific size distributions for sale as product. *Id.* Aggregate is processed to 3/4 inch, 3/8 inch, and much smaller particles called "fines." *Id.* PM containing c-silica from the crushing of material is able to escape the Finish Plant building from openings on the east (ground level openings for

personnel and equipment entry and window-sized openings on the upper wall), south (ground level opening about the size of a standard doorway, and openings for conveyor belts leaving the building), and west (entry/exit openings for conveyor belts, and openings for personnel and equipment movement) sides of the building. *Id.* at ¶ 21.

The Facility stores the processed aggregate from the Finish Plant in piles for distribution to customers. *Id.* at ¶ 13. All piles are open except for a fines aggregate product that is stored long-term in a large tent structure. *Id.* Aggregate product is loaded by physical and open-air handling through the use of heavy equipment such as front-end loaders and is transported by heavy duty vehicles such as dump trucks and tractor trailers. *Id.* Each kiln is equipped with a baghouse control unit that collects particulate from the processing of raw mined shale. *Id.* at ¶ 14. The baghouses prevent particulate emissions from the stack related to the Air Pollution Control Equipment (APCE) system, which controls pollution from the processing of the raw shale. *Id.* Particulate collected from the baghouse and APCE is transported to a fully enclosed silo, with additional smaller baghouses as control for the storage of baghouse dust. *Id.* at ¶ 15. Baghouse dust is conveyed out of the silo and combined with aggregate fines from another silo onto a conveyor system. *Id.* at ¶ 16. The combination of the two materials is referred to as block mix, which consists of approximately 88% baghouse dust and 12% aggregate fines. *Id.* The block mix is then transported via conveyor to an open dump pile that is moved to a nearby open storage pile area used as a short-term storage. *Id.* The short-term pile of block mix



is then transported to an on-site long term open storage pile via heavy equipment.  
*Id.*

## **II. The Community Surrounding Norlite**

The Saratoga Sites apartment complex is located approximately 100 feet east of the Norlite Facility, separated only by railroad tracks. Saratoga Sites is a public housing complex consisting of 70 apartment units with 1-bedroom, 2-bedroom, and 3-bedroom apartments. DuMoulin Aff. at ¶ 4. It has a playground and a basketball court on-site. *Id.* As of October 18, 2022, 43 of the 70 units were occupied and 100 people were living at Saratoga Sites. *Id.*; DuMoulin Aff. Ex. 1. As of that date, the Saratoga Sites population included 43 children, 3 people over 65 years old, and 18 people considered disabled. *Id.* at Ex. 1.

Residents of Saratoga Sites and the surrounding communities report observing clouds of dust migrating from the direction of Norlite onto and into their homes at levels that interfere with their lives. *Id.* at ¶ 6. The residents describe health concerns including upper respiratory issues, sinus and ear problems, allergies, high blood pressure, headaches, eye irritation, sore throat, chest pain, nose bleeds, anxiety, depression, obesity, fatigue, cancer, COPD, asthma, and cardiac conditions. *Id.* at ¶ 8. Some residents say their health has gotten worse since moving to the vicinity of Norlite, and others report that their conditions have improved after moving further from Norlite. *Id.*; affidavit of Rebecca Perry, dated September 29, 2022 (Perry Aff.), ¶ 6.

For example, Rebecca Perry, who lived in a Saratoga Sites apartment from 2015 through June 2022, suffers from COPD, asthma, heart problems, allergies,

and sinus issues. Perry Aff. at ¶¶ 2-4. Her husband suffers from diabetes, problems sleeping, anxiety, and a serious heart condition, for which he is heavily medicated. *Id.* at ¶ 5. Ms. Perry and her son both suffered from problematic nosebleeds while living at the Saratoga Sites, and have not had any since moving away. *Id.* at ¶ 6. Julia McGraw-Brammer has lived in a neighborhood near Norlite since 1967, except for nine years. Affidavit of Julia McGraw-Brammer, dated November 3, 2022 (McGraw-Brammer Aff.), ¶ 2. She has observed dust emanating from the direction of Norlite throughout her life, and her upper respiratory, sinus, and ear problems seem to be more problematic when Norlite dust is heaviest and most frequent. *Id.* at ¶ 3. She has had cancer, and has a cardiac condition, asthma, Grave's disease, hyperthyroidism, and endometroid disease, has chronic sinus and ear problems, and had her tonsils removed due to chronic throat infections. *Id.* at ¶ 4. Both of her children were diagnosed with asthma at a young age. *Id.* at ¶ 5.

Between 2015 and 2019, on average, the community in the one-half mile radius of Norlite included an estimated 661 people. Affidavit of D Pei Wu, PhD, dated October 31, 2022 (Wu Aff.), Ex. 4. Twenty-three percent, or 151 people, were 0-17 years old, and 22%, or 142 people, were 65 years old or over. *Id.* This population's per capita income was \$32,818, and 29% of households made less than \$25,000 per year. *Id.* In addition to having increased numbers of children and elderly in communities of lower socioeconomic status, there are typically more prevalent underlying health conditions of concern (heart disease, asthma, metabolic syndrome, obesity, and diabetes) and a lack of adequate access to medical care,

placing individuals in those communities at greater risk for suffering adverse effects from exposure to harmful air contaminants. Affidavit of Sheila L. Butler, M.D., dated November 8, 2022 (Butler Aff.), ¶ 51.

### **III. Crystalline Silica and PM<sub>10</sub>**

Norlite's operations produce respirable c-silica and PM<sub>10</sub>, both of which are harmful to human life.

#### **A. Harm Associated with C-Silica Exposure**

Respirable silica describes airborne dust composed of silica particulates capable of entering the respiratory system, including the deep lung. Butler Aff. at ¶ 8. Because most c-silica exposure is occupationally related, there are national occupational exposure limits for respirable c-silica; while there is relatively little information related to community exposure to c-silica, a number of large studies have demonstrated the extreme damage that c-silica causes. Butler Aff. at ¶¶ 9-19. There is no threshold for exposure to respirable c-silica below which no adverse effects occur. *Id.*

C-silica has a fibrogenic effect on tissue, creating scarring and causing irreversible lung damage that affects lung function. *Id.* at ¶¶ 14-15. This can lead to the development of silicosis, which can cause severe respiratory impairment and death. *Id.* at ¶¶ 14-19. It can also lead to COPD (including emphysema and chronic bronchitis), increased risk of lung infection, mineral dust-induced small airway disease and airflow obstruction, and lung cancer. *Id.* It is also associated with increased risk of tuberculosis. *Id.* There is increased mortality associated with

exposure to c-silica for silicosis, COPD, pulmonary tuberculosis, and rheumatoid arthritis. *Id.*

The Agency for Toxic Substances and Disease Registry (ATSDR) Toxicological Profile, which reflects a comprehensive evaluation of available toxicological and epidemiological information for c-silica, documents the following health effects: (1) respiratory effects including silicosis, mortality due to silicosis, decreased lung function in the absence of silicosis, and respiratory COPD; (2) renal (kidney) effects, including acute and chronic renal nephritis/ nephrosis, end-stage renal failure, glomerulonephritis, and renal damage associated with autoimmune disorders (e.g., ANCA-associated vasculitis); (3) immunological effects, including increased risks of a wide spectrum of autoimmune disorders such as systemic sclerosis (scleroderma), rheumatoid arthritis, systemic lupus erythematosus, ANCA-associated vasculitis, and sarcoidosis; and (4) lung cancer. Wu Aff. at ¶¶ 10-15. The Department of Health and Human Services classified c-silica (respirable size) as a Group 1 (definite) human lung carcinogen. *Id.* at ¶ 16. The International Agency for Research on Cancer and the National Institute for Occupational Safety and Health have also concluded that c-silica (respirable size) is a human carcinogen. *Id.* at ¶ 17.

#### **B. C-silica Guideline Concentrations**

DEC establishes Annual Guideline Concentrations (AGCs) and Short-Term Guideline Concentrations (SGCs), which are “used within a regulatory context to protect the general public from adverse health effects that may be induced by exposure to ambient air contaminants.” Wu Aff at ¶ 7. AGCs are chosen “to protect

against adverse, long-lasting effects from exposure lasting months, years, or lifetimes,” based upon annual exposure. *Id.* at ¶ 8. SGCs are chosen “to protect the general population from adverse, acute, 1-hour exposures.” *Id.* DEC set an AGC for respirable c-silica of 2 µg/m<sup>3</sup>. *Id.* at ¶ 9.

In addition, a 24-hour average limit can be calculated based on the exposure limit set by Occupational Safety and Health Administration (OSHA). Affidavit of Adam Black, dated November 8, 2022 (Black Aff.), ¶ 12. OSHA’s c-silica standards contemplate eight hours of exposure a day for a person of working age who is healthy enough to work; applying that standard to create a non-occupational standard for community members exposed to Norlite emissions results in an appropriate 24-hour weighted average limit of 6 µg/m<sup>3</sup>. *Id.*

### **C. Harm Associated with PM<sub>10</sub> Exposure**

PM, also called particle pollution, describes a mixture of solid particles and liquid droplets found in the air. Affidavit of George Allen, dated November 2, 2022 (Allen Aff.), ¶ 7. Some particles, such as dust, dirt, soot, or smoke, are large or dark enough to be seen with the naked eye. *Id.* Others, such as PM<sub>10</sub> and smaller, are so small they can only be detected using a microscope. *Id.* PM<sub>10</sub> is one of EPA’s criteria pollutants, meaning that EPA has promulgated regulations intended to limit the concentrations of PM<sub>10</sub> in ambient air to protect human health. *Id.* at ¶ 8. Particles 10 µg in diameter or smaller are respirable particles and are capable of entering and affecting the lower airways (bronchi, bronchioles, alveoli and lung parenchyma). Butler Aff. at ¶ 6. PM adversely effects the cardiopulmonary system,

causing excess morbidity and mortality, and effects the respiratory and central nervous system, and increases the risk of cancer. *Id.* at ¶ 5. There is no evidence of a safe level of exposure to PM<sub>10</sub>, or a threshold below which no adverse health effects occur. *Id.* at ¶ 6.

Most people who are exposed to elevated levels of PM<sub>10</sub> for a short period will experience irritation of mucus membranes contributing to eye symptoms and nasal congestion. *Id.* at ¶ 21. When particulates under 10 µg enter the airway, they elicit an inflammatory response in the lungs, eventually leading to cell death and scar tissue, resulting in hyperactive airways, increased susceptibility to infections, and increased risk of obstructive disorders (*e.g.*, asthma, COPD, chronic bronchitis), or diseases and disorders that result in restrictive lung function. *Id.* at ¶¶ 22-25. Chronic exposure results in airway remodeling and irreversible airway obstruction. *Id.* It can also result in increased sensitivity to viral and bacterial pathogens, contributing to increased frequency of respiratory infections like bacterial or viral bronchitis, sinusitis, and pneumonitis. *Id.* Inhaling respirable PM also exacerbates existing pulmonary disease. *Id.* at ¶ 26.

Acute effects of increases in ambient PM<sub>10</sub> exposure also can impact the cardiovascular system, causing arrhythmias, and chronic PM<sub>10</sub> exposure increases systemic inflammation, increasing atherosclerosis. *Id.* at ¶¶ 27-28. Acute and chronic elevated PM exposure increases the risk of death from cardiovascular disease including heart failure and ischemic heart disease (coronary artery disorder and myocardial infarction). *Id.* PM is also a potent endocrine disrupter, and

exposure is linked to increased risk of metabolic disorders like diabetes and obesity. *Id.* at ¶ 36. Gestational exposure to PM is associated with lower birth rate, and children of a lower socioeconomic status are particularly vulnerable to the injurious effects of PM<sub>10</sub> emissions. *Id.* at ¶¶ 37-38 & 51.

Exposure to emissions of PM increases risk of cardiac, pulmonary, and extra-pulmonary diseases, causing both acute and chronic health effects. *Id.* at ¶ 55. Acute exposure to elevated PM contributes to increased hospital admissions for cardiovascular events and respiratory and other morbidities, especially in vulnerable populations. *Id.* at ¶¶ 27-36 & 46. The potential health impacts from exposure to PM air pollution are significant; indeed, PM is “the fraction of air pollution that is most reliably associated with human disease,” and has been linked with increases in all-cause and disease-specific mortality, with increases in cerebrovascular accidents and cardiopulmonary-related deaths. *Id.* at ¶¶ 29-33, 40, & 53. A daily increase of as little as 10 µg/m<sup>3</sup> in PM<sub>10</sub> is associated with an increase in daily hospital admissions and death related to adverse cardiac and respiratory events. *Id.* at ¶¶ 29-30 & 42.

#### **D. PM<sub>10</sub> Standards and Guideline Concentrations**

##### *1. Annual and Daily Standards*

In 2001 and 2002, the California Air Resources Board (CARB) and the California Office of Environmental Health Hazard Assessment (OEHHA) reviewed the published literature on particulate pollution and health impacts to make a recommendation for amendments to the California Ambient Air Quality Standards

for particulate pollution that would be “protective of the health of the public, including infants and children, with an adequate margin of safety.” Wu Aff. at ¶ 25. This work by California represents the most comprehensive review of the health impacts of PM<sub>10</sub> anywhere in the United States, and provides a standard that is health-protective of vulnerable populations, such as those living at Saratoga Sites. *Id.* The CARB & OEHHA recommendation, which was adopted, for an annual PM<sub>10</sub> standard is 20 µg/m<sup>3</sup>. *Id.* at ¶ 27. The CARB & OEHHA recommendation, which was also adopted, for a PM<sub>10</sub> 24-hour-Average Standard not to be exceeded is 50 µg/m<sup>3</sup>. *Id.* at ¶ 28.

## 2. *One and Two-Hour Guideline Concentrations*

DEC also utilizes a one-hour PM<sub>10</sub> SGC of 380 µg/m<sup>3</sup> to serve as a guideline for assessing compliance with the federal 24-hour PM<sub>10</sub> standard. Potter Aff. at ¶ 37. Exceedance of this value is a public health concern due in part to an increased risk for acute irritation, physiological stress and inflammatory response, especially to vulnerable populations such as children, seniors, and those with health conditions including respiratory and cardiorespiratory conditions. *Id.* at ¶ 38. These same public health concerns apply to 2-hour exposure to PM<sub>10</sub> in excess of 200 µg/m<sup>3</sup>. *Id.*; Butler Aff. at ¶ 7.

## **IV. Norlite Has Caused or Allowed Emissions Containing C-Silica and PM<sub>10</sub> to Migrate Off-Site at Concentrations that Are Injurious to Human Life**

### **A. Fugitive Dust Plan**

Norlite is required to comply with a Fugitive Dust Plan that is intended to address dust generation from emission sources and how to prevent dust from



becoming fugitive. Potter Aff. at ¶ 19. The most recent one was approved in 2014 and has been incorporated into the Facility's Clean Air Act Title V Permit. *Id.* It identifies fugitive dust emission sources and details or updates fugitive dust practices at the Facility to prevent fugitive dust from occurring. *Id.* Norlite's Title V Air Permit contains requirements related to its emissions, including requiring compliance with the dust control practices in the 2014 Fugitive Dust Plan. *Id.*

Controlling dust at Norlite is important because the dust includes not only larger, visible particles, but also smaller PM and c-silica that are the subject of this motion. *Id.* at ¶ 18. Harmful levels of c-silica and PM<sub>10</sub> can migrate off-site even when there are no visible dust emissions. *Id.* Fugitive dust frequently migrates off-site, and DEC has issued a number of notices of violation for the fugitive dust emissions, but Norlite has failed to comply with the Title V Air Permit and 6 NYCRR § 211.1 by curbing those emissions. *Id.* at ¶¶ 55-59; Verified Complaint at ¶¶ 128-133.

## **B. Emissions Monitoring**

Beginning in March 2021, DEC performed 24-hour integrated filter-based sampling for PM<sub>10</sub> and c-silica. Allen Aff. at ¶ 9. DEC collected the data on an alternating every sixth-day basis at two monitoring stations (north and south) located at Saratoga Sites. *Id.* DEC suspended the filter-based sampling in late-October 2021, after collecting six months of samples. In late-January 2022, DEC resumed 24-hour integrated sampling for PM<sub>10</sub> and c-silica on the same schedule but only from the south monitoring station. *Id.* In February 2022, DEC issued a

Norlite Fugitive Dust Monitoring Interim Report, which provided the data collected at the two Saratoga Sites monitoring stations to Norlite and the public. *Id.* at ¶ 15. The Interim Report also confirmed Norlite is the source of the air contaminants recorded at Saratoga Sites. *Id.*

On July 30, 2021, DEC began monitoring for PM<sub>10</sub> at the south Saratoga Sites location using a TEOM monitor, which continuously monitors particulate mass, producing data in real-time and providing hourly PM<sub>10</sub> data which can detect rapid spikes in PM. *Id.* at ¶ 10. The placement of this monitoring equipment is appropriate, produces reliable data, and importantly, appropriately represents residents of Saratoga Sites' outdoor exposure to pollutants. *Id.* at ¶ 11. The monitoring for PM<sub>10</sub> and c-silica performed by the State at the two Saratoga Sites monitoring sites produces data that can be used for the purposes of determining regulatory compliance and assessing health effects. *Id.* Data that is being collected include one-minute PM<sub>10</sub> concentrations and c-silica deposition samples. Potter Aff. at ¶ 30.

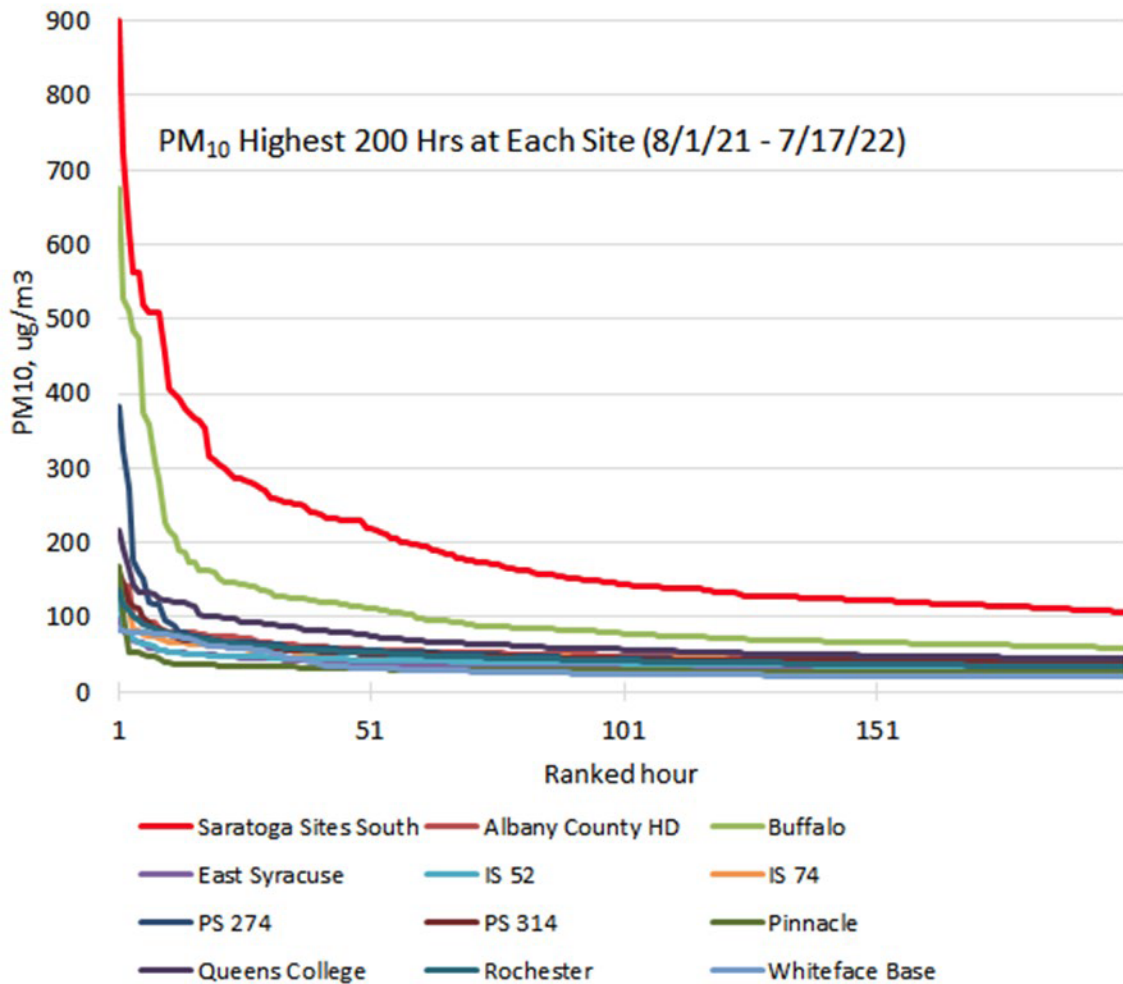
The State also measured wind speed and direction with a sonic wind sensor every 5 seconds at the Saratoga Sites south monitor. Allen Aff. at ¶ 17. Based on data on the timing of the events and the wind speed and wind direction, Norlite is the primary source of the elevated PM<sub>10</sub> at Saratoga Sites. *Id.* at ¶ 28. Indeed, when wind speed is greater than 2 mph, the average concentration is 5 to 6 times higher when the wind is coming from Norlite than from elsewhere. *Id.* at ¶ 24. When the wind is coming from the direction of Norlite, the average concentration is 54 µg/m<sup>3</sup>.

*Id.* at ¶ 25. The wind data demonstrates that the emissions are coming from Norlite; this is depicted in the model contained in paragraph 25 of the Allen Affidavit. In addition, the monitoring data shows that PM<sub>10</sub> and c-silica data are reasonably correlated, and that high c-silica events usually occur when there are high PM events. *Id.* at ¶ 29.

The monitoring makes it possible to determine what Norlite activities cause spikes in contaminant emissions. The real-time one-minute PM<sub>10</sub> concentrations can be compared to both real-time wind conditions at Norlite as well as the daily Finish Plant activity logs. Potter Aff. at ¶ 30. The Finish Plant daily activity logs include startup and shutdown times of block mix processing, fines processing, and Finish Plant processing. *Id.* at ¶ 31. The State has analyzed this information and found that spikes in PM<sub>10</sub> correlated with startups of the Finish Plant, fines, or block mix processes while the wind was blowing in the direction of the monitoring station. *Id.* at ¶¶ 31-32. When the wind direction was blowing toward the monitoring station, one-hour PM peaks coincided with Finish Plant startup times regardless of wind speed; during times of low wind speed, the Finish Plant equipment operation can cause dust to rise, disperse, then settle in the area near the Finish Plant. *Id.* at ¶¶ 31-33. All of the instances when the 24-hour average of 50 µg/m<sup>3</sup> was exceeded, block mix or fines production was occurring. *Id.* at ¶ 52.

DEC compared PM<sub>10</sub> data at 11 other locations in New York State with the Saratoga Sites data from August 1, 2021 through July 17, 2022, looking at the highest 200 hours from each location, as depicted in the graph below. Allen Aff. at

¶¶ 13-14. The Saratoga Sites levels are much higher than any of the other PM<sub>10</sub> levels in the comparison locations, including those that had construction activity contributing to elevated PM<sub>10</sub> concentrations. *Id.* Norlite's high PM<sub>10</sub> events were also much more frequent than the other eleven locations. *Id.*



The data collected by the State, as well as microscopy of particulate samples, demonstrates that levels of toxic respirable c-silica and PM<sub>10</sub> at Saratoga Sites are unusually high and are coming from Norlite. Allen Aff. at ¶¶ 15 & 28; Potter Aff. at ¶ 27.

## V. Actual and Imminent Harm to Human Health Caused by Norlite

The data collected by the State demonstrates that the air contaminants emitted by Norlite are injurious to human lives in the surrounding neighborhoods. Butler Aff. at ¶ 43.

Norlite's emissions exceed guidelines and standards that are protective of human health in significant ways. Norlite's average c-silica emissions between March 17, 2021 and July 28, 2022 was 2.4  $\mu\text{g}/\text{m}^3$ , above the AGC of 2  $\mu\text{g}/\text{m}^3$ , and exceeded 2  $\mu\text{g}/\text{m}^3$  on 30 of the 62 days for which valid samples were collected. Wu Aff. at ¶ 20. In addition, the average c-silica emissions collected between January and July of 2022 was 2.7  $\mu\text{g}/\text{m}^3$ . *Id.* at ¶ 23. Norlite's emissions expose residents of Saratoga Sites and surrounding neighborhoods to levels of c-silica above those determined to protect against adverse, long-lasting effects from chronic, long-term exposure. *Id.* at ¶ 56.

Further, DEC's Interim Report confirmed observations of an independent researcher who found that some of the dust samples from downwind of Norlite were very angular with extremely sharp edges. Potter Aff. at ¶ 28; Allen Aff. Ex. 2 at pp. 11 & 27. DEC's analysis found that the non-heat treated primary shale particles from Norlite often exhibit an angular shape and sometimes have very sharp edges. *Id.* Freshly fractured silica has a fresh surface and causes more harm to human health than more weathered particles do. Wu Aff. at ¶ 18.

In addition, Norlite's average annual PM<sub>10</sub> emissions between August 1, 2021 and July 10, 2022 was 25  $\mu\text{g}/\text{m}^3$ . Wu Aff. at ¶ 40. This is greater than California's annual average standard of 20  $\mu\text{g}/\text{m}^3$  not to be exceeded, and increases the risk of

short-term and long-term health impacts in the nearby community. *Id.* Indeed, cities with annual PM<sub>10</sub> averages between 21 and 25 µg/m<sup>3</sup> had increases in rates of health conditions such as COPD, asthma, cardiorespiratory conditions, and reproductive health impacts including low birth weight and premature birth. *Id.* Norlite PM<sub>10</sub> emissions exceeded California’s protective daily standard of 50 µg/m<sup>3</sup> not to be exceeded on 25 days. *Id.* at ¶ 38. Its PM<sub>10</sub> emissions reached a 24-hour average of 107 µg/m<sup>3</sup> on June 30, 2022. *Id.* at ¶ 45. There were also 15 instances of hourly PM<sub>10</sub> emissions over 380 µg/m<sup>3</sup>, the DEC SGC, and 55 hours on 29 days during which the two-hour average of PM<sub>10</sub> emissions was greater than 200 µg/m<sup>3</sup>. *Id.* at ¶¶ 44 & 46. On May 5, 2022, Norlite hourly emissions exceeded 900 µg/m<sup>3</sup>. *Id.* at ¶ 47. In addition, between June 27, 2022 and June 30, 2022 there were repeated periods of elevated PM<sub>10</sub> each day, lasting from 4 to 7 hours with 1-hour PM<sub>10</sub> peaks each day between 270 and 720 µg/m<sup>3</sup>. Allen Aff. at ¶ 27.

The levels of PM<sub>10</sub> observed at the Saratoga Sites south monitoring station are higher than the levels determined to be “protective of the health of the public, including infants and children, with an adequate margin of safety.” Wu Aff. at ¶¶ 38-48; Butler Aff. at ¶55. Acute exposure to spikes in PM such as the events recorded at the Saratoga Sites air monitoring stations contribute to increased hospital admissions for cardiovascular events and respiratory and other morbidities, especially in vulnerable populations. Butler Aff. at ¶ 46.

The Saratoga Sites residents are particularly vulnerable to suffering negative effects from Norlite’s air pollution, as people of lower socioeconomic status more

often have more prevalent underlying health conditions of concern, and more often lack adequate access to medical care. Butler Aff. at ¶ 51. Indeed, the population that is vulnerable to experiencing heightened impacts from Norlite's emissions includes people with asthma, impaired respiratory function, and respiratory diseases, persons with an impaired immune system, as well as the elderly, cancer patients, pregnant women, infants, and children. Butler Aff. at ¶ 13. The residents of Saratoga Sites and the surrounding community, whose conditions include cancer, upper respiratory problems, COPD, asthma, heart problems, allergies and sinus issues, diabetes, problems sleeping, anxiety, cardiac conditions, problematic nosebleeds, and chronic throat infections are exacerbated by exposure to Norlite's emissions of air contaminants. *Id.* at ¶¶ 52 & 55. In addition to Norlite's pollution likely having contributed to the development of illness in community members, the chronicity of the exposure may also make these illnesses difficult to treat. *Id.* at ¶ 52.

The State performed modeling using Hybrid Single-Particle Lagrangian Integrated Trajectory (HYSPLIT) modeling to better understand the fate and transport of the high levels of emissions from Norlite in areas further from the Saratoga Sites monitoring stations. Wu Aff. at ¶¶ 49-56; Wu Aff. Ex. 5. This modeling computes the transport and dispersion of particles from Norlite using the location of the source of the emissions, emissions rate, and wind speed and direction. *Id.* at ¶¶ 50-53. This modeling was performed for ten days that had 24-hour average PM<sub>10</sub> levels over 50 µg/m<sup>3</sup>, as well as for the days from June 27, 2022

through June 30, 2022. *Id.* at ¶ 51. Setting the Finish Plant as the source location for the emissions, the HYSPLIT model dispersion plumes showed that the highest concentration varied from between less than one-quarter mile to approximately three-quarters of a mile from the Finish Plant. *Id.* at ¶¶ 53-55. People living in that area are exposed to PM<sub>10</sub> levels above thresholds that are unsafe for vulnerable populations, including children, and to levels of c-silica that are above levels determined to be harmful to human health. *Id.* at ¶ 56; Wu Aff. Ex. 5. Indeed, in certain persons with chronic PM exposure, especially those with underlying health issues, this type of exposure is likely to lead to exacerbation of asthma, COPD, cardiac arrhythmias and initiation of other cardiac events such as heart attack. Butler Aff. at ¶ 53.

## **VI. Injunctive Relief Sought**

The State seeks an injunction requiring Norlite to implement an Emissions Monitoring, Reporting, and Curtailment Program that would (1) require Norlite to provide data to the State to continue to monitor Norlite's emissions, (2) require Norlite to inform the public when emissions rise to a level where people may consider changing their activities to protect their health, and (3) prohibit Norlite from emitting c-silica and PM<sub>10</sub> at levels above prescribed health-based thresholds and, in the event they violate the injunction, submit a root cause analysis determining why the prohibition was violated. The State also seeks an order requiring Norlite to obtain an assessment by an independent engineer to identify all



technically feasible options for preventing the off-site migration of harmful air contaminants prohibited by 6 NYCRR § 211.1.

Norlite has been notified of the off-site migration of dust on numerous occasions over many years and has failed to implement readily available, common-sense measures for mitigating the generation and off-site migration of dust with harmful PM<sub>10</sub> and toxic c-silica. Potter Aff. at ¶¶ 4-5 & 54-59; Verified Complaint at ¶¶ 79-88 & 128-134. The State has repeatedly advised Norlite that it must implement measures to abate the emission of air contaminants injurious to human life in violation of 6 NYCRR § 211.1; it has issued numerous notices of violation and cease and desist notices and a proposed schedule of compliance, which Norlite has failed to comply with. Potter Aff. at ¶ 4. In addition, Norlite has been notified of community complaints related to fugitive dust for many years. *Id.* at ¶ 65. Norlite could prevent fugitive dust events and harmful c-silica and PM spikes by implementing technically feasible methods that have been implemented by other facilities facing similar issues, including by enclosing dust generating sources, increasing watering, as well as through operational adjustments based on weather conditions and emission levels. *Id.* at ¶ 5. Despite its knowledge of problems and its ability to institute controls, Norlite has failed to curtail or adjust plant operations sufficient to prevent harmful emissions of c-silica and PM. This is particularly so in light of Norlite's access to real-time monitoring information due to the monitors installed this year; Norlite has failed to curtail or adjust plant operations in

response to real-time monitoring information showing elevated levels of PM<sub>10</sub> at the property boundary adjacent to the Saratoga Sites. *Id.* at ¶ 64.

In July 2022, Norlite implemented measures purportedly intended to reduce the off-site migration of harmful air contaminants from the Finish Plant. Potter Aff. at ¶ 61. However, from July 21, 2022 through September 30, 2022, there were several events with high hourly PM<sub>10</sub> concentrations, with 16 hours greater than 250 µg/m<sup>3</sup>. *Id.* at ¶¶ 61-62; Allen Aff. at ¶ 36. These elevated PM<sub>10</sub> levels correspond to plant activities—mostly including block mix processing startups, fines processing startups, and Finish Plant processing startups. Potter Aff. at ¶ 62. Therefore, the measures implemented in July 2022 have not been adequate for achieving compliance with 6 NYCRR § 211.1 and the Air Permit. *Id.* at ¶¶ 61-63; Allen Aff. at ¶ 36.

Plaintiffs therefore seek an order from the Court requiring Norlite to implement an emissions monitoring, emissions reporting, and operations curtailment program. Allen Aff., Ex. 5. The Program will use the existing Saratoga Sites south air monitoring station and a second location near the northeast boundary of the site. The Program requires that continuous wind and PM data be made available in real time on a publicly available website, with threshold exceedance notifications to the Facility and to the State. It requires that validated continuous PM data be posted on the website on a weekly basis, along with plots of c-silica data on a monthly basis. Norlite will be required to notify the public in real time through the NY-Alert program so that the public can adjust its activities when

emissions exceed the following concentrations which correspond to NowCast AQI thresholds: 3-hour average exceeding 155  $\mu\text{g}/\text{m}^3$  (Unhealthy for Sensitive Groups); 3-hour average exceeding 255  $\mu\text{g}/\text{m}^3$  (Unhealthy); 3-hour average exceeding 355  $\mu\text{g}/\text{m}^3$  (Very Unhealthy); and 3-hour average exceeding 425  $\mu\text{g}/\text{m}^3$  (Hazardous).<sup>1</sup> Norlite must also report any exceedance to DEC and OAG within 30 days, include it on its website, and include the results of a root cause analysis certified by a professional engineer. *Id.*

In addition, in the event emissions approach the thresholds of a  $\text{PM}_{10}$  1-Hour average of 380  $\mu\text{g}/\text{m}^3$ , a  $\text{PM}_{10}$  2-Hour average of 200  $\mu\text{g}/\text{m}^3$ , or a  $\text{PM}_{10}$  24-Hour average of 50  $\mu\text{g}/\text{m}^3$ , Norlite must implement measures to ensure such thresholds are not exceeded. Such measures shall include sounding alarms and modifying or curtailing operations, and notifying DEC in real time. Additionally, Norlite must not exceed a c-silica 24-Hour average of 6  $\mu\text{g}/\text{m}^3$ . In the event that Norlite violates the preliminary injunction by exceeding any of these thresholds, it shall notify DEC

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<sup>1</sup> The Nowcast shows current air quality using EPA's AQI scale, which runs from 0 to 500. Wu Aff. at ¶ 29. The higher the AQI value, the greater the level of air pollution and the greater the health concern. *Id.* It is intended to allow the public to easily determine whether air quality is reaching unhealthy levels in their communities, and provides information about which groups of people may be affected by the air quality, and steps individuals can take to reduce exposure to air pollution. *Id.* at ¶¶ 30-31; Potter Aff. at ¶¶ 42-46. The NowCast shows current air quality using a calculation involving multiple hours of past data, with longer averages during periods of stable air quality and shorter averages when air quality is changing rapidly, such as during a wildfire. Wu Aff. at ¶ 32; Potter Aff. at ¶ 48. The NowCast approach to periods of rapidly changing PM concentrations applies to the fast-moving spikes of  $\text{PM}_{10}$  that are associated with Norlite's emissions of air contaminants. *Id.*

and OAG and shall report any such exceedances to the public by including the relevant information on its website. This reporting shall include the results of a root cause analysis certified by a professional engineer. The Program allows Norlite to seek approval to modify or suspend the monitoring program upon a sufficient period of compliance. *Id.* The State's experts recommend that the Court direct Norlite to implement the Program. Allen Aff. at ¶¶ 33-35; Potter Aff. at ¶¶ 69-70.

The State also seeks an order requiring Norlite to obtain a critical assessment by an independent engineer identifying the technically feasible measures for preventing the off-site migration of harmful air contaminants. In light of Norlite's past failure to comply, the relief requested is necessary to ensure the public is not further harmed, and the Program as designed is appropriate to do so. *Id.*

The State's requested relief is narrowly tailored. Norlite's common or typical PM<sub>10</sub> emission levels are between 10 µg/m<sup>3</sup> and 25 µg/m<sup>3</sup>; 100 µg/m<sup>3</sup> is the 97th percentile. Allen Aff. at ¶ 12. Norlite's emissions are only at 100 µg/m<sup>3</sup> or above three percent of the time, and so it is anticipated that any curtailment of operations required by the requested preliminary injunction would impact a small percentage of Norlite's operating hours. The high concentration peaks are largely attributable to very high-concentration emissions over relatively short periods of time. *See* Wu Aff. at ¶ 44 (reporting monitoring data, with some one-hour occurrences of up to 901 µg/m<sup>3</sup>). Also, as explained above, the harmful spikes in emissions of air contaminants are associated with specific Facility activities, and not all Facility

operations. Potter Aff. at ¶ 32. Therefore, granting the State’s requested relief will protect the nearby communities from harmful emissions of air contaminants without putting Norlite out of business.

## ARGUMENT

### **THE STATE IS ENTITLED TO A PRELIMINARY INJUNCTION DIRECTING NORLITE TO IMMEDIATELY CEASE VIOLATING THE ECL AND TO ABATE HARM**

The State is entitled to a preliminary injunction because it has the authority to enforce ECL Article 19 and 6 NYCRR § 211.1, and it has made a *prima facie* showing that Norlite violated these statutes and regulations, which are designed to protect the environment and the health of the citizens of the State. It is imperative that Norlite be ordered to take immediate steps to abate the harm from its violations.

#### **A. The State Is Authorized by Statute to Seek the Relief at Issue and It Has Made a *Prima Facie* Showing that Norlite Is Violating the ECL.**

Where the ECL authorizes the State to enjoin an ongoing violation, as it does here, the State need only demonstrate that it has the authority to enforce the law at issue and make a *prima facie* showing that the defendant has violated the law. *City of Albany v. Feigenbaum*, 204 A.D.2d 842 (3d Dep’t 1994) (based upon the commission of a prohibited act, a municipality has the authority to obtain a preliminary injunction without resort to the three-prong test for injunctive relief); *Adirondack Park Agency v. Hunt Bros. Contrs., Inc.*, 234 A.D.2d 737, 738 (3d Dep’t 1996) (where the State has statutory authority to seek injunctive relief to abate violations, commission of the prohibited acts is sufficient for issuance of a

preliminary injunction); *Town of Thompson v. Braunstein*, 247 A.D.2d 753, 754 (3d Dep't 1998) (municipality seeking to enforce zoning ordinances is not subject to traditional three-prong test for temporary injunctive relief). Here, ECL § 71-2107 provides DEC with the right to seek to enjoin any violation of any provision of Article 19, and any code, rule or regulation promulgated pursuant thereto. By the plain language of ECL § 71-2107, the State has the authority to bring an action to enjoin Norlite's continuing environmental violations.

The State has also made a *prima facie* showing that Norlite has violated the laws that the State seeks to enforce and the State therefore is likely to succeed on the merits. The purpose of a preliminary injunction is to prevent unlawful irreparable harm pending a decision on the merits. *See Lew Beach Co. v. Carlson*, 57 A.D.3d 1153, 1155-56 (3d Dep't 2008). The moving parties need only make a *prima facie* showing of their right to relief; they do not need to prove the case. *Tucker v. Toia*, 54 A.D.2d 322, 326 (4th Dep't 1976); *see J.A. Preston Corp. v. Fabrication Enters., Inc.*, 68 N.Y.2d 397, 406 (1986); *Peterson v. Corbin*, 275 A.D.2d 35, 37 (2d Dep't 2000).

The State has established that Norlite has violated and is continuing to violate ECL Article 19 and 6 NYCRR § 211.1. Section 211.1 provides that:

No person shall cause or allow emissions of air contaminants to the outdoor atmosphere of such quantity, characteristic or duration which are injurious to human, plant or animal life or to property, or which unreasonably interfere with the comfortable enjoyment of life or property. Notwithstanding the existence of specific air quality standards or emission limits, this prohibition applies, but is not limited to, any particulate, fume, gas, mist, odor, smoke, vapor, pollen, toxic or deleterious emission, either alone or in combination with others.

Norlite emits air contaminants containing levels of c-silica that are injurious to human life. Norlite's emissions between March 2021 and July 2022 was 2.4  $\mu\text{g}/\text{m}^3$ , above the AGC of 2  $\mu\text{g}/\text{m}^3$ , and from January to July of 2022 was 2.7  $\mu\text{g}/\text{m}^3$ . C-silica is a carcinogen, and it causes irreversible lung damage, along with renal and immunological effects. It affects vulnerable populations more severely, including children and the elderly. In addition, some c-silica particles emitted by Norlite are angular with sharp edges, which may make them more damaging to human health than more weathered particles of c-silica would be. Potter Aff. at ¶ 28; Wu Aff. at ¶ 18; Allen Aff. Ex. 2 at pp. 11 & 27.

Norlite also emits levels of  $\text{PM}_{10}$  that California has determined, after evaluating results from epidemiological studies in hundreds of cities, are injurious to human life. Norlite's average annual  $\text{PM}_{10}$  emissions between August, 2021 and July, 2022 was 25  $\mu\text{g}/\text{m}^3$ . Wu Aff. at ¶ 40. This is greater than California's annual average standard of 20  $\mu\text{g}/\text{m}^3$ , not to be exceeded, and indicates an elevated risk of short-term and long-term health impacts in the nearby communities. *Id.* Indeed, cities with annual  $\text{PM}_{10}$  averages between 21 and 25  $\mu\text{g}/\text{m}^3$  showed increases in rates of relevant health conditions such as COPD, asthma, cardiorespiratory conditions, as well as reproductive health impacts including low birth weight and premature birth. *Id.* Norlite 24-hour  $\text{PM}_{10}$  emissions exceeded California's 24-hour standard of 50  $\mu\text{g}/\text{m}^3$ , not to be exceeded, on 25 days. *Id.* at ¶ 38. In fact, the  $\text{PM}_{10}$  emissions reached a 24-hour average of 107  $\mu\text{g}/\text{m}^3$  on June 30, 2022. *Id.* at ¶ 45. Hourly  $\text{PM}_{10}$  emissions exceeded 380  $\mu\text{g}/\text{m}^3$  15 times, and on May 5, 2022, Norlite

hourly emissions exceeded 900  $\mu\text{g}/\text{m}^3$ . *Id.* at ¶¶ 46-47. In addition, between June 27 and June 30, 2022 there were repeated periods of elevated  $\text{PM}_{10}$  each day, lasting from 4 to 7 hours with 1-hour  $\text{PM}_{10}$  peaks between 270 and 720  $\mu\text{g}/\text{m}^3$ . Allen Aff. at ¶ 27. Acute exposure to these spikes contributes to increased hospital admission for cardiovascular events and respiratory and other morbidities, especially in vulnerable populations. Butler Aff. at ¶ 46. Indeed, as little as a daily increase of 10  $\mu\text{g}/\text{m}^3$  in PM is associated with an increase in daily hospital admissions and death related to adverse cardiac and respiratory events. *Id.* at ¶¶ 30 & 46.

The HYSPLIT models prepared by the State make clear that these impacts most affect the population that lives between approximately one-quarter to three-quarters of a mile from Norlite, a community that contains people who are vulnerable and particularly sensitive to Norlite's emissions of harmful air contaminants. Wu Aff. at ¶ 55; Butler Aff. at ¶ 50. The population that is subjected to the highest concentration of emissions is the community of 100 people living at the Saratoga Sites apartments, which is where the State's air monitors are, and is only 100 feet east of the Facility. Currently 43 children, 3 people over 65 years old, and 18 people considered disabled live at this low-income housing complex. Butler Aff. at ¶ 51; DuMoulin Aff. at ¶ 4; DuMoulin Aff. Ex. 1. An especially vulnerable population is bearing the brunt of Norlite's harmful c-silica and  $\text{PM}_{10}$  emissions.

The State's ongoing monitoring demonstrates that Norlite has not taken the steps necessary to prevent emissions from reaching dangerous levels, as they have remained high. It is therefore necessary that the Court impose the Emissions



Monitoring, Reporting, and Curtailment Program to (1) provide data to the State to continue to monitor Norlite's emissions; (2) inform the public when emissions rise to a level where they may consider changing their activities; and (3) ensure that Norlite emissions do not exceed certain thresholds and, that if they do, a root cause analysis be performed to determine why the threshold was exceeded. In addition, an engineer's report indicating what technically feasible controls could be implemented at the Facility to reduce emissions will allow for permanent reduction of emissions.

The State has made a *prima facie* showing that Norlite is violating the ECL because its emissions are injuring human life. The State is therefore entitled to injunctive relief.

**B. The Equities Favor Promptly Protecting the Citizens of New York from Harm by Issuing a Preliminary Injunction Compelling Compliance with the ECL.**

Because the State has satisfied the applicable test for injunctive relief as explained above, it is not necessary for the Court to engage in a balancing of the equities. However, even if the Court were to engage in such an exercise, balancing the equities in this matter favors issuing the preliminary injunction the State is seeking. *See Metro. Package Store Ass'n v. Koch*, 80 A.D.2d 940, 941 (3d Dep't 1981) (the irreparable injury to be sustained is more burdensome than the harm caused to defendants through imposition of the injunction).

In weighing the interests of the litigants when balancing the equities, it is axiomatic that courts must not only consider the public interest, but should attach principal importance to it. *See Destiny USA Holdings, LLC v. Citigroup Global Mkts. Realty Corp.*, 69 A.D.3d 212, 223 (4th Dep't 2009) (balancing the equities in

favor of granting a preliminary injunction because of the public interests involved); *Seitzman v. Hudson River Assocs.*, 126 A.D.2d 211, 214–15 (1st Dep’t 1987) (same).

This matter is of particular importance to the State because the violations can cause significant health problems, even in a short period of time, to a particularly vulnerable population. Indeed, by their nature, many of the harms imposed by these emissions are irreversible. As such, should the Court balance the equities here, the equities clearly weigh in favor of protecting vulnerable segments of the public against irreparable physical harm. This is particularly so because the harm to Norlite by requiring it to curtail operations when it approaches dangerous thresholds is anticipated to have a relatively small impact on its business operations.

Moreover, as a general matter, when a regulator seeks a preliminary injunction for the express legislative purpose of implementing the environmental policy of the State, the equities weigh heavily in favor of granting the injunction. *See* ECL §§ 3-0301(1); *Hunt Bros. Contrs.*, 234 A.D.2d at 738 (the equities weigh heavily in favor of state regulators charged with enforcing a statute intended to benefit all of the people of the State). This is because legislation is an embodiment of the public interest, and a violation of a statute designed explicitly to protect the public on its face harms the public interest. Weighing the equities favors the State when seeking an injunction in the course of enforcing the ECL.

In short, Norlite cannot assert any equitable interest that would overcome the overwhelming public interest in enjoining and remedying its unlawful activities.

The nature of the harm involved outweighs the minimal burdens that the requested relief requires. The requested relief is reasonable and narrowly tailored to prevent future ECL Article 19 violations. It is abundantly clear that if an injunctive order is not implemented, people living in the neighborhoods surrounding Norlite will continue to be harmed. This harm, which includes irreversible lung damage, cardiovascular effects, COPD, renal effects, immunological effects, lung cancer, and increased mortality, is actual and imminent.

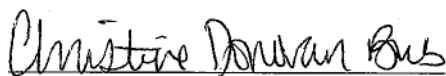
### CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court grant its motion for a preliminary injunction and grant such other relief as it deems appropriate.

November 10, 2022  
Albany, New York

Respectfully submitted,

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