STATE OF CONNECTICUT
SUPREME COURT

S.C. 19620

CONNECTICUT ENERGY MARKETERS ASSOCIATION
Plaintiff-Appellant

VS.

CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION and CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY
Defendant-Appellees

BRIEF OF PLAINTIFF-APPELLANT CONNECTICUT ENERGY MARKETERS ASSOCIATION WITH SEPARATE APPENDIX

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TO BE ARGUED BY:
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STATEMENT OF THE ISSUES

1. Whether the trial court erred in holding that the proposed plan of the Department of Energy and Environmental Protection ("DEEP") to convert 300,000 Connecticut consumers to natural gas, to lay 900 miles of new gas mains, to bring new gas pipelines into the State, and to make other infrastructure changes, is not an "action" that may have a significant effect on the environment for purposes of General Statutes §22a-1b(c) and that no environmental impact evaluation of the proposed activities need be prepared. (pp. 16-29)

2. Whether DEEP was the agency "responsible for the primary recommendation" of an action for purposes of Section 22a-1b(c) by virtue of its detailed proposal outlining the essential prerequisites of a plan to effect the conversions and the legislative and administrative actions that would have to be taken before such conversions could be effected. (pp. 16-22; 24-27)

3. Whether DEEP (through its constituent agencies, including the Public Utilities Regulatory Authority "PURA") was the agency responsible for the initiation of an action for purposes of Section 22a-1b(c) by virtue of its discretionary determinations to approve the above-stated conversion activities and its engaging in acts of implementation that were essential to the conversion activities being carried out. (pp. 16-22; 24-27)

4. Whether the trial court erred in defining the issue presented by DEEP's motion to dismiss as whether the "approval" of DEEP's recommendations by the legislature (as opposed to the action by DEEP) constitutes an action that may significantly affect the environment. (pp. 22-24)

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INTRODUCTION

This case presents a question of first impression in the State of Connecticut. It pertains to the meaning of "actions which may significantly affect the environment" for purposes of the Environmental Policy Act, CONN. GEN. STAT. §§ 22a-1a through 22a-1h (the "Policy Act"). DEEP first proposed, and later implemented, a sequence of activities that will have a significant adverse effect on the environment. The activities, first recommended and later implemented by DEEP, were essential to the proposed conversion of 300,000 homes to natural gas and the construction of 900 miles of new gas lines. The conversion process will have an unprecedented impact on the environment, principally by significantly increasing the amount of methane, a greenhouse gas, that is emitted each year by Connecticut's gas companies.

DEEP violated the Policy Act when it failed to prepare an environmental impact evaluation in connection with its proposal to undertake the activities and to implement them. The trial court erred in holding that the activities proposed and implemented by DEEP do not constitute an "action" that will have a significant effect on the environment.

STATEMENT OF FACTS AND PROCEEDINGS

This is an action for declaratory and injunctive relief challenging DEEP's failure to prepare an environmental impact evaluation. It was instituted by the Connecticut Energy Marketers Association ("CEMA"), a trade association whose members engage in the sale of gasoline and heating fuel to consumers in the State of Connecticut. The trial court dismissed the case on jurisdictional grounds after concluding that the claims asserted in the complaint are barred by sovereign immunity. Although the sovereign immunity of the state is waived for claims under the Policy Act, the trial court concluded that the waiver applies

only to legally sufficient Policy Act claims. Memorandum of Decision (hereinafter "Mem.") A477-478. It went on to hold that the complaint fails to state a claim under the Policy Act on which relief can be granted. *Id.* The trial court's ruling was based on its conclusion that the acts of DEEP do not constitute an "action" for purposes of the Policy Act and its implementing regulations.

DEEP's actions were undertaken by and through its constituent agencies, the Bureau of Energy and Technology Policy ("BETP") and the Public Utilities Regulatory Authority ("PURA"). DEEP's website states that DEEP is organized into three branches and that one of these, the Energy Branch, "includes the Public Utilities Regulatory Authority (PURA) . . . as well as a Bureau of Energy and Technology Policy [(BETP)], which develops forward-looking energy efficiency, infrastructure and alternative power programs. http://www.ct.gov/deep/cwp/view.asp?a=2690&q=322476.

The relevant activities took place in the context of a statutory, regulatory, and factual background that is essential to an understanding of whether DEEP committed a Policy Act violation. This statutory, regulatory, and factual background, which was stipulated to by the parties, and accepted by the trial court as part of the record in this case, is as follows.[1]

In 2011, the Connecticut General Assembly directed DEEP to prepare a comprehensive energy plan identifying energy policies, objectives, and strategies appropriate for the State of Connecticut and recommending administrative and legislative actions to implement them. Specifically, the General Assembly directed that:

[1] See, Transcript of Proceedings Before The Honorable Kevin G. Dubay in CEMA v. DEEP, *et al*., March 30, 2015. A495-497.

> [T]he Commissioner of Energy and Environmental Protection . . . shall prepare a ***comprehensive energy plan*** . . . Such plan shall further include, but not be limited to . . .
>
> > (D) a statement of energy policies and long-range energy planning objectives and strategies appropriate to achieve, among other things, a sound economy, the least-cost mix of energy supply sources and measures that reduce demand for energy . . .
> >
> > (E) recommendations for administrative and legislative actions to implement such policies, objectives and strategies, . . .
>
> (Emphasis added.)[2]

The 2011 Act did not direct DEEP to adopt any specific policy, strategy, or action. Instead, it required DEEP to investigate, evaluate, and exercise judgment and discretion to fashion a plan, and to recommend the sequence of administrative and legislative activities necessary to implement it.

Pursuant to the grant of authority in the 2011 Act, DEEP issued its "2013 Comprehensive Energy Strategy for Connecticut" ("CES") on February 19, 2012. A340-389. The CES contains five chapters, addressing energy efficiency, industrial energy needs, electricity supply, natural gas, and transportation.

The natural gas segment is contained in Chapter 4 of the CES. The centerpiece of the fourth chapter of the CES is a proposal to undertake a large scale conversion of homes and businesses to natural gas (hereinafter referred to as "DEEP's Plan"). Specifically, DEEP's Plan proposed "to make gas available to as many as 300,000 additional

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[2] Section 51 to Public Act No. 11-80, An Act Concerning the Establishment of the Department of Energy and Environmental Protection and Planning for Connecticut's Energy Future, effective July 1, 2011 (the "2011 Act") as amended by Section 23 to P.A. No. 13-298; CONN. GEN. STAT. § 16a-3d.

Connecticut homes." A344. This proposal to convert hundreds of thousands of homes and businesses in Connecticut to natural gas appeared for the first time in the fourth chapter of the CES.

Under DEEP's Plan, DEEP was to facilitate the gas companies' efforts to expand natural gas pipeline capacity, implement the regulatory changes necessary to facilitate new gas customer connections, and authorize and coordinate the building of hundreds of miles of new gas lines. DEEP was also to fashion incentives for the gas companies to ramp-up construction. Specifically, DEEP's Plan proposed that DEEP undertake or oversee:

> "Expansion of the natural gas *pipeline* capacity into Connecticut";
>
> "*Regulatory changes* (i.e., extended payback periods) that would enable potential gas customers who are not on but are near gas mains to have their connections financed by the state's gas companies and repaid through the added revenues of their expanded customer base";
>
> Building "roughly 900 miles of *gas mains*"; and
>
> "*Incentives* for the state's gas companies to ramp-up the required construction quickly".

A344. (Emphasis added.)

DEEP's Plan characterized these measures, taken together, as a State directed planning process for natural gas expansion, emphasizing that:

> the benefits of developing a more coordinated fuel-switching program, organized through ***a planning process overseen by the State***."

A373. (Emphasis added.)

As the first step in this State implementation, DEEP proposed that the gas companies prepare and jointly submit to DEEP a detailed conversion plan ("Gas Companies' Plan"), laying out all of the elements to be addressed and to be included in the plan. DEEP proposed that the gas companies include a very specific and detailed list of

the elements in the joint plan and the considerations that should inform its preparation. DEEP proposed that the gas companies address each of the following items, in detail, in the joint presentation:

1) A customer conversion plan and schedule . . . [to] identify the number of new . . . customers . . . for conversion during each year . . .

2) Feasibility analysis . . . [to] demonstrate the feasibility of reaching the conversion goals . . ., including:

   Expected capital budget for . . . conversion projects;

   Any proposed incentives, . . . how such will be funded;

   Identification of expected costs of distribution service installations and customer equipment . . .;

   Plans to secure the infrastructure and overhead . . . and capacity needed to meet the conversion goals . . .;

   A cost/benefit analysis . . . over a twenty year time frame; and

   A discussion of changing market conditions . . .

3. Outreach and marketing analysis . . . [to] include a well-structured marketing analysis for each sector . . .

4. Cost reduction strategy . . . [to] identify the steps . . . to reduce the costs of conversion . . .

5. Capacity Procurement . . . [to] identify the capacity needed and timing of additions needed to serve the new customers . . .

6. Financing mechanisms . . . [to] include a detailed strategy for leveraging third-party investment to finance equipment conversion and main extensions for the new customers . . .

7. Regulatory proposals . . . [to] include suggested regulatory changes (e.g., hurdle rate model, new customer rate riders, PGA credit sharing)...

A377-378.

Second, in order to assure that the plan filed by the gas companies conforms to DEEP's Plan, DEEP proposed that DEEP review and approve the Gas Companies' Plan. DEEP stated that:

> DEEP and PURA will conduct *coordinated proceedings* to consider the Plan. DEEP will review the Plan for its *consistency with the goals of the Strategy*. (Emphasis added.)

A377.

Implicit in this review is the authority to identify aspects of the Gas Companies' Plan that do not conform to DEEP's Plan and the authority to require changes to bring it into conformity.

Third, once DEEP had brought the Gas Companies' Plan into conformity with DEEP's Plan, DEEP proposed that the next step in the process would be an evaluation and implementation by PURA. As DEEP explained:

> PURA will assess its potential ratepayer impact. After DEEP *modification and approval* of the Plan for its consistency with the Strategy and PURA's guidance, any elements of it that require *PURA implementation* may be submitted individually and/or sequentially for timely regulatory evaluation by PURA.

A377. (Emphasis added.)

DEEP proposed that PURA's responsibilities should include implementing the ratepayer adjustments recommended in DEEP's Plan as well as any other elements of the plan that required regulatory approval. A377. Implicit in these PURA proceedings is the authority to order further changes to bring the Gas Companies' Plan into conformity with DEEP's Plan.

Fourth, DEEP's Plan included other steps to facilitate conversions to the use of natural gas. First among these additional steps was effecting regulatory revisions by

making "changes to some current regulatory policies to encourage gas conversions . . . and allowing greater flexibility in projecting revenues from proposed [gas] main extension." A369.

DEEP also proposed the following actions to be performed by DEEP, by the gas companies, and by DEEP and the gas companies, working together: (i) the gas companies will detail the steps necessary to increase natural gas capacity in Connecticut and PURA will approve the gas companies' proposals, A369; (ii) DEEP will undertake measures to expand access to additional sources of natural gas, working closely with the gas companies and potential pipeline developers, A369; (iii) DEEP will seek to increase transmission capacity for natural gas from new and existing sources of production, A376; (iv) DEEP will revise the permitting process to facilitate distributing gas to additional customers, A385; (v) DEEP will reduce the cost of expanding the distribution infrastructure by streamlining the permitting and siting processes, A376; and (vi) DEEP will directly encourage home owners and businesses to convert to natural gas by raising customer awareness about the economic opportunity from fuel switching. A373-374.

On June 5, 2013, less than four months after DEEP issued the CES with its proposed its natural gas conversion Plan, the Connecticut General Assembly passed H.B. 6360, which substantially adopted the CES along with the elements of DEEP's Plan. Public Act 13-298, CONN. GEN. STAT. §§ 16-19ww (the "2013 Act").

The 2013 Act codified the sequence of administrative steps which DEEP had proposed. Specifically, the 2013 Act directed that:

> (a) the gas companies submit a detailed joint plan to accomplish the conversion objectives previously identified by DEEP—

> On or before June 15, 2013, the gas companies . . . shall jointly submit to the Commissioner of Energy and Environmental Protection and the Public Utilities Regulatory Authority a natural gas infrastructure expansion plan . . . consistent with the goals of the 2013 Comprehensive Energy Strategy.

2013 Act, Section 51(a), CONN. GEN. STAT. §§ 16-19ww(a).

(b) DEEP review the gas companies joint plan to assure that it conforms to DEEP's Plan—

> Not later than thirty days after the natural gas infrastructure expansion plan is submitted to the commissioner pursuant to subsection (a) of this section, the commissioner shall review the plan and issue a preliminary determination as to whether the plan is consistent with the goals of the Comprehensive Energy Strategy.

2013 Act, Section 51(b), CONN. GEN. STAT. §§ 16-19ww(b).

(c) PURA complete the process of review, but only if DEEP found the Gas Companies Plan is consistent with DEEP's Plan—

> *In the event that the commissioner determines that the plan is consistent with the Comprehensive Energy Strategy pursuant to subsection (b) of this section*, the Public Utilities Regulatory Authority shall, in a contested proceeding during which the authority shall hold a public hearing*, approve or modify the plan* not later than one hundred twenty days after such plan is submitted to the authority.

2013 Act, Section 51(c), CONN. GEN. STAT. §§ 16-19ww(b). (Emphasis added.)

(d) PURA adopt a series of regulatory measures to encourage and facilitate the natural gas expansion plan—

> [T]he authority shall . . . (1) establish a hurdle rate . . . (2) establish a new rate for new customers added pursuant to the natural gas infrastructure expansion plan . . . (3) establish a rate mechanism for the gas companies to recover prudent investments made pursuant to the approved natural gas infrastructure expansion plan in a timely manner outside of a rate proceeding . . ., and (4) . . . effective for the period of

> the natural gas expansion plan, (A) assign at least half of the nonfirm margin credit to offset the rate base of the gas companies, and (B) assign the lesser of (i) an amount equal to half of the nonfirm margin credit, or (ii) an amount equal to fifteen million dollars from the nonfirm margin credit annually for all gas companies in the aggregate, apportioned to each gas company in proportion to revenues of and the existing and new capacity contracted for by each gas company, to offset expansion costs . . .

2013 Act, Section 51(d), CONN. GEN. STAT. §§ 16-19ww(d).

These four statutory requirements correspond to the sequence of implementation measures set forth in DEEP's Plan.

On June 14, 2013, the three Connecticut gas companies[3] submitted "Connecticut's Gas Local Distribution Companies Joint Natural Gas Infrastructure Expansion Plan" to DEEP. A65-179.

A month after the Gas Companies' Plan was filed, the BETP issued DEEP's evaluation of the joint plan. See, DEEP Letter to the Gas Companies, dated July 16, 2013 ("DEEP's Modifications"), A391-400.

DEEP's evaluation concluded that the Gas Companies' Plan was generally consistent with DEEP's Plan; but, at the same time, it required numerous revisions. DEEP considered nineteen specific areas, and in more than half of them, revisions were required. These revisions were later summarized by PURA in its Final Decision as follows:

> BETP ***ordered*** the following modifications:
>
> - The Plan must include greater detail on the worker training program to be consistent with the CES. The BETP recommended that the training program be open to displaced oil workers, and that those workers be encouraged to participate.

[3] Southern Connecticut Gas Company, Connecticut Natural Gas Corporation, and Yankee Gas Services Company collectively the Local Distribution Companies or "LDCs".

- The Plan must include more detail on proposed marketing strategies.

- The Companies should propose a time limited "credit" payment up to $250 to stimulate demand.

- Matching rebates should be offered by the Companies and made available only for equipment that meets the same efficiency standards required for the Conservation and Load Management rebate programs for high efficiency gas furnaces and boilers.

- At the outset of the Plan, a company should be able to demonstrate that at least 60% of potential customers have committed to gas conversion before construction commences, and forecasting of revenues should be limited to three years when determining the contribution-in-aid-of-construction (CIAC).

- The inclusion of societal benefits in the Hurdle Rate calculation should be limited to commercial, industrial and government customers that will add important societal benefits by converting to natural gas. The total value of the societal benefits should be no more than 20% of the total revenues of the project.

- If the Companies include a performance incentive proposal in the Plan, it must be conditioned on not only meeting the expansion goals, but also maintaining low rates and ensuring that customers install high efficiency furnaces and other "deeper" efficiency measures (such as insulation) at the time of conversion.

- The Plan should indicate the steps that will be taken to refer homes and businesses that are not located near a natural gas main to the Conservation and Load Management Programs.

- The Companies should establish an ongoing reporting system so they, the BETP, and the PURA can monitor the status of the gas expansion program on an ongoing basis and make adjustments as necessary. More appropriate triggers would be: a 50% reduction in the gas oil spread, 10% increase in distribution rates, and 20% less conversions than planned. (Emphasis added.)

("PURA's Decision") A189-190.

As directed by DEEP, the gas companies made the modifications and resubmitted their joint plan to DEEP. As later summarized by PURA, DEEP had "*directed* the

Companies to make certain modifications and resubmit the changed portions of the Initial Plan to the Authority. On July 26, 2013, the Companies submitted the *required* modifications to the Initial Plan." PURA's Decision, A189-190. (Emphasis added.)

Once DEEP brought the Gas Companies' Plan into conformity with DEEP's Plan, PURA initiated its review and implementation of the gas companies revised plan. PURA completed its review and further revision by issuing a Decision on November 22, 2013. PURA's Decision, A181-251. The PURA Decision explains that it makes further modifications to the Gas Companies Plan and then, as modified, approves the plan pursuant to the Comprehensive Energy Strategy. Specifically, the Decision explains that it:

> *approves, with modifications*, *a regulatory model* . . . *which will allow the companies to carry out a large-scale natural gas expansion plan, pursuant to the Governor's 2013 Comprehensive Energy Strategy for Connecticut*.

A184. (Emphasis added.)

The 2013 Act requires DEEP to prepare a new comprehensive energy strategy on or before October 1, 2016, and every three years thereafter. Section 23(a) to P.A. No. 13-298; CONN. GEN. STAT. § 16a-3d(a). In addition, DEEP may at any time modify the CES. Section 23(d) to P.A. No. 13-298; CONN. GEN. STAT. § 16a-3d(d).

PURA's Decision modifying and approving the Gas Companies Plan concludes with 22 Orders specifying in detail every subsequent step the gas companies must take to implement DEEP's Plan. A248-250. See a summary of the Orders in A402-403.

PURA received two comments contending that an environmental impact study was required by law. Charles Banfield wrote that PURA had this obligation, Letter of Charles Banfield, dated October 15, 2013, A405. Energy Northeast, an intervenor, observed that

DEEP should have prepared an environmental impact evaluation. Comments of Energy Northeast, October 18, 2013, A409 (n.6).

In response, PURA requested written comments, s*ee*, PURA Notice of Request for Written Comments, A411-412; and received responses from DEEP as well as the Gas Companies, both of which elected to address only the question whether *PURA* was legally required to prepare an environmental impact evaluation. Neither comment addressed the question whether *DEEP* itself had this obligation.

Specifically, DEEP contended that: "CEPA does not apply . . . because this decision is solely a regulatory action and PURA is not the sponsoring agency". Letter from DEEP's BETP, November 5, 2013, A414. PURA cited this rationale in its final decision, concluding that no Environmental Impact Evaluation was required. A186.

ARGUMENT

I. The Policy Act Waives Sovereign Immunity And Dispenses With Other Jurisdictional Bars For Claims Challenging An Agency's Failure To Prepare of An Environmental Impact Evaluation

The trial court dismissed the complaint in the action for lack of subject matter jurisdiction. Subject matter jurisdiction is an issue of law. *Town of Rocky Hill v. SecureCare Realty, LLC*, 315 Conn. 265, 276 (2015). This Court reviews *de novo* a trial court's ruling on a motion to dismiss. *Id.* at 276-77; *see also RMS Residential Properties, LLC v. Miller,* 303 Conn. 224, 229 (2011). "[I]n determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." *Byrne v. Avery Ctr. For Obstetrics & Gynecology, P.C*., 314 Conn. 433, 447 (2014).

The Environmental Policy Act, CONN. GEN. STAT. §§ 22a-1a through § 22a-1h (the "Policy Act"), is a supplement to Connecticut's Environmental Protection Act, §§22a-14

through 22a-20 ("CEPA"). *Manchester Environmental Coalition v. Stockton*, 184 Conn. 51, 64 (1981).

The Policy Act contains the procedural requirements for insuring that state actions receive a "thoughtful and meaningful consideration of environmental factors." *Manchester Environmental Coalition*, 184 Conn. at 68 n.20. It provides in pertinent part that agencies responsible for the primary recommendation or initiation of actions that may significantly affect the environment make a written evaluation of the environmental consequences of the proposed action. CONN. GEN. STAT. § 22a-1b(b). An impact statement is required "whenever a project will arguably damage the environment." *Id*., 184 Conn. at 67.

"An agency's determination that no impact statement is necessary is subject to judicial review." *Manchester Environmental Coalition*, 184 Conn. 67 n. 20. The determination of whether an action "may" significantly affect the environment "is a legal issue, involving the interpretation of § 22a-1b and § 22a-1c, which can be decided by a court." *Id.*

The complaint in the instant case asserts jurisdiction "pursuant to CONN. GEN. STAT. § 22a-16." Complaint at ¶13. A8. The defendants concede that this provision confers standing on any person in a Policy Act case, irrespective of whether such person is aggrieved for non-statutory standing purposes.[4] A289.

Because the Policy Act is "in furtherance of and pursuant to sections 22a-1 and 22a-15," and because it was intended to be supplemental to CEPA, standing to raise the procedural issues governed by the Policy Act is conferred by § 22a-16, and it is granted to

[4] As the Supreme Court of Connecticut stated in *Manchester Environmental Coalition*, the Environmental Policy Act "does not require aggrievement as a prerequisite to challenging the preparation, or lack of preparation, of an impact statement." *Id.* 184 Conn. at 64 n. 15.

the same persons on whom standing is conferred to raise substantive issues under CEPA. *Manchester Environmental Coalition,* 184 Conn. at 65-66. That is, "any person" has standing to sue under the Policy Act to challenge a failure to prepare an environmental impact evaluation. *Id.*

By conferring standing on "any person" to challenge the failure of an agency to prepare an impact statement, Section 22a-16 stands as an explicit waiver of sovereign immunity with respect to such actions.

II. The Motions Filed By DEEP And PURA Challenging The Jurisdiction Of The Trial Court Are, In Reality, Motions To Strike The Complaint For Failure To State A Claim On Which Relief Can Be Granted

The standard of review in an appeal from the granting of a motion to strike is plenary. *Lawrence v. O And G Industries, Inc.*, 319 Conn. 641, 648-49, 126 A.3d 569, 574 (2015).

Although DEEP and PURA conceded in the trial court that § 22a-16 waives sovereign immunity for a Policy Act violation,[5] they contended nonetheless that sovereign immunity bars the instant complaint. In short, they argued that sovereign immunity is waived only for claims properly cognizable under the Policy Act, and not for claims that fail to state a legally sufficient Policy Act claim.

Thus, they styled their motions as motions to dismiss, challenging the jurisdiction of the trial court on sovereign immunity grounds. The gravamen of the motions, however, are

[5] See, DEEP Mem. at 8-9, A290-291; PURA Mem. at 19, A50.

assertions that the complaint fails to state a claim under the Policy Act on which relief can be granted, which is properly the subject of a motion to strike.[6]

In agreeing with DEEP and PURA on this point, the trial court ultimately dismissed the complaint on jurisdictional grounds, after finding that the complaint is legally insufficient to state a Policy Act claim, and is thus barred by sovereign immunity. It is this determination that is the subject of this appeal, and the validity of the trial court's holding should be adjudicated under the legal principles that govern motions to strike.

In reviewing the motion to strike, the Court should "construe the complaint in the manner most favorable to sustaining its legal sufficiency." *Sullivan v. Lake Compounce Theme Park, Inc*., 277 Conn. 113, 117 (2006). If the facts set forth in the complaint would support a cause of action, "the motion to strike must be denied." 277 Conn. at 117-18.

Moreover, the "pleadings must be construed broadly and realistically, rather than narrowly and technically." *McCoy v. City of New Haven*, 92 Conn.App. 558, 561 (2005). The courts "assume the truth of both the specific factual allegations and any facts fairly provable thereunder . . .," construing the allegations "broadly . . . rather than narrowly." *Batte-Holmgren v. Commissioner of Public Health*, 281 Conn. 277, 294 (2007).

[6] The purpose of a motion to strike "is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted." *Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 498 (2003).

III. The Trial Court Erred In Holding That The Complaint Fails To State A Claim Under The Policy Act On Which Relief Can Be Granted.

A. An Environmental Impact Evaluation Is Required When An Agency Proposes Or Initiates An Activity Or Sequence Of Activities That May Adversely Affect The Environment

The standard of review of issues involving statutory interpretation is de novo. *State of Connecticut v. Pond*, 315 Conn. 451, 466, 108 A.3d 1083, 1092 (2015).

Section 22a-1b(c) of the Policy Act provides that:

> (c) Each state department, institution or agency responsible for the *primary recommendation or initiation of actions* which may significantly affect the environment shall in the case of each such proposed action make a detailed written evaluation of its environmental impact *before deciding whether to undertake or approve such action*. (emphasis added).

Section 22a-1c of the Policy Act defines "actions that may significantly affect the environment" as:

> . . . individual activities or a sequence of planned activities proposed to be undertaken by state departments, institutions or agencies, or funded in whole or in part by the state, which could have a major impact on the state's land, water, air, historic structures and landmarks as defined in section 10-410, existing housing, or other environmental resources, or could serve short term to the disadvantage of long term environmental goals.

Shortly after the Policy Act was enacted, DEEP promulgated regulations that drew upon Sections 22a-1b(c) and 22a-1c to define in greater depth the type of "actions which may significantly affect the environment." DEEP's regulatory definition is set forth in CONN. AGENCIES REGS. § 22a-1a-1(2), which provides, in part, that:

> 2. Action means an individual activity or a sequence of planned Activities *initiated or proposed to be undertaken* by an agency or agencies, *or* funded in whole or in part by the state. (Emphasis added).

Thus, under the regulations, an "action" is an "activity" or "a sequence of planned activities" that are proposed to be undertaken by an agency, or an activity or activities that are initiated or funded by an agency. The "proposed to be undertaken" language of the regulation is taken from Section 22a-1c of the Policy Act. The "initiated" language is taken from the "initiation of actions" language of Section 22a-1b(c).[7]

In providing examples of the type of activities that constitute an "action," Section 22a-1a-1(2) of DEEP's regulations includes within the applicable definition *"other proposed activity for which an agency exercises judgment or discretion as to the propriety of that action."* CONN. AGENCIES REGS. § 22a-1a-1(2). (Emphasis added). This language is derived from Section 22a-1b(c) of the Policy Act, which requires an agency to make a detailed written evaluation of environmental impact "before deciding whether to undertake or approve such action." Thus, the agency's approval of an activity or sequence of proposed activities constitutes an "action" under the regulations if the activity may significantly affect the environment.

The essence of an "action," therefore, is an activity or sequence of planned activities that may have a significant impact on the environment. But the activity or sequence of activities must be triggered by an act of a state department, institution, or agency. As per DEEP's regulations, activities are triggered by state action when an agency proposes the activity or sequence of activities, when an agency initiates the activities by an authorizing act of approval or by other acts of implementation, or when an agency funds the activity, in whole or in part.

[7] See, § 22a-1b(c) ("Each state department, institution or agency responsible for the primary recommendation or initiation of actions . . .").

DEEP is bound by its regulations in deciding whether to prepare an environmental impact evaluation. Administrative regulations "have the full force and effect of statutory law and are interpreted using the same process as statutory construction, namely, under well established principles of General Statutes 1-2z." *Sarrazin v. Coastal, Inc*., 311 Conn. 581, 603 (2014). They are "presumed valid and, unless they are shown to be inconsistent with the authorizing statute, they have the force and effect of a statute." *Travelers Insurance Company v. Kulla*, 216 Conn. 390, 399 (1990).

1. The Meaning Of Initiation Of An Action.

Because the term "initiated" is not defined in the relevant statute or in DEEP's regulations, it is to be given its plain and ordinary meaning under the rules of statutory construction. In interpreting the language of a statute, "the words must be given their plain and ordinary meaning and their natural and usual sense unless the context indicates that a different meaning was intended." *Blumenthal v. Barnes*, 261 Conn. 434, 460 n.37 (2002), *quoting Mattatuck Museum-Mattatuck Historical Society v. Administrator Unemployment Compensation Act*, 238 Conn. 273, 278 (1996).

The plain meaning of the word "initiate" is "to cause something to begin,"[8] or "to cause or facilitate the beginning" of something.[9] A person initiates an activity, therefore, when it takes action to set a process in motion.

All agency action, of course, is authorized or directed in one way or another by the legislature.[10] But legislative directives cannot usually be implemented in the absence of

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[8] *Cambridge Dictionaries Online*, http://dictionary.cambridge.org/us/dictionary/american-english/initiate.

[9] *Meriam-Webster Online*, http://www.merriam-webster.com/dictionary/initiate.

discretionary determinations by agencies. When an agency acts on its legislative authority to authorize or implement activities that may have a significant impact on the environment, the authorization or implementation of such activities is an "action" under the Policy Act and its implementing regulations.

The agency or department initiates an action by providing the requisite authorization or approval of the activity or by engaging in other acts of implementation necessary for the activity or activities to be undertaken. *If the activity or activities cannot be undertaken in the absence of such agency approval or implementation, the acts of approval and implementation are acts of initiation.*

2. The Meaning Of "Proposed" To Be Undertaken.

As is the case with the word "initiate," the word "proposed" is not defined in the statute or in DEEP's regulations. The plain meaning of the word "propose," however, is "to offer or suggest (a matter, subject, case, etc.) for consideration, acceptance, or action."[11] A proposal, therefore, is in the nature of a recommendation. Indeed, DEEP's regulations define the "sponsoring agency" as "an agency that makes the primary recommendation or initiation of actions . . ." CONN. AGENCIES REGS. § 22a-1a-1(8).

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[10] As the trial court observed, "administrative agencies, such as the defendants, "possess no inherent power. [Their] authority is found in a legislative grant, beyond the terms and necessary implications of which it cannot lawfully function." (Internal quotation marks omitted.) *Nizzardo v. State Traffic Commission,* 259 Conn. 131, 155 (2002); see also *State v. State Employees' Review Board*, 231 Conn. 391, 406 (1994) ("[a]n administrative agency, as a tribunal of limited jurisdiction, must act strictly within its statutory authority")." Memorandum of Decision dated July 2, 2015 ("Mem. Op.") at 13. A479.

[11] *Dictionary.Com*, http://dictionary.reference.com/browse/propose?s=t.

The word "propose" does not mean to mandate or require. A "proposal" is the "act of offering or suggesting something for acceptance, adoption, or performance."[12] As the Court stated in *City of New Haven v. PAC*, 1991 WL 273130, ". . . [a]n environmental impact statement is required from the state when it initiates or *recommends* the action; the state must be the proponent." *Id*. at * 7 (emphasis added).

Moreover, by its very nature, a proposal is a recommendation made to another person or entity. In the context of above-quoted regulations, it may be made by the proponent to another agency or instrumentality of government, to the public, to the Governor, or to the legislature.

There is nothing in the Policy Act to suggest that agency proposals or recommendations made to the legislature are exempt from Policy Act coverage. As long as the agency's recommendation to the legislature requests authority to initiate, approve, or implement an activity or activities that may significantly affect the environment, it is a recommendation or proposal to undertake or initiate an "action."

In this way, the Policy Act is consistent with the National Environmental Policy Act ("NEPA"). The Policy Act was modeled after NEPA, *Manchester Environmental Coalition*, 184 Conn. at 63, and the Supreme Court of Connecticut has relied on NEPA for guidance in construing CEPA. *Id*., 184 Conn. at 67 n.20. *See also, City of New Haven v. Connecticut Siting Council*, 2002 WL 31126293.

Under NEPA, proposals made by a federal agency to Congress require the preparation of an environmental impact statement if the agency's proposal would have a significant effect on the quality of the human environment. 40 C.F.R. §§ 1502.1, *et seq*.,

[12] *Dictionary.Com*, http://dictionary.reference.com/browse/proposal?s=t.

1505.1, *et seq*., 1507.1, *et seq*. Under NEPA, the term "legislation" includes "a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency." 40 C.F.R. § 1508.17.[13]

This Court has construed environmental protection statutes liberally. *See, Keeney v. Old Saybrook*, 237 Conn. 135, 157 (1996); *Starr v. Commissioner of Environmental Protection*, 226 Conn. 358, 382 (1993); *Manchester Environmental Coalition v. Stockton*, 184 Conn. 51, 57 (1981). These statutes are "remedial in nature and should be construed liberally to accomplish their purpose." *Id.*, 184 Conn. at 57. The purpose of the Policy Act cannot be fulfilled if activities that will adversely affect the environment are attributed to the legislature, and not to the agencies that propose them for legislative approval.

Thus, when an agency proposes an activity or sequence of planned activities that may significantly affect the environment, it must perform an environmental impact evaluation to accompany the proposal. "An environmental impact evaluation shall be prepared as close as possible to the time an agency *proposes* an action. . . . [t]he evaluation shall be prepared early enough so that it can practically serve as an important contribution to the decision-making process." CONN. AGENCIES REGS. § 22a-1a-7(b). (Emphasis added).

As will be demonstrated below, DEEP (through its constituent agencies, the BETP and the PURA) proposed *and* initiated a series of planned activities that may significantly affect the environment. The trial court erred, however, in failing to review these administrative acts, focusing instead on the legislature's act of approving the CES.

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[13] Moreover, various states that have patterned similar legislation after NEPA have included legislative proposals as acts that trigger the preparation of an environmental impact statement. See, e.g., WASH. REV. CODE § 43.21C.030(2)(c); MD. CODE ANN. NATURAL RESOURCES §§ 1-301 and 1-304; WIS. STAT. ANN. § 1.11.

B. The Trial Court Erred In Failing To Consider DEEP's Administrative Actions, Focusing Instead On The Approval Of The CES By The Legislature

In the Court below, the plaintiff argued that DEEP engaged in actions that may significantly affect the environment, and that such actions triggered the requirement for preparation of an environmental impact evaluation. The plaintiff did not argue, or even suggest, that an act of the legislature could constitute an "action" under the Policy Act, or that the Policy Act is otherwise applicable to the legislature. Plaintiff focused exclusively on the rules pertaining to administrative agencies and executive departments.

The trial court's Memorandum of Decision in this case contains no discussion of what constitutes an action by an administrative agency or executive department that may "significantly affect the environment." Instead, the Court focused on an act of the General Assembly approving the CES. It held that such legislative approval is not an "action" under the Policy Act.

In substance, the Court concluded that:

> Ultimately, the Policy Act only requires an EIE for activities funded by or proposed to be undertaken by the state. The CES was neither. Because *approval of the CES* is not an action which may significantly affect the environment, as the phrase is defined in §§ 22a-1b(c) and 22a-1c, the plaintiff has failed to state a claim under the Policy Act.

Mem. at 14, A480. (Emphasis added.)

The discussion of the trial court preceding its above-quoted holding suggests that DEEP (through the BETP and PURA) played no role in formulating and proposing a natural gas conversion strategy, initiating the strategy through a series of discretionary determinations approving and modifying the Gas Companies' Plan, and issuing orders

necessary for its implementation. According to the trial court, "the defendants simply followed the legislative duties imposed upon them." Mem. at 13, A479.

The trial court proceeds as if DEEP performed a series of ministerial duties directed by the legislature, as if by rote, with no authorization to make discretionary determinations, especially determinations crucial to whether a natural gas conversion plan would ever be implemented. Implicit in its holding is that the broad statement of objectives enunciated by the legislature could be translated into a concrete natural gas conversion plan, and be implemented, in the absence of discretionary determinations by an agency or agencies.

In fact, the opposite is true. DEEP conceived of and implemented the natural gas conversion program in a way that is different only in form but not in substance from the way that administrative agencies normally formulate and implement programs authorized by the legislature. Typically, the legislature devises a program by stating broad goals, objectives, and strategies, and it delegates to one or more agencies the authority to fashion a program (through regulations or otherwise) that is consistent with the legislative objectives. The authority of the agency to implement the program is usually contained in the same legislation. Here, the legislature proceeded along the same path, but it did so in two separate pieces of legislation, rather than one.

In 2011, the legislature delegated to DEEP the authority to: (i) develop a plan setting forth the essential elements of a program to convert energy users to natural gas; and (ii) recommend legislative and administrative actions to implement the plan. 2011 Act, Section 51, CONN. GEN. STAT. §16a-3d. DEEP developed a natural gas conversion plan with specific elements and recommendations for implementation.

In the 2013 Act, the legislature approved DEEP's Plan and the administrative steps proposed by DEEP to implement it, and it delegated to DEEP the authority to implement the plan as proposed. 2013 Act, Section 51, CONN. GEN. STAT. §§ 16-19ww(d). Although the legislature proceeded in two steps rather than one, it nevertheless delegated to DEEP the authority to make discretionary determinations, without which the program would not have been developed, and without which it would not have been implemented.

The trial court erred in focusing on the acts of the legislature and not on the discretionary determinations and other implementation activities of DEEP. The conversions to natural gas that are at the heart of this case could not have been implemented without DEEP's actions.

C. The Complaint States A Legally Sufficient Claim Under The Policy Act

1. DEEP Proposed And Initiated "Actions" Within The Meaning Of The Policy Act And DEEP's Regulations

The standard of review of a trial court's conclusions on a matter of law is *de novo*. Watts v. Chittenden, 301 Conn. 575, 585, 22 A.3d 1214 (2011).

In moving to dismiss the complaint, the defendants focused on the acts of the legislature and the gas companies, ignoring the intervening acts of DEEP and PURA. They attempted to portray DEEP and PURA as functionaries who played no meaningful role in the formulation and implementation of the State's natural gas conversion program.

The trial court followed suit. It diminished the significance of DEEP's actions, characterizing them as ministerial acts of adherence to strict and narrowly tailored legislative commands. See Mem. at 13, A479 ("the defendants simply followed the legislative duties imposed on them."). The record, however, shows otherwise.

The legislature had neither the technical expertise nor the inclination to make the types of determinations it delegated to DEEP. As is customary, it relied on the expertise of the administrative agencies to make the determinations necessary to implement Connecticut's natural gas conversion program. The determinations of DEEP (acting through the BETP and PURA) were essential prerequisites to implementation of the plan and, as such, they were acts of initiation within the meaning of the Policy Act.

In the 2011 Act, the legislature mandated that DEEP propose a comprehensive energy strategy for the State of Connecticut. 2011 Act, Section 51, CONN. GEN. STAT. §16a-3d. As part of the CES, DEEP proposed the elements and contours of a natural gas conversion plan, and it proposed a series of administrative actions that placed DEEP at the center of the implementation process.

DEEP's proposal requested authority to review the Gas Companies Plan, to determine its consistency with the CES, to modify the Gas Companies Plan, and, through PURA, to make the changes to the regulatory structure necessary to ensure its feasibility and, ultimately, to approve it. In short, DEEP proposed a sequence of activities leading to performance of the conversions by the gas companies.

This sequence of activities was first proposed by DEEP. None of the activities were mandated by or even mentioned in the 2011 Act. Had DEEP not fashioned a natural gas conversion plan, and had DEEP not proposed the administrative steps to implement it, there would have been no plan for the legislature to approve or endorse.

After the enactment of the 2013 Act, DEEP was vested with discretion to review the Gas Companies' Plan and to determine whether it is consistent with DEEP's plan. DEEP approved the Gas Companies Plan only after the gas companies made numerous revisions

to their plan that were directed by DEEP. Much of the Gas Companies' Plan is the work of DEEP.

Had DEEP not made the consistency determination, the plan would not have moved forward to final approval by PURA. The 2013 Act provides in pertinent part that "[i]n the event the commissioner determines that the [gas companies'] plan is consistent with the Comprehensive Energy Strategy . . . the Public Utilities Regulatory Authority shall . . . approve or modify the plan . . ."[14] There would have been no plan to "approve or modify" had DEEP not made the threshold determination of consistency.[15]

Moreover, the legislative delegation to PURA to "approve or modify" the plan was extremely broad. PURA had almost unfettered discretion to condition its approval on modifications by the gas companies to their natural gas conversion plan. An agency's power to approve conditionally is inherent in the power to approve or disapprove. *Connecticut Fund For The Environment v. E.P.A*., 672 F.2d 998, 1006 (2nd Cir. 1982). This broad discretion provided PURA with the power to influence and shape the Gas Companies' Plan and the activities necessary to implement it.

Thereafter, PURA approved and modified the Gas Companies' Plan. It also made a series of discretionary determinations to change the rate structure in ways that were necessary to the plan's feasibility, including determinations to lower the hurdle rate for recoupment of costs by the gas companies. Had PURA not approved the Gas Companies'

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[14] CONN. GEN. STAT §§ 16-19ww(c).

[15] DEEP's consistency determination is much the same as the determination made by the Department of Planning and Energy Policy in *Manchester Environmental Coalition*, 184 Conn. at 54-55. There, the Department of Planning and Energy Policy was required to determine that the project at issue "is not inimical to any statewide planning program objectives." *Id.* The Department's "not inimical to" determination was a prerequisite to the approval of the project by the Commissioner of Commerce. Here, DEEP's consistency determination was a prerequisite for approval of the gas companies' plan by PURA.

Plan as modified, and had PURA not made these other determinations, the gas companies' conversion plan could never have been implemented. PURA's actions, as effectuated in 22 separate orders, were a major part of the implementation process.

Thus, DEEP proposed (made the primary recommendation for) activities that may significantly affect the environment, making it the "sponsoring agency" for purposes of CONN. AGENCIES REGS. § 22a-1a-2. It also initiated the activities, after legislative approval, by making discretionary determinations that were essential to permitting the gas companies to carry out their plan. DEEP's actions (through its constituent agencies, the BETP and PURA) were "actions" within the meaning of the Policy Act and its implementing regulations.

2. The Actions Of DEEP As Alleged In The Complaint Will Significantly Affect The Environment.

The complaint alleges that if DEEP had performed an environmental assessment, it would have determined that the natural gas expansion plan will have a significant effect on the environment. Complaint ("C.") at ¶50, A15.

The complaint alleges that that DEEP's Plan, which proposes to convert 300,000 additional homes to natural gas and to build 900 miles of new gas lines, will significantly increase the amount of methane, a greenhouse gas, that is emitted each year by Connecticut's gas companies. C. ¶7, A7. Currently, the natural gas distribution system in Connecticut is leaking over 200,000 metric tons of methane per year while serving 415,000 customers. C. ¶6, A6. Since the DEEP's Plan would almost double the number of gas customers, increased methane emissions must result and their extent should have been assessed and, if necessary, moderated. C. ¶50, A15.

As set forth in the complaint, the impact of methane is considerably more serious than that of carbon dioxide. The United States Environmental Protection Agency ("EPA") has concluded that methane is more than 20 times as effective as carbon dioxide in trapping heat in the atmosphere. C. ¶7, A7. For this reason, Connecticut has established targets for decreased greenhouse gas emissions in the state's Global Warming Solutions Act. CONN. GEN. STAT. §§ 22a-200 thru 22a-200e. The conversion activities at issue in this case "could serve short term to the disadvantage of long term environmental goals." CONN. GEN. STAT. § 22a-1b(c).

The complaint also alleges that that DEEP's plan to build 900 miles of new gas lines requires construction activities that will adversely impact the State's freshwater wetlands, soils, water, groundwater aquifers, trees and wildlife habitat. C. ¶65, A19. The complaint states that these consequences, like the increased methane emissions, should also have been assessed and, if necessary, moderated. C. ¶70, A20.

All of these activities were undertaken with no environmental review whatsoever. If the trial court's decision is allowed to stand, the statutory and regulatory procedure by which the natural gas conversion plan was conceived of and implemented will serve as a blueprint for future action. The State will be able to avoid an environmental review of selected projects by following the process it followed here.

Such a result was not contemplated by the Policy Act. The Policy Act was designed to ensure a thoughtful and meaningful consideration of environmental issues. The procedures mandated by the Policy Act should have been invoked in this case.

CONCLUSION

The decision of the trial court dismissing the complaint for lack of subject matter jurisdiction should be reversed. The matter should be remanded to the trial court with instructions consistent with a determination that DEEP proposed and initiated an "action" within the meaning of the Policy Act and for proceedings to determine whether DEEP's "action" will arguably have a significant effect on the environment.

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CERTIFICATION

Pursuant to Practice Book § 67-2(g), I hereby certify that:

(1) on February ___, 2016, the electronically submitted brief and appendix were delivered electronically to the last known email address of each counsel of record for whom an email address has been provided, as listed below; and

(2) the electronically submitted brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law.

Pursuant to Practice Book § 67-2(i), I hereby certify that:

(1) on February ___, 2016, a copy of the brief and appendix was delivered by first-class mail, postage prepaid, to each counsel of record listed below, in compliance with Practice Book § 62-7, and to the Honorable Kevin G. Dubay, the trial judge who rendered the decision that is the subject of the appeal;

(2) the brief and appendix being filed with the Appellate Clerk are true copies of the brief and appendix that were submitted electronically pursuant to Practice Book § 67-2(g);

(3) the brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

(4) the brief complies with all applicable rules of appellate procedure, including the provisions of Practice Book § 67-2 and § 62-7.

Pursuant to Practice Book § 67-2(j): a copy of the electronic confirmation receipt indicating that the brief and appendix were submitted electronically in compliance with Practice Book § 67-2(g) is being filed with the original brief.

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