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Fresh Air for the Eastside, Inc.

The State of New York
New York State Department of Environmental Conservation
The City of New York
Waste Management of New York, L.L.C.

Total Fees Paid: \$0.00

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State of New York

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

FRESH AIR FOR THE EASTSIDE, INC.,

Plaintiff,

- v. -

Index No. E2022000699

Hon. John J. Ark

THE STATE OF NEW YORK,
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,
THE CITY OF NEW YORK,
WASTE MANAGEMENT OF NEW YORK, L.L.C.,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF
THE STATE'S MOTION TO DISMISS**

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TABLE OF CONTENTS

PRELIMINARY STATEMENT..... 1

STATUTORY AND REGULATORY BACKGROUND 2

 A. Regulation of Solid Waste Landfills in New York..... 2

 B. The Green Amendment 5

FACTUAL BACKGROUND 6

 A. The Landfill..... 6

 B. Control of Odors and Greenhouse Gas Emissions at the Landfill
 Through Permits Issued by DEC 7

 C. Monitoring and Enforcement by DEC 9

FAFE’S COMPLAINT 10

ARGUMENT..... 13

 POINT I FAFE’s Challenge to DEC’s Actions Is Properly Brought Under
 CPLR Article 78 13

 POINT II Even if Converted to a Special Proceeding Under CPLR Article 78,
 FAFE’s Claim Against the State Should Be Dismissed. 16

 A. FAFE’s Challenge to the Permits Is Untimely..... 17

 B. The Court May Not Compel DEC to Exercise Its Enforcement
 Discretion. 19

CONCLUSION 23

WORD COUNT CERTIFICATION PURSUANT TO RULE 202.8-B 24

TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>Alliance Network, LLC v. Sidley Austin LLP</i> , 987 N.Y.S.2d 794 (Sup. Ct. N.Y. Cnty. 2014)	7
<i>Ayman v. Teachers’ Retirement Bd.</i> , 9 N.Y.2d 119 (1961)	17
<i>Brooks v. County of Onondaga</i> , 167 A.D.2d 862 (4th Dept. 1990)	18
<i>Butler v. Wing</i> , 275 A.D.2d 273 (1st Dept.), <i>lv. denied</i> 95 N.Y.2d 770 (2000)	15
<i>Community Action against Lead Poisoning v. Lyons</i> , 43 A.D.2d 201 (3d Dept. 1974), <i>aff’d</i> , 36 N.Y.2d 686 (1975).....	20
<i>Consol. Edison Co. v State Bd. of Real Prop. Servs.</i> , 255 A.D.2d 8 (3d Dept. 1999)	14
<i>Entergy Nuclear Operations, Inc. v. New York State Dept. of State</i> , 28 N.Y.3d 279 (2016)	15
<i>Greystone Mgt. Corp. v. Conciliation & Appeals Bd. of City of N.Y.</i> , 62 N.Y.2d 763 (1984)	13
<i>Heckler v. Chaney</i> , 470 U.S. 821 (1985).....	20
<i>Imandt v. N.Y.S. Unified Court Sys.</i> , 168 A.D.3d 1051 (2d Dept. 2019)	17
<i>James v. Alderton Dock Yards</i> , 256 N.Y. 298 (1931)	16
<i>Klostermann v. Cuomo</i> , 61 N.Y.2d 525 (1984)	20
<i>Kovarsky v Hous. & Dev. Admin.</i> , 31 N.Y.2d 184 (1972)	15
<i>Matter of Barhite v. Town of Dewitt</i> , 144 A.D.3d 1645 (4th Dept. 2016), <i>lv. denied</i> , 29 N.Y.3d 902 (2017).....	20
<i>Matter of Foley v. Masiello</i> , 38 A.D.3d 1201 (4th Dept. 2007)	17

Matter of Overhill Bldg. Co. v. Delany,
28 N.Y.2d 449 (1971) 14

Matter of Russo v. Jorling,
214 A.D.2d 863 (3d Dept. 1995), *lv denied*, 86 N.Y.2d 705 (1995) 16

Metro. Taxicab Bd. of Trade v. N.Y.C. Taxi & Limousine Commn.,
115 A.D.3d 521 (1st Dept. 2014) 21

Smoke v. Planning Bd. of Town of Greig,
138 A.D.3d 1437 (4th Dept. 2016) 13

Town of Marilla v. Travis,
151 A.D.3d 1588 (4th Dept. 2017) 14

Watergate II Apartments v. Buffalo Sewer Auth.,
46 N.Y.2d 52 (1978) 18

Waterside Assocs. v. New York State Dept. of Env't. Conservation,
72 N.Y.2d 1009 (1988) 14

Witryol v. CWM Chem. Servs., L.L.C.,
174 A.D.3d 1449 (4th Dept. 2019) 16

STATE STATUTES

Environmental Conservation Law

§ 27-0106 3

§ 27-0703 2

§ 27-0707 3

§ 27-0707(2) 3,4,7

§ 70-0115 4

§ 70-0115(1) 20

§ 71-2727 21

State Administrative Procedure Act

§ 401(2) 8

STATE REGULATIONS

6 New York Codes, Rules and Regulations

§ 201-6.3(c) 4

§ 211.1 9

§ 360-1.4 4

§ 360-1.9(d)(1) 3,7

§ 360-1.9(d)(3) 3,7

§ 360-1.11 4

§ 360-1.14 3

§ 360-1.14(m) 9

§ 360-2.3 3

§ 360-2.3(f) 7

§ 360-2.9 3,7

§ 360-2.11 3

§ 360-2.17 3,7

§ 360.19(i) 9

§ 621.11(l) 8

§ 621.13 4

§ 621.13(a) 20

§ 621.13(a)(4) 18

§ 621.13(b) 18

FEDERAL REGULATIONS

40 CFR 60 8

40 CFR

§ 60.755(b) 8

§ 60.755(c) 8

§ 60.755(d) 8

FEDERAL REGISTER

66 Fed. Reg. 63,180 (December 5, 2001) 4

RULES

Civil Practice law and Rules

§103(c) 16

§217(1) 17

§3001 16

§7803(1) 14

§7803(4) 14

PRELIMINARY STATEMENT

In this plenary action, plaintiff Fresh Air for the Eastside, Inc. (“FAFE”) claims that defendants the State of New York and New York State Department of Environmental Conservation (“DEC”) (together, the “State”), have violated New York’s recently passed “Green Amendment” by issuing two permits to a landfill and by exercising their enforcement discretion regarding the landfill’s operations. This lawsuit—the first against New York State or a state agency under the Green Amendment—is not the proper vehicle to raise those claims and should be dismissed as to the State because FAFE challenges quintessential agency actions that are properly challenged in a special proceeding under CPLR Article 78.

The first permit (the “Landfill Permit”) was issued to defendant Waste Management of New York LLC (“Waste Management”) for the High Acres Landfill and Recycling Center (the “Landfill”), located in the Towns of Perinton and Macedon, in October 2013. It allowed Waste Management to construct an intermodal rail facility to receive waste from other areas, including from defendant the City of New York, and modified an existing permit that authorized the Landfill to operate as a solid waste management facility. The second permit issued to Waste Management (the “Air Permit”) caps the quantity of various gases the Landfill may release into the environment. Under these permits (together, the “Permits”), DEC holds extensive authority to oversee the Landfill’s activities and to enforce violations of the Permits, applicable provisions of the Environmental Conservation Law (“ECL”), and DEC’s regulations implementing that statutory law.

FAFE claims that the State has violated the Green Amendment—which provides that “[e]ach person shall have a right to clean air and water, and to a healthful environment”—because the Permits do not adequately restrict odors and the emissions of gases, including greenhouse gases, and because DEC has failed to take enforcement action regarding such odors and emissions. FAFE’s cause of action against the State should be dismissed because challenges to agency actions, including permit approvals and agency decision-making about enforcement, are properly brought under Article 78, not in a plenary action. Even if FAFE’s cause of action against the State is converted to a special proceeding under Article 78, it should be dismissed because FAFE’s challenge to the Permits is untimely and the Court may not compel DEC to exercise its enforcement discretion. Dismissal of this action would not preclude FAFE from seeking review of the Permits through other means, including petitioning DEC to modify, suspend, or revoke the Permits based on the Green Amendment and, if DEC determines there is no basis to do so, seeking review of DEC’s decision under Article 78.

STATUTORY AND REGULATORY BACKGROUND

A. Regulation of Solid Waste Landfills in New York

Solid waste landfills in New York are regulated under Article 27 of the Environmental Conservation Law, which empowers DEC to develop a comprehensive regulatory program to govern all aspects of landfill management, including siting, design, construction, and operation. ECL § 27-0703. Depending on its size and amount of emissions, a landfill’s air emissions are also regulated under the federal Clean Air Act and under State air regulations.

1. Solid Waste Management under the ECL

To operate lawfully, a landfill requires a solid waste management facility permit issued by DEC. *See* ECL § 27-0707. In 2017, DEC adopted final revisions to its Part 360 regulations for solid waste management. Under the ECL and Part 360, both before and after the 2017 revisions, a renewal application for a solid waste management permit must, among other things, describe how the facility is consistent with the solid waste management policy set forth under ECL § 27-0106, *i.e.*, the so-called Solid Waste Hierarchy, under which the State prioritizes the reduction, reuse, and recovery of solid waste, followed by its disposal. *See* ECL § 27-0707(2); *see also* 6 NYCRR §§ 360-1.9(d)(1), (3).

If permitted before the 2017 revisions, a landfill must comply with all permit conditions and DEC's extensive pre-2017 Part 360 requirements for operation of a solid waste management facility, including: (1) maintaining a waste control program; (2) preventing waste and leachate from entering surrounding waters except as otherwise authorized by DEC; (3) conducting self-inspections; and (4) controlling dust, vectors (*e.g.*, pests), odors, and noise. *See* 6 NYCRR §§ 360-1.14, 360-2.17. It must also comply with significant additional obligations imposed on landfills, including requirements for operating; installing daily, intermediate, and final landfill cover material; monitoring ground and surface waters; controlling decomposition gases, such as methane; and operations during winter and inclement weather. *See id.* §§ 360-2.3, 360-2.9, 360-2.11, 360-2.17.

Landfills are subject to comprehensive inspection, monitoring, and enforcement oversight by DEC. *See* 6 NYCRR §§ 360-1.4, 360-1.11. Failure to comply

with any applicable requirement constitutes a violation, which DEC may enforce by requiring corrective measures or by modifying, suspending, or revoking the permit. *See* ECL §§ 27-0707(2), 70-0115; *see also* 6 NYCRR §§ 360-1.4, 621.13. DEC may also impose significant civil penalties upon a violator. *See* ECL § 27-2703(1)(a).

2. Air Emissions under the Clean Air Act and the Climate Law

When a landfill constitutes a “major source” of air emissions, it is subject to the air pollution control requirements under Title V of the federal Clean Air Act. EPA has approved New York’s Title V operating permit program, which authorizes DEC to implement and enforce the Clean Air Act’s Title V permit program in New York. *See* 66 Fed. Reg. 63,180 (December 5, 2001); *see also* 40 CFR Part 70; 6 NYCRR Part 201. Prior to the issuance of a Title V permit by DEC, EPA has the right to review and object to any proposed permit. *See* 6 NYCRR § 201-6.3(c).

A landfill’s Title V permit contains requirements for monitoring, record-keeping, and reporting of air emissions to DEC. A Title V permittee must certify compliance each year to DEC and the permit must be renewed every five years. Pursuant to its EPA-approved authority, DEC is empowered to enforce violations of any condition or requirement set forth under the permit.

New York’s Climate Leadership and Community Protection Act (“Climate Law”), which became effective in January 2020, requires New York to reduce 1990 levels of Statewide greenhouse gas emissions by 40 percent by 2030 and by no less than 85 percent by 2050. *See* ECL § 75-0107(1); *see also* 6 NYCRR § 496. In addition, when a state agency issues permits or takes other action, the Climate Law requires the agency to consider whether the action is “inconsistent with or will interfere with

the attainment” of greenhouse gas emissions limits established under the Law. *See* Climate Law § 7. As noted by FAFE, as required by Section 7 of the Climate Act, DEC has applied the Climate Law in its review of applications for permits, including air permits for natural gas power plants, which emit greenhouse gases. *See* Compl. ¶ 102.

B. The Green Amendment

In November 2021, New Yorkers voted to adopt a new section 19 to Article I of the New York State Constitution. Commonly called the “Green Amendment,” it provides that: “Each person shall have a right to clean air and water, and to a healthful environment.”

The sponsor memo for the bill that was later adopted by voters explained that several other states, including Pennsylvania, Hawaii, Illinois, Massachusetts, and Montana, had adopted green amendments and stated that the proposed amendment would follow those models. *See* NY Assembly Memorandum in Support of Legislation for Assembly Bill A6279, Apr. 24, 2017, Affirmation of Mihir Desai, Ex. 1. However, the amendment passed by the Legislature differs from those of other states, which expressly impose specific obligations on the state and/or means for enforcement of the amendment.¹

¹ For example, the green amendments of Pennsylvania, Hawaii, Illinois, and Montana provide as follows:

Pennsylvania: The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people. Pa. Const. Art. I § 27.

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During debate in the Assembly and Senate, the legislative sponsors recognized a “context of need” that had arisen from new and as yet unregulated environmental harms, including “[n]ew contamination events, new threats to the public health in places like Hoosick Falls and Newburgh and West Hampton.” Assemblyman Englebright, NY Assembly Debate on Assembly Bill A6279, Apr. 24, 2018, at 53-54, Desai Aff. Ex. 2. The Assembly sponsor indicated the legislation “does not change [] any of the existing laws of the State.” NY Assembly Debate on Assembly Bill A1368, Feb. 8, 2021, at 35-36, Desai Aff. Ex. 3. Further, the bill “does not create anything new in terms of rights of action.” *Id.* at 39.

FACTUAL BACKGROUND

A. The Landfill

The Landfill is in the Town of Perinton in Monroe County and the Town of Macedon in Wayne County. The Landfill opened on land adjacent to a former landfill in the mid-1990s and has expanded into the Towns of Perinton and Macedon. *See id.* ¶¶ 25, 28-31. FAFE alleges that, since 2015, the Landfill has increasingly accepted

Hawaii: Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law. Haw. Const. Art. XI § 9.

Illinois: Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law. Ill. Const. Art. XI, § 2.

Montana: The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations. The legislature shall provide for the administration and enforcement of this duty. The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources. Mont. Const. Art. IX § 1.

municipal solid waste transported from New York City, which now represents about 90 percent of all such waste disposed of at the Landfill. *See id.* ¶¶ 32-34.

B. Control of Odors and Greenhouse Gas Emissions at the Landfill Through Permits Issued by DEC

DEC regulates the release of odors and air emissions from the Landfill under the Landfill Permit and the Air Permit.

The Landfill Permit. DEC renewed the Landfill Permit in July 2013 and modified it in October 2013 under the pre-2017 Part 360 regulations for solid waste management. *See* Landfill Permit, Ex. 1 to Affidavit of Thomas P. Haley;² *see also* Compl. ¶¶ 23, 24. Under the ECL and Part 360 regulations, Waste Management’s application to renew that permit was required to include a statement that the permit renewal would be consistent with the Solid Waste Hierarchy. *See* ECL § 27-0707(2); *see also* 6 NYCRR §§ 360-1.9(d)(1), (3). The July 2013 renewal permit authorized Waste Management to continue operating the Landfill and the October 2013 modification allowed Waste Management to construct and operate a rail facility to accept waste from the CSX railroad. *See* Landfill Permit at 1, Haley Aff. Ex. 1.

The Landfill Permit, among other things, requires Waste Management to comply with various programs in its DEC-approved operations and maintenance manual (“O&M Manual”) with respect to gas and odors, including a system to collect methane and other decomposition gases generated by the Landfill for combustion at the facility and monitoring for methane and hydrogen sulfide (H₂S). *See* O&M

² In reviewing a motion to dismiss, courts may consider documents referenced in the complaint. *See Alliance Network, LLC v. Sidley Austin LLP*, 987 N.Y.S.2d 794 (Sup. Ct. N.Y. Cnty. 2014).

Manual at 41, Haley Aff. Ex. 2; *see also* 6 NYCRR §§ 360-2.17, 360-2.3(f), 360-2.9. The Landfill also operates under an Odor Control Plan which, among other things, requires daily and intermediate cover, the use of a gas collection system to contain landfill gas emissions, and immediate disposal or covering of particularly odorous waste. *See* O&M Manual at A-5 to A-8, Haley Aff. Ex. 2. The Landfill Permit expires July 8, 2023. Landfill Permit at 1, Haley Aff. Ex. 1; *see also* Compl. ¶ 24.

The Air Permit. The Landfill also operates under the Air Permit issued by DEC in December 2016 pursuant to Title V of the Clean Air Act. *See* Air Permit, Haley Aff. Ex. 3; *see also* Compl. ¶ 23. Under the State Administrative Procedure Act, § 401(2), Waste Management has continued to operate under the Air Permit after it expired on December 1, 2021. *See* Compl. ¶ 27; *see also* 6 NYCRR § 621.11(l).

The Air Permit requires Waste Management to limit surface emissions of methane to 500 parts per million (“ppm”) above background, monitor surface methane, and verify that non-methane organic compounds emitted as a result of flaring (burning) methane are within thresholds established by U.S. EPA. *See* Air Permit, Condition 62, Item 69.2, Haley Aff. Ex. 3; 40 CFR § 60.755(c). Waste Management must monitor surface methane on a quarterly basis around the perimeter of the collection area and along a pattern that traverses the Landfill. *See* Air Permit, Condition 69, Item 69.1, Haley Aff. Ex. 3; 40 CFR § 60.755(d); *see also* Compl. ¶ 69. Any reading of 500 ppm or greater requires Waste Management to implement corrective action measures. *See id.*; 40 CFR § 60.755(b). The Air Permit recognizes that emissions monitoring may be impossible if areas of the Landfill are

covered with snow and/or ice for an entire quarter. *See* Air Permit, Condition 74, Item 74.2, Haley Aff. Ex. 3; *see also* 40 CFR 60, Subpart WWW.

C. Monitoring and Enforcement by DEC

DEC may modify, suspend, or revoke the Permits and may require Waste Management to correct, abate, or remediate any non-complying condition as determined by DEC. *See* Landfill Permit, General Condition 4, Special Conditions 2 and 5, Haley Aff. Ex. 1; Air Permit, General Permittee Obligations, Items D and E, Haley Aff. Ex. 3. In its discretion, DEC may also determine that the Landfill's emission of odors constitutes a nuisance and bring an enforcement action to abate the nuisance. *See* 6 NYCRR §§ 360-1.14(m), 360.19(i), 211.1.

In winter 2018, after odors from the Landfill began affecting the local community, DEC issued a "Notice of Violation" that required Waste Management to implement several corrective actions at the Landfill, reduce allowable methane gas emissions from the surface of the Landfill from 500 ppm to 200 ppm, and amend the Landfill's Gas Management Program to meet the more stringent requirements for solid waste management under DEC's 2017 revised regulations. *See* Compl. ¶ 71; *see also* Notice of Violation, Haley Aff. Ex. 4. As a condition of DEC's Notice of Violation, Waste Management incorporated these requirements into the Landfill's O&M Manual. *See* O&M Manual at Appx. C, Haley Aff. Ex. 2. DEC also ordered Waste Management to temporarily close two areas of the Landfill—Cells 10 and 11—and cover those areas with a plastic geomembrane until odors were eliminated. *See* Compl. ¶ 61; *see also* Notice of Violation, Haley Aff. Ex. 4.

FAFE’S COMPLAINT

As alleged by FAFE, Waste Management’s operation of the Landfill under the Permits and DEC’s failure to enforce violations the Permits is causing odors, greenhouse gases, and other emissions to be released into the surrounding community, affecting FAFE’s members.

FAFE alleges that, following construction of the rail facility to accept waste from New York City, there were at least 161 exceedances of the 500 ppm level for methane in the Air Permit and at least 188 exceedances of the lower 200 ppm level ordered by DEC in its February 2018 Notice of Violation. Compl. ¶¶ 71, 78, 79, 96. FAFE alleges that Waste Management has estimated that total greenhouse gas emissions from the Landfill in 2052 will be approximately 210,000 tons per year. *Id.* ¶ 95. FAFE also alleges that high methane emissions imply leakages of other gases, including hazardous air pollutants and VOCs. *Id.* ¶ 76.

FAFE also states that the Air Permit does not require Waste Management to measure emissions of gases other than methane, such as VOCs and hazardous air pollutants, or emissions at either the Landfill’s “side slopes” or in areas under construction, and that inclement weather during winter months can prevent quarterly monitoring. *Id.* ¶¶ 73, 74, 75, 82, 96, 97. FAFE claims that, as a result, methane and carbon dioxide, which are greenhouse gases, and other gases, including VOCs and hazardous air pollutants, are emitted beyond levels allowed in the Air Permit. *Id.* ¶¶ 40, 41, 44, 45. These pollutants include compounds that smell of rotten eggs. *Id.* ¶ 43.

FAFE advocated to DEC for various modifications to the Landfill's operations and maintenance. *Id.* ¶ 64. For example, FAFE alleges it "hired a landfill expert to meet with [DEC] and submitted recommendations to improve Landfill performance," including, for example, covering the side slopes with a permanent membrane to contain gas emissions; conducting more frequent monitoring for gas leaks; and monitoring all Landfill surfaces for gas emissions.³ *Id.* ¶¶ 64, 83. FAFE states that DEC did not adopt these recommendations. *Id.*; *see also id.* ¶ 84. As a result, FAFE alleges the Landfill's odors and gas emissions have "resulted in unclean and unhealthful air" to its members. *Id.* ¶¶ 46, 57; *see also id.* ¶¶ 72, 81, 85, 98.

FAFE brings a single cause of action against each defendant alleging violations of the Green Amendment. FAFE asserts two grounds against the State.

First, FAFE alleges the Permits violate the Green Amendment. *Id.* ¶¶ 156-158; *see also id.* ¶¶ 5, 99, 100, 102, 113, 117-128, 133-134, 165. In particular, FAFE claims in its cause of action that the State has violated the Green Amendment because it "has authorized and permitted activities that emit vast quantities of [greenhouse gases]." Compl. ¶ 157; *see also id.* ¶ 153. That claim refers to the Air Permit, which regulates the Landfill's emissions of greenhouse gases. FAFE also claims that DEC

³ As background information, the State notes that FAFE has submitted recommendations to DEC on several occasions. For example, in July 2018, FAFE submitted a petition to DEC pursuant to Part 621.13(b), requesting that DEC modify the Landfill Permit. *See* FAFE Petition, Haley Aff. Ex. 5. In March 2019, DEC responded to FAFE's petition, in large part denying it. *See* DEC Response to FAFE Petition, Haley Aff. Ex. 6. Subsequently, in August 2021, FAFE wrote to DEC to make related requests regarding the Landfill and summarize the views expressed by FAFE's expert during an April 2021 call with DEC. *See* FAFE Letter to DEC of August 10, 2021, Haley Aff. Ex. 7. After reviewing and considering the expert's views, DEC responded to FAFE two weeks later and stated it would require Waste Management to revise sections of its O&M Manual to clarify Waste Management's obligations under the Permits. *See* DEC Response to FAFE Letter of August 25, 2021, Haley Aff. Ex. 8.

has violated the Green Amendment because “the continued operation of the Landfill is in violation of the Solid Waste Hierarchy.” *Id.* ¶ 158. That claim concerns the Landfill Permit, which governs the continued operation of the Landfill as a solid waste management facility. FAFE also claims that “[t]he continuing emissions of Odors and Fugitive Emissions by the Landfill violate the constitutionally protected, affirmative rights of the Members to ‘clean air ... and a healthful environment.’” *Id.* ¶ 152. That claim involves both the Landfill Permit, which regulates the continuing emission of odors, and the Air Permit, which regulates the continuing emission of greenhouse gases and of odors that “unreasonably interfere with the comfortable enjoyment of life or property.” Air Permit, Condition 30, Item 30.1, Haley Aff. Ex. 3.

Second, FAFE alleges the State and DEC have violated the Green Amendment by failing to take enforcement action to prevent or reduce odors and gas emissions. FAFE claims in its cause of action that the State has violated the Green Amendment by failing “to properly exercise its enforcement powers” (Compl. ¶¶ 152-153); by “allowing repeated permit and regulatory violations at the Landfill and delaying actions to drastically cut [greenhouse gas] emissions” (*id.* ¶ 156); and by failing “to adequately use its enforcement powers to cause [Waste Management] to control the Odors and Fugitive Emissions at the Landfill” (*id.* ¶¶ 163-164; *see also* ¶¶ 58-62).

As relief, FAFE seeks a declaration that the defendants are violating the rights of its members under the Green Amendment. Compl., Wherefore Clause. FAFE also seeks an injunction “directing the immediate proper closure of the Landfill” or alternatively, requiring defendants to abate odors and emissions from the Landfill.

ARGUMENT

FAFE's cause of action should be dismissed or converted to a special proceeding under CPLR Article 78 because it seeks to challenge agency actions and inaction that may only be challenged under Article 78. If converted, FAFE's cause of action should be dismissed because its challenge to the Permits is time-barred and because it challenges agency enforcement decisions that are discretionary and may not be compelled by the Court.

POINT I

FAFE's Challenge to DEC's Actions Is Properly Brought Under CPLR Article 78

FAFE's cause of action for declaratory and injunctive relief against the State should be dismissed—or in the alternative converted to a special proceeding under CPLR Article 78—because in New York, CPLR Article 78 is the appropriate procedural means to seek judicial review of an administrative agency's action or alleged failure to act. “[A] declaratory judgment action is not the proper vehicle to challenge an administrative procedure where judicial review by way of [a CPLR] article 78 proceeding is available.” *Greystone Mgt. Corp. v. Conciliation & Appeals Bd. of City of N.Y.*, 62 N.Y.2d 763, 765 (1984); *see also Smoke v. Planning Bd. of Town of Greig*, 138 A.D.3d 1437 (4th Dept. 2016). To allow this action to proceed in its present form would frustrate the statutory mandate that challenges to agency action, including constitutional challenges, be adjudicated under Article 78.

FAFE bases its cause of action against the State for violation of the Green Amendment on agency actions and alleged failures to act that are reviewable under

Article 78: DEC's issuance of the Permits, which FAFE contends violate the ECL's Solid Waste Hierarchy and the Climate Law (*see pp. 11-12, above*), and DEC's alleged failure to take enforcement action against Waste Management (*see p. 12 above*). As to the first basis, the Permits are "agency determination[s]" that may be timely challenged under Article 78 on the ground, among others, that they were "affected by an error of law." *See* CPLR 7803(4). *See also, e.g., Town of Marilla v. Travis*, 151 A.D.3d 1588, 1590 (4th Dept. 2017) (Article 78 petition seeking to annul determination by DEC to grant Part 360 solid waste management permit to anaerobic digestion facilities). As to the second basis, an agency's alleged "fail[ure] to perform a duty enjoined upon it by law" is also reviewable under Article 78. CPLR 7803(1). *See, e.g., Waterside Assocs. v. New York State Dept. of Env't. Conservation*, 72 N.Y.2d 1009 (1988) (Article 78 proceeding to compel DEC to process pollution discharge permit application pending future mapping of wetlands).

A challenge to agency action or inaction under Article 78 may include a claim that the agency violated the Constitution. *See, e.g., Matter of Overhill Bldg. Co. v. Delany*, 28 N.Y.2d 449, 458 (1971) (Article 78 proceeding in which the Court of Appeals determined that petitioner had not been deprived by zoning board of any reasonable use of his property in violation of his constitutional rights); *Consol. Edison Co. v State Bd. of Real Prop. Servs.*, 255 A.D.2d 8, 11 (3d Dept. 1999) (petitioner's constitutional claims in Real Property Tax Law proceeding should have been brought as Article 78 proceeding). Thus, FAFE may raise its Green Amendment claim in an Article 78 proceeding.

In contrast, it is well established that a challenge to the facial constitutionality of a statute must be brought as a declaratory judgment action. *Kovarsky v Hous. & Dev. Admin.*, 31 N.Y.2d 184, 192 (1972) (holding that while “an article 78 proceeding is generally the proper vehicle to determine whether a statute, ordinance, or regulation has been applied in an unconstitutional manner,” it cannot be used to determine whether a statute is facially unconstitutional). As FAFE’s cause of action against the State is brought as a challenge to whether DEC’s permitting authority and enforcement discretion have been applied in violation of the Green Amendment, rather than as a facial challenge to the constitutionality of any statute, Article 78 is the only appropriate vehicle for its cause of action.

FAFE could also claim in an Article 78 proceeding that the Permits are inconsistent with the policies and requirements under the Climate Law and with the Solid Waste Hierarchy. *See, e.g., Entergy Nuclear Operations, Inc. v. New York State Dept. of State*, 28 N.Y.3d 279, 288 (2016) (Article 78 proceeding to challenge agency determination that relicensing application for nuclear power facility was not exempt from agency review for consistency with policies of New York’s Coastal Management Program); *Butler v. Wing*, 275 A.D.2d 273 (1st Dept.), *lv. denied* 95 N.Y.2d 770 (2000) (Article 78 proceeding is proper for challenge to policy of applying tax refunds to past-due debts to state agencies).

The type of relief FAFE is seeking is also available under Article 78 if FAFE can establish grounds for that relief. The Court has the power to award an injunction requiring DEC to suspend or revoke the Permits and direct closure of the Landfill

(see *Compl.* ¶ 168) or to direct DEC to require daily emissions monitoring and permanent cover over parts of the Landfill (see *id.* ¶ 168, “Wherefore” clauses (1), (2)). See, e.g., *Witryol v. CWM Chem. Servs., L.L.C.*, 174 A.D.3d 1449, 1451 (4th Dept. 2019) (declaration that owner and operator of waste management site must “immediately cease” waste treatment and storage operations is properly sought under CPLR article 78, as opposed to an action for declaratory judgment under CPLR 3001).

Accordingly, because FAFE’s challenge to the State’s action and inaction was required to be brought under Article 78, and FAFE could raise the claims it has made and seek the relief it has sought under Article 78, the Court should dismiss the complaint as it may in the exercise of its discretion under CPLR 3001. See *James v. Alderton Dock Yards*, 256 N.Y. 298, 305 (1931) (“[t]he use of a declaratory judgment, while discretionary with the court, ... is usually unnecessary where a full and adequate remedy is already provided by another well-known form of action”) (internal citation omitted). In the alternative, the Court should convert FAFE’s complaint to a CPLR Article 78 special proceeding. See CPLR 103(c); see also *Matter of Russo v. Jorling*, 214 A.D.2d 863, 864-865 (3d Dept. 1995), *lv denied* 86 N.Y.2d 705 (1995).

POINT II

Even if Converted to a Special Proceeding Under CPLR Article 78, FAFE’s Claim Against the State Should Be Dismissed.

Even if FAFE’s cause of action against the State is converted to a special proceeding under CPLR Article 78, it should be dismissed because FAFE’s challenge to the Permits is untimely, and because the agency inaction challenged by FAFE is discretionary and may not be compelled by the Court.

A. FAFE’s Challenge to the Permits Is Untimely.

Article 78 proceedings are governed by a four-month statute of limitations that begins to run when an agency’s determination is “final and binding upon the petitioner.” CPLR § 217(1). FAFE’s constitutional challenge to the Permits (*see* Compl. ¶¶ 152, 156-158 and pgs. 11-12 above) is untimely because this action was filed more than four months after the Landfill Permit became final and binding in 2013 and the Air Permit became final and binding in 2016.

The four-month bar applies where, as here, “a declaratory judgment action could have been brought pursuant to CPLR article 78,” including a declaratory judgment action brought on constitutional grounds. *Imandt v. N.Y.S. Unified Court Sys.*, 168 A.D.3d 1051, 1053 (2d Dept. 2019). In *Matter of Foley v. Masiello*, the Fourth Department ruled that a union’s declaratory judgment action was subject to Article’s 78’s statute of limitations rather than the six-year statute of limitations for declaratory judgment actions because the union’s constitutional challenge to a wage freeze imposed by the City of Buffalo could have been brought under Article 78. 38 A.D.3d 1201 (4th Dept. 2007). The court explained that “the time for asserting the claim cannot be extended through the simple expedient of denominating the action one for declaratory relief.” *Id.* at 1202 (citations omitted). *See also Imandt*, 168 A.D.3d at 1053.

The limitations period for challenging the Permits was not extended or revived when the Green Amendment went into effect on January 1, 2022. Constitutional provisions, like statutes, apply prospectively absent a clear expression of legislative intent to apply them retroactively. *See, e.g., Ayman v. Teachers’ Retirement Bd.*, 9

N.Y.2d 119, 125 (1961) (it is “[a] general rule of construction that statutes as well as constitutional provisions are to be construed as prospective only, unless a clear expression of intent to the contrary is found”); *Brooks v. County of Onondaga*, 167 A.D.2d 862, 863 (4th Dept. 1990) (same). Because there was no clear expression of legislative intent to apply the Green Amendment retroactively, it does not apply to DEC’s issuance of the Permits in 2013 and 2016.⁴ Accordingly, to the extent that FAFE’s cause of action against the State is premised on a challenge to the Permits, the cause of action should be dismissed as untimely.

But FAFE has other means to seek review of the Permits. While FAFE does not ask the Court to modify or revoke the Permits here—nor could it without exhausting its administrative remedies, *see Watergate II Apartments v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978)—FAFE may petition DEC to modify or revoke the Permits on the ground that they violate the Green Amendment and may request the same relief it requests here, *i.e.*, final cover and daily emissions monitoring or closure of the Landfill. *See* 6 NYCRR §§ 621.13(a)(4), 621.13(b) (DEC “may consider requests from any interested party for modification, suspension, or revocation” of a permit issued by DEC where, among other things, there is “a material change in ... applicable law or regulations since the issuance of the existing permit”).

If FAFE files such a petition and DEC determines that the Green Amendment does not provide a basis to modify or revoke the Permits, FAFE may seek judicial

⁴ The same analysis would apply to the Climate Law, which became effective on January 1, 2020 and which FAFE raises as a ground for its Green Amendment claim.

review under Article 78.⁵ That procedure would allow DEC to make any regulatory and technical determinations within its area of expertise so that a court could consider FAFE's Green Amendment claim with the benefit of a full administrative record. Alternatively, FAFE may raise its Green Amendment claim by filing a timely Article 78 petition if and when DEC makes a determination to renew the Permits.

B. The Court May Not Compel DEC to Exercise Its Enforcement Discretion.

FAFE's claim that the State has violated the Green Amendment is also premised on DEC's alleged failure to take enforcement action regarding odors and emissions at the Landfill. *See* Compl. ¶¶ 153, 156, 163 and p. 12 above. In the absence of a mandate to enforce the law, DEC, like all law enforcement agencies, has discretion to enforce the law and cannot be compelled by a court to do so. The Permits, the ECL, and the regulations grant DEC the discretion to take enforcement action and FAFE identifies no language in the Green Amendment requiring DEC to take enforcement action regarding every possible violation. As a result, FAFE's request that the Court compel the State to enforce should be dismissed.

Mandamus to compel "is an extraordinary remedy that, by definition, is available only in limited circumstances." *Klostermann v. Cuomo*, 61 N.Y.2d 525, 537

⁵ As background for the Court, the State notes that FAFE is familiar with this Part 621 procedure because, in 2018, it petitioned DEC to modify or revoke the Permits based in part on its allegations that increased waste from New York City constituted changed circumstances. *See* FAFE Petition, Haley Aff. Ex. 5; Complaint ¶¶ 64, 66 (discussing FAFE's retention of an expert to meet with DEC and its submission of recommendations to DEC). DEC largely denied the petition, including FAFE's requests that the Landfill's cells in Perinton be closed; that its permitted height in Macedon be reduced; that additional daily cover requirements be imposed; and that Waste Management be directed to stop accepting rail waste if it becomes a nuisance in the future. *See* DEC Response to FAFE Petition, Haley Aff. Ex. 6. FAFE did not seek judicial review of DEC's determination nor does it allege otherwise in its Complaint.

(1984). Mandamus is available only to force a public official to perform a ministerial duty enjoined by law. *See Matter of Barhite v. Town of Dewitt*, 144 A.D.3d 1645, 1648 (4th Dept. 2016), *lv. denied*, 29 N.Y.3d 902 (2017). The United States Supreme Court has long recognized “that an agency’s decision not to prosecute or enforce . . . is a decision generally committed to an agency’s absolute discretion,” which courts are particularly ill-equipped to review. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Courts in New York agree. *See also Community Action against Lead Poisoning v. Lyons*, 43 A.D.2d 201, 202-03 (3d Dept. 1974), *aff’d*, 36 N.Y.2d 686, 688 (1975) (holding that mandamus to compel is not available to require health department to enforce laws and regulations relating to the prevention of lead poisoning.)

FAFE claims that DEC has failed to take various enforcement actions, including enforcing the methane action levels and odor control requirements in the Air Permit and the requirements in NYCRR Part 360 for control of odors and permanent cover of areas of the Landfill not being actively landfilled. *See Compl.* ¶¶ 153, 156, 163-164, 168. However, the ECL, the regulations, and the Permits make clear that DEC has discretion to enforce their provisions. Under the ECL, DEC “*may* modify, suspend or revoke a permit” and “*may*” enjoin violations. *See ECL* §§ 70-0115(1) (emphasis added), 71-2703(1) (emphasis added). Under several provisions of the Title 6 regulations, DEC permits “*may* be modified, suspended or revoked at any time” by DEC. *See 6 NYCRR* §§ 621.13(a) (emphasis added); *see also* 360.9(d), 360.16(e), 201-1.12, 201-6.4 (post-2017 Part 360 regulations). Additionally, DEC “*may* issue, modify and revoke orders” to prohibit violations of law and require a permittee

to implement remedial measures and corrective actions. ECL § 71-2727 (emphasis added). Under the Permits, DEC expressly reserved its ability to modify, suspend, or revoke the Permits to correct, abate, or remediate any non-complying condition as determined by DEC. *See* Landfill Permit, General Condition 1, Haley Aff. Ex. 1; Air Permit, General Permittee Obligations, Items D and E, Haley Aff. Ex. 3.⁶

Indeed, DEC exercised its enforcement discretion with respect to methane, odors, and landfill cover in its February 2018 Notice of Violation, where it lowered the 500 ppm action level for methane emissions to 200 ppm and required Waste Management to implement improvements to its landfill gas collection system, conduct separate real-time monitoring for hydrogen sulfide (H₂S) gas, and close certain areas of the Landfill and apply an intermediate soil cover and geo-membrane cover for those areas until odors were considered resolved. *See* Compl. ¶¶ 59, 61, 71; Notice of Violation, Haley Aff., Ex. 4. Subsequently, DEC required Waste Management to revise sections of its O&M Manual and its plans related to control of odors and gases to “clarify and refine” its obligations under the Permits. *See* DEC Response to FAFE Letter of August 25, 2021, Haley Aff. Ex. 8.

⁶ If FAFE’s contention regarding the Solid Waste Hierarchy is based on a failure to enforce rather than a challenge to the Landfill Permit (*see* Compl. ¶ 158 and pg. 12 above), the Hierarchy also imposes no mandatory duty on DEC to take any particular enforcement action. Instead, it is a pronouncement of State policy for the management of solid waste. Similarly, the Hierarchy does not require DEC to promulgate regulations to implement its policies. *See Metro. Taxicab Bd. of Trade v. N.Y.C. Taxi & Limousine Commn.*, 115 A.D.3d 521, 525 (1st Dept. 2014) (“[A] governmental function such as rulemaking is necessarily an exercise of judgment and discretion performed in the public interest”) (citations and quotations omitted); *see also Hervias v. City of N.Y.*, 154059/2017, 2017 NYLJ LEXIS 3523, *4 (Sup. Ct. N.Y. Cty., Nov. 29, 2017) (denying mandamus to compel New York City to establish standards for regulating taxicab medallions because such regulatory action is clearly discretionary).

By its plain language, the Green Amendment does not impose any mandatory duty on the State to take enforcement action or otherwise withdraw DEC’s discretion to take enforcement action. In contrast to the green amendments of other states on which it was modeled upon, the Amendment mandates no particular action by the State. For example, Pennsylvania’s green amendment mandates that “[a]s trustee of [its public natural resources], *the Commonwealth* shall conserve and maintain them for the benefit of all the people.” Pa. Const. Art. I § 27 (emphasis added). Similarly, Montana’s green amendment requires that “[*t*]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.” Mont. Const. Art. IX § 1 (emphasis added). Such mandatory language is absent in the Green Amendment.

Moreover, nothing in the legislative history of the Green Amendment suggests otherwise. Instead, according to Assemblyman Englebright, the bill sponsor, the Green Amendment “does not change [] any of the existing laws of the State” NY Assembly Debate on Assembly Bill A1368, Feb. 8, 2021, at 35-36, Desai Aff. Ex. 3.

In short, nothing in the Permits, the ECL, or the regulations removes DEC’s enforcement discretion and the Green Amendment does not withdraw that discretion. Accordingly, to the extent that FAFE’s cause of action against the State is premised on DEC’s failure to take those actions, mandamus to compel is not available and the cause of action should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss FAFE's cause of action against the State.

Dated: New York, New York
May 6, 2022

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WORD COUNT CERTIFICATION PURSUANT TO RULE 202.8-b

I, Assistant Attorney General Mihir A. Desai, certify in accordance with Uniform Civil Rule 202.8-b, that the total number of words in this Memorandum of Law in Support of the State's Motion to Dismiss is 6,436, based on the Microsoft Word word-processing system used to prepare this document, and that this document complies with the word count limit set forth under this Rule.

Dated: New York, New York
May 6, 2022

Mihir A. Desai

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