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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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JAMIE ROMEO

MONROE COUNTY CLERK

SUPREME COURT
STATE OF NEW YORK COUNTY OF MONROE

FRESH AIR FOR THE EASTSIDE, INC.,

Plaintiff,

vs.

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.

Index No. E2022000699

WASTE MANAGEMENT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiff's Complaint consists of a broad array of criticisms of decades of New York State's environmental policy decisions. After opining about the State's policies with respect to municipal solid waste ("MSW"), Plaintiff asks this Court to shut down or order significant operational changes at an already highly-regulated, private landfill that has been operating under environmental permits for 50 years. Pointing to a recently enacted New York State constitutional provision—which states *in its entirety* that "[e]ach person shall have a right to clean air and water, and a healthful environment" (NY Const, art I, § 19) ("environmental rights amendment" or "ERA")—Plaintiff demands that the judiciary start creating, modifying, and implementing environmental policy. Nothing in the text or constitutional history of the ERA suggests any intention for the judiciary to usurp the roles of the legislative and executive branches, or to embroil itself in such political questions in violation of the separation of powers.

As explained in Point I, the ERA contains *no language* defining the words "clean" and "healthful." Without implementing legislation, courts have no proper way of interpreting the meaning of those words. Supplying definitions to such vague, aspirational terms would necessarily involve policymaking. Regardless, the constitutional history rebuts any presumption that the ERA was intended to be immediately enforceable in court. The ERA's sponsor and other lawmakers repeatedly stated that the ERA does *not* create a private right of action. Indeed, lawmakers specifically stated that private citizens could not invoke the ERA to sue a private landfill on the basis of alleged odors—*precisely* what Plaintiff is attempting to do here (*see* Point I[a][2]).

That the Legislature chose not to create a private right of action is hardly surprising. As Plaintiff is keenly aware, having pursued serial litigation concerning the Landfill for years, numerous other avenues for relief already exist. (This is the fourth proceeding commenced by Petitioner concerning this landfill since 2018.)

Even if the ERA created a new private right of action (it did not), this Court should reject Plaintiff's call to wield the ERA against a private party—namely, shutting down or controlling a private landfill. The ERA does not even remotely suggest that it constrains private actors. And yet, the relief sought by Plaintiff in this proceeding is specifically directed against a private entity.

As explained in Point II, when distilled to allegations concerning the *government*, each of Plaintiff's allegations falls into one of three categories: (1) specific government actions; (2) government policy decisions; and (3) government inaction. None states a valid claim. With respect to the first category, Plaintiff has not alleged a single government action that occurred after the effective date of the ERA (*i.e.*, January 1, 2022), and the ERA is not retroactive. With respect to the second category, such controversies are non-justiciable political questions. With respect to the third category, mandamus relief is not available as a matter of law because every government inaction alleged by Plaintiff involves an exercise of discretion.

As explained in Point III, even if Plaintiff could overcome these hurdles, it failed to exhaust administrative remedies. In this lawsuit, Plaintiff, in essence, seeks revocation or modification of Waste Management's ("WM") environmental permits based upon allegations of ongoing harm. Yet Plaintiff did not first exhaust its remedies by petitioning the New York State Department of Environmental Conservation ("NYSDEC"). As a result, the agency with environmental expertise and authority has not: (i) vetted Plaintiff's allegations of ongoing harm; (ii) developed an administrative record; or (iii) had an opportunity to make a reasoned determination.

In short, only the Legislature may define such amorphous words as "clean" and "healthful". This Court should reject Plaintiff's invitation for the judiciary to use the newly-enacted ERA as an excuse to transcend this State's longstanding and comprehensive legislation, regulations, and administrative processes for addressing environmental matters.

ARGUMENT

POINT I

THE ERA DID NOT CREATE A RIGHT OF ACTION, MUCH LESS ONE AGAINST PRIVATE PARTIES.

Plaintiff's sole cause of action invokes New York's new ERA to obtain a judicial shutdown of a private landfill. For Plaintiff's claims to survive, this Court would have to determine that the ERA endows the judiciary with absolute power to decide the meaning of "clean air," "clean water," and "healthful environment" without any deference to the legislative and executive branches; and that the courts may then implement and enforce their interpretations of the ERA against private parties, including those who (like WM) are already heavily regulated and operating pursuant to environmental approvals and permits governed by federal, state, and local statutes and regulations. The ERA does not purport to create new rights, much less constrain private conduct.

A. The ERA is not self-executing.

1. *The plain text of the ERA demonstrates that it did not create a right of action.*

The plain text of the ERA demonstrates that the ERA is not self-executing. Under New York law, "[t]he most compelling criterion in the interpretation of an instrument is, of course, the language itself" (*People v Carroll*, 3 NY2d 686, 689 [1958]). In determining whether a constitutional provision is self-executing—*i.e.*, effective without reference to outside legislation—the New York Court of Appeals has directed courts to first consider whether the provision's language reflects that implementing legislation is imperative to give the right effect (*id.*). A constitutional provision is self-executing if "the language of the constitutional provision speaks its meaning with sufficient clarity" and if the writers of the provision "suppl[ied] the essential details" for its implementation (*id.*).

For example, in *Carroll*, 3 NY2d at 689-690, the Court of Appeals determined that Article I, Section 2 of the New York State Constitution—which provides for waiver of a right to trial by jury in criminal trials—was sufficiently clear to be self-executing. The provision read, in pertinent part:

> "A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver."

(*id.* at 687-688, citing NY Const, art I, § 2). The defendant in *Carroll* had "submitted a written stipulation signed by both defendant and his counsel whereby he purported to waive his right to a jury trial" (*id.*). The Court of Appeals considered whether the waiver provision was self-executing, such that the defendant's waiver was effective despite the lack of implementing legislation (*id.*).

Focusing heavily on the language of the constitutional provision, the Court of Appeals in *Carroll* found that the language was sufficiently clear because it spelled out "the form in which the waiver is to be made: 'by a written instrument signed by the defendant in open court before and with approval of a judge or justice of a court having jurisdiction to try the offense'" (*id.* at 689).

> "Nothing in the language indicates that legislation would be imperatively necessary to give the right effect and the very fact that the writers did assume to supply the essential details indicates that supplementary legislation was not relied upon."

(*id.* at 689-690). Thus, the Court of Appeals concluded, the constitutional provision on its face was self-executing.

Not so with the ERA. The language of the ERA comes nowhere close to speaking its meaning with sufficient clarity to be self-executing. Nor does it contain details essential for

implementation. The *entirety* of the text of the ERA is: "Each person shall have a right to clean air and water, and a healthful environment" (NY Const, art I, § 19). The words "clean" and "healthful" are aspirational terms that are left entirely undefined.

The vague language in the ERA is much more akin to the New York Constitution's civil rights clause (NY Const, art I, § 11), which the New York Court of Appeals found is *not* self-executing (*Dorsey v Stuyvesant Town Corp.*, 299 NY 512, 531 [1949]). The civil rights clause provides: "No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights ...." Because this provision did not define the phrase "civil rights," the Court held it was not self-executing—*i.e.*, it was not effective without implementing legislation (*id.*). The term "civil rights" could refer only to "those already denominated as such in the Constitution itself, in the Civil Rights Law or in other statutes" (*id.*). The constitutional provision would extend further only if the Legislature enacted implementing legislation spelling out which other rights qualified as protected "civil rights" (*id.*). The Legislature subsequently enacted implementing legislation (*see Brown v State*, 89 NY2d 172, 190 [1996] [citing implementing statutes]).

Similar to the civil rights clause, terms critical for defining the scope of the ERA—"clean" and "healthful"—are left undefined in the constitutional provision, and thus cannot be understood without reference to outside legislation. Such clearly aspirational terms provide no essential details or standard by which to judge a claimed violation. Many human behaviors may *subjectively* be described as leaving water or air "unclean" or having environmental impacts that are "unhealthful" (*e.g.*, emitting smoke from a campfire, driving cars, raising cows, swimming in a lake after liberal sunscreen application), but undoubtedly are not intended to trigger a constitutional violation.

The plain language of the ERA demonstrates it is not self-executing, and thus there is no need for applying other principles of construction. The ERA, on its face, requires implementing legislation to supply necessary definitions and essential details.

2. *New York's constitutional history for the ERA unambiguously demonstrates that the Legislature did not intend for it to create a right of action, including with respect to a private solid waste landfill.*

Even if construction was necessary, the constitutional history rebuts any presumption that the ERA was intended to be self-executing, much less to create a private right of action (*see Caroll*, 3 NY2d at 690-692 [performing lengthy analysis of constitutional history for purposes of determining whether a constitutional provision was self-executing]).

The ERA was subject to numerous debates in the Assembly before it became a part of the New York Constitution. Throughout those debates, the ERA's Sponsor (Assemblyman Steve Englebright) consistently stated that the ERA would *not* create a new cause of action. For example, on April 24, 2017, when asked outright whether the amendment would give individuals a cause of action, amendment Sponsor Englebright responded "No" (Exh. 5 at 32).[1] He later explained that the ERA "doesn't pretend to add specifics. It doesn't pretend to be a cause of action" (*id.* at 53). On April 30, 2019, when questioned whether "a business or industry that's complying with all of our current statutory regulatory provisions could still be subjected to lawsuits from somebody claiming that even though they're complying in every respect, they are creating air or water that's not 'clean,'" Sponsor Englebright responded: "This doesn't change any of that" (Exh. 9 at 32-33). On February 8, 2021, Sponsor Englebright repeated: "This does not create anything new in terms of rights of action" (Exh. 13 at 39).

[1] Exhibits are attached to the accompanying Affirmation of Kelly S. Foss, Esq.

Sponsor Englebright was asked point blank on April 30, 2019 whether individuals complaining about smell from a landfill would "have the opportunity to have that addressed through this change," and his response was "They already have that right" and the ERA "does not alter their right" (Exh. 9 at 41). On February 8, 2021, when asked whether "smell [is] going to be part of clean air," and whether someone complaining about smell could invoke the ERA to stop a particular business operation, Sponsor Englebright responded: "This does not empower any particular lawsuit" (Exh. 13 at 48).

Assemblymember Jennifer Lunsford, whose district encompasses a portion of the High Acres Landfill, specifically addressed this topic on February 8, 2021:

> "Public nuisance, land use laws, negligence, we have any number of avenues for people to bring suit for exactly the kind of problems contemplated by my colleagues today. This amendment does not convey upon the citizenry any additional rights of action against any other businesses, against other people, against their neighbors."

(Exh. 13 at 68-69). Ms. Lunsford also stated:

> "There's nothing in this amendment that creates a private right of action. I know several of us have said that, but I feel it bears repeating: A private right of action must be affirmatively conveyed. It cannot be read backwards into a law. There is nothing that gives a citizen an explicit right to sue another private citizen or private corporation, a landfill, a farm, a wind turbine manufacturer, under this law."

(Exh. 13 at 68). Assemblymember Jo Anne Simon similarly stated on February 8: "We've heard several [objections], including an assumption of a private right of action for environmental damage. I can assure my colleagues that this Constitutional Amendment does not do that. I know because I have carried a bill to provide for a private right of action for environmental damage for several years" (Exh. 13 at 90).

In crafting the ERA, the Legislature declined a New York State Bar Association Task Force recommendation to add language to "provide for any person to enforce the right against the State

and its subdivisions through appropriate legal proceedings" (38 Pace L. Rev. 182, 207-208 [2017]). The Legislature also rebuffed the Task Force's invitation to create a right that would "invite a judicial oversight role and provide the judiciary with sufficient guidance to enable courts to meaningfully engage" to protect New Yorkers (*id.* at 208).

The constitutional history demonstrates that the Legislature did not understand the ERA to create a new right of action. Indeed, the ERA is a new type of constitutional provision; environmental rights do not have a long or established constitutional history in this country and they do not carry common, expected civil remedies.[2] The Legislature studied ERAs adopted in other states (Exh. 13 at 35; *see also* Exh. 14; Exh. 15 at 4). After studying those ERAs, the Legislature chose to mimic language from other state ERAs that have been held *not* to create a private right of action (*see e.g.*, *Hootstein v Amherst-Pelham Reg'l Sch Comm*, 361 F Supp 3d 94 [D Mass 2019] [noting that Massachusetts had "never held that there is a right of action to enforce" the Massachusetts ERA, which states that "[t]he people shall have the right to clean air and water"]), while *omitting* language interpreted elsewhere as creating affirmative rights of action (*see e.g.*, *Pa. Env. Defense Found. v Pennsylvania*, 640 Pa. 55, 161 A3d 911 [Pa 2017] [finding a right of action against the state because Pennsylvania's ERA expressly confers upon the state the obligations of a "trustee" responsible to conserve and maintain natural resources]). Here, the constitutional history reflects that the New York Legislature deliberately omitted language that would have created a right of action while expressly affirming its intention *not* to create a new cause of action.

[2] In this way, the ERA differs from constitutional rights adopted with the intention that they would carry the same civil remedies that had long accompanied violations of those same rights under English common law and federal law. *Cf. Brown*, 89 NY2d at 189 (right of action existed for equal protection violations and unlawful searches in large part because "the rights guaranteed by these two provisions have common-law antecedents warranting a tort remedy for invasion of the rights they recognize" and because the debates during the 1938 Constitutional Convention reflected that the delegates "assumed a civil remedy already existed" given the English common law history and the availability of civil remedies under the corollary federal constitutional rights).

B. Even if the ERA created a private right of action, Plaintiff may not obtain relief against private parties.

Plaintiff does not just seek to invoke the ERA against the government, but rather improperly attempts to wield the ERA against private parties. Specifically, Plaintiff seeks a declaration that "the Defendants [including WM] are violating Plaintiff's constitutional rights ... to clean air and a healthful environment," and an order mandating "the immediate proper closure of [WM's] Landfill, or alternatively directing Defendants [including WM] to immediately abate the [alleged] Odors and Fugitive Emissions in the Community" (Compl., Wherefore clause). In other words, Plaintiff cannot succeed unless this Court holds that the ERA imposes obligations on, and gives rise to a cause of action against, private parties. Even if the ERA were self-executing (it is not), Plaintiff's Complaint should be dismissed insofar as it seeks relief against WM, because the ERA does not even purport to restrict or compel actions by non-governmental, private actors.

Unless a constitutional provision "explicitly regulate[s] private conduct," it restricts only government actions (*see Brown*, 89 NY2d at 183; *see also SHAD Alliance v Smith Haven Mall*, 66 NY2d 496, 503 [1985] ["there can be no question that [the drafters] intended the State Constitution to govern the rights of citizens with respect to their government and not the rights of private individuals against private individuals"]). For comparison, the civil rights clause in Article I, section 11 expressly regulates private conduct; it provides: "No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights *by any other person or by any firm, corporation, or institution*, or by the state or any agency or subdivision of the state" (emphasis added). In contrast, the ERA does not contain any such explicit language.

The intent to avoid impacting private actors is even more pronounced when New York's ERA is compared with other states' ERAs. For instance, Hawaii's ERA provides:

> "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 [emphasis added]). Similarly, the Illinois ERA provides:

> "Each person has the right to a healthful environment. Each person may enforce this right against ***any party, governmental or private,*** though appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law."

(Ill Const, art XI, § 2) [emphasis added]). New York omitted language regarding private conduct.

Plaintiff seeks to wield the ERA against a private business, requesting that this Court declare that WM violated Plaintiff's members' constitutional rights and shut down WM's private business operation. Nothing about the text or history of the ERA supports such an interpretation. Accordingly, the Complaint fails to state a claim under the ERA, and should be dismissed.

POINT II

PLAINTIFF'S COMPLAINT DOES NOT STATE A TIMELY CLAIM FOR RELIEF UNDER THE ERA.

Even if the ERA were self-executing (it is not), and created a private right of action against the government (it does not), Plaintiff has not stated a timely claim for relief. Each of Plaintiff's criticisms of the government falls into one of three categories:

1. Specific government actions that occurred before the ERA became effective;
2. Broad policy decisions (as opposed to specific actions); and/or
3. Failure by the government to take a particular action or adopt a policy that Plaintiff prefers (*i.e.*, government *in*action).

As to the first category, Plaintiff's claims fail as a matter of law because the ERA does not have retroactive effect. Further, for government actions alleged to have occurred before September 29, 2021 (*i.e.*, four months before Plaintiff filed this action), Plaintiff's challenges are time-barred

pursuant to Section 217(1) and Article 78 of the CPLR. As to the second category—Plaintiff's criticisms of general state policies—such issues are not justiciable, and the challenged policies do not satisfy the state action requirement for alleging a constitutional violation. As to the third category—Plaintiff's requests that this Court compel government action—such claims are in the nature of mandamus, and must be dismissed because every challenged inaction involves an exercise of governmental discretion.

A. This Court should reject Plaintiff's attempt to invoke the ERA to challenge governmental actions that occurred before the ERA took effect.

The Complaint does not allege a single specific action by the State, NYSDEC, or the City of New York ("NYC") after the ERA took effect. Instead, the Complaint is based upon government actions that predate the ERA's effective date, and which occurred far longer than four months before Plaintiff filed the Complaint.

The ERA became part of the New York Constitution pursuant to the provisions of Article XIX, Section 1 of the New York Constitution, which governs amendments without a constitutional convention (Foss Aff. ¶ 22; Exh. 13 at 32). Article XIX, Section 1 makes clear that such amendments become a part of the New York Constitution on the first day of January following final approval and ratification. (NY Const, art XIX, § 1 ["such amendment or amendments shall become a part of the constitution on the first day of January next after such approval"]).

The Legislature first approved the ERA in 2019, and again in 2021 (Exh. 11 at 19; Exh. 15 at 16). The ERA received final voter approval on November 2, 2021 (Foss Aff. ¶ 35). Accordingly, the ERA did not become a part of the New York Constitution until January 1, 2022.

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" (*Ayman v Teachers' Retirement Bd.*, 9 NY2d 119, 125 [1961]; *see also Becker v Huss Co.*, 43

NY2d 527, 540 [1978]). Here, there is no clear expression that the ERA was intended to have a retroactive effect. Nothing in the text of the ERA—"[e]ach person shall have a right to clean air and water, and a healthful environment"—purports to give it retroactive effect. To the contrary, its language is forward looking, providing that each person "shall have" such a right. As noted above, the ERA does not grant citizens a private right of action at all, much less one that allows a cause of action to be based on alleged actions taken before the ERA took effect.

Below is a list of the specific government actions alleged in the Complaint (as opposed to statewide policies or government inaction, which are addressed in Point II[b]-[c] below). As evident here, none is alleged to have taken place after the ERA's effective date:

- 1991: NYSDEC issued an air permit for the Landfill, and subsequently modified the permit to allow expansion (¶26).
- 1993: NYSDEC issued a MSW permit for the Landfill, and approved the Western Expansion (¶25).
- 2001: NYSDEC modified the MSW permit for a Phase I expansion (¶28).
- 2003: NYSDEC modified the MSW permit for a Phase II expansion (¶28).
- 2008: NYSDEC modified the MSW permit for a Phase III expansion (¶29).
- 2011: NYSDEC modified the MSW permit to eliminate a vertical expansion (¶30)[3].
- 2013: NYSDEC modified the MSW permit for the Landfill to allow transportation of waste by rail (¶31).
- February 2, 2018: NYSDEC issued a Notice of Violation, requiring certain operational changes and imposing a lower methane concentration limit (¶¶59, 69-71)[3].
- The Complaint vaguely alleges that NYSDEC has "allow[ed] repeated permit and regulatory violations" and "authorized and permitted activities that emit vast quantities of GHGs into the atmosphere" (¶¶156-157), but it does not allege any specific action by NYSDEC, much less one that allegedly occurred after the effective date of the ERA.

[3] Plaintiff does not appear to criticize these actions.

- The Complaint also refers to NYSDEC's odor complaint hotline (¶54), but does not appear to complain about any action taken by NYSDEC in operating the hotline, particularly not after the effective date of the ERA.

- Finally, the Complaint alleges that "NYC has contracted with" WM (¶18), but it does not appear to complain about NYC's action in entering the contract.

None of these allegations identifies a government action after the ERA took effect.

Further, to the extent Plaintiff is challenging government actions prior to September 29, 2021, its challenges are time-barred pursuant to the four-month statute of limitations applicable to Article 78 proceedings (*see* CPLR § 217[1]). Plaintiff cannot avoid the limitations period applicable to challenges to administrative determinations merely by couching their claim as a constitutional objection (*see Bonar v Shaffer*, 140 AD2d 153, 155 [1st Dept 1988] ["mere fact that constitutional objections are raised to an administrative determination may not serve to avoid the period of limitations applicable to a proceeding pursuant to CPLR article 78"]; *Roebling Liqs. v Urbach*, 245 AD2d 829, 830 [3d Dept 1997]).

B. This Court should reject Plaintiff's invitation to violate the separation of powers and engage in environmental policymaking.

Large swaths of Plaintiff's Complaint challenge broad policies of the New York State government rather than specific state actions. By couching political disagreements as constitutional violations, Plaintiff seeks to enlist the judiciary to start creating environmental policy where, in Plaintiff's view, the Legislature and Executive have fallen, or might fall, short. The New York Court of Appeals has specifically warned against interpreting constitutional provisions in this manner, stating that "[a] State Constitution is a document defining and limiting the powers of State government, not a blueprint for the judiciary to turn what it perceives to be 'desirable' social policies into law" (*SHAD Alliance*, 66 NY2d at 504).

The Complaint presents the following laundry list of Plaintiff's political disagreements with the State government and openly invites this Court to exercise absolute control, under the auspices of the ERA, over State environmental policy:

- Plaintiff complains that NYSDEC allows certain types of soil to be disposed in landfills without requiring treatment as hazardous waste (¶42).

- Plaintiff expresses concern that the State's and NYSDEC's regulation of landfills across the State will not position the State to achieve its goals for greenhouse gas emissions (¶101).

- Plaintiff opines that the State's greenhouse gas emission goals "necessitate[] a dramatic shift in the way waste is managed, to the point that landfills are only used sparingly for specific waste streams, and reduction and recycling are robust and ubiquitous" (¶107).

- Plaintiff opines that the State has taken insufficient action toward policy goals, including "to encourage the development of recycling and waste to energy facilities" (¶¶118-122).

- Plaintiff complains that NYSDEC, by issuing landfill permits and approving landfill expansions, "has encouraged landfilling" and contributed to the "destruction" of the climate (¶¶124, 157).

- Plaintiff complains that NYSDEC has allowed expansions "at the few remaining landfills [in New York] without mandating [largely unspecified] significant improvements" (¶126).

- Plaintiff expresses its opinion that NYC "does not effectively recycle" or make sufficient efforts to use waste "to generate energy," that NYC should not ship waste to the Landfill," and that NYC should be forced to exercise alleged contract rights[4] to pressure WM to take certain actions at the Landfill (¶¶129-133).

- Plaintiff complains that NYC's "policy" of sending waste to upstate landfills "violates principles of Environmental Justice" and has a disparate impact on upstate New Yorkers (¶134).

- Plaintiff complains that NYC's management of its residents' waste is not sufficiently sustainable, that NYC should be doing more to control operations of landfills where its waste goes, and that NYC should do more to incentivize its residents to recycle (¶¶159-63).

[4] Notably, nowhere does the Complaint allege that Plaintiff is a third-party beneficiary with any rights under a contract between New York City and Waste Management (*see Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 44-45 [1985] [describing requirements for a third party beneficiary to enforce a contract]).

- Plaintiff also criticizes the State for not doing enough to reduce greenhouse gas emissions, and speculates that the State will thereby harm the environment or Plaintiff's members' health and well-being (¶¶148, 153-156).

- Plaintiff expresses fear that the State will not meet its goals with respect to greenhouse gas emissions from Landfills, and that a failure to meet those goals will harm the children of Plaintiff's members (¶145).

Ultimately, Plaintiff argues that the alleged failures of the State, NYSDEC, and NYC to adopt better environmental policies violates its members' "constitutionally protected rights of to [sic] 'clean air ... and a healthful environment'" (¶¶165-166).

This Court should reject Plaintiff's request to interpret the ERA as granting courts plenary power to overrule the will of the People as expressed and carried out by the State Legislature. Nothing in the constitutional history of the ERA suggests an intention for the judiciary to usurp the role of the legislative and executive branches of the State government, and become the supreme decision-maker of all environmental policies in the State.

To the contrary, "it is a fundamental principle of the organic law that each department of government should be free from interference, in the lawful discharge of duties expressly conferred, by either of the other branches" (*NY State Inspection, Sec. & Law Enforcement Emps., Dist. Council 82 v Cuomo*, 64 NY2d 233, 239 [1984]). Indeed, courts should not decide claims that "would embroil the courts in the administration of programs that primary responsibility for which lies in the executive branch of the government ... [as] accepting [such] responsibility would violate the constitutional scheme for the distribution of powers among the three branches of government and involve the judicial branch in responsibilities it is ill-equipped to assume" (*Jones v Beame*, 45 NY2d 402, 406 [1978]). "[J]udicial deference to a coordinate, coequal branch of government includes one issue of justiciability generally denominated as the 'political question' doctrine" (*NY State Inspection*, 64 NY2d at 239). In particular, "the manner by which the State addresses

complex societal ... issues is a subject left to the discretion of the political branches of government" (*Campaign for Fiscal Equity, Inc. v New York*, 8 NY3d 14, 28 [2006]).

Where, as here, the recognition of new rights by virtue of the ERA would constitute a change of current state environmental policy that would impact many stakeholders—including both public and private parties not before the Court—the decisions whether and how to establish new policy must not be the doing of the judiciary (*see NY State Inspection*, 64 NY2d at 240).

In *NY State Inspection*, for example, state correctional system employees sought to enjoin the Governor from closing the Long Island Correction Facility on the ground that closure would exacerbate the risk of serious bodily injury and death to persons employed at prison facilities, in violation of their right to a safe workplace pursuant to Section 27-a of the Labor Law. The Court held that the remedy sought by the employees would require the judiciary to preempt the exercise of discretion by the executive branch of government, and would embroil the judiciary in the management and operation of the state correction system, a responsibility vested in the Commissioner of Correctional Services. The controversy was at its heart a political question.

Here, Plaintiff seeks new environmental policies that will force closure of a private landfill. At the heart of Plaintiff's claim are non-justiciable political questions. The NYSDEC Commissioner, appointed by the governor, is responsible for developing the State's environmental policies and programs (ECL §§ 3-0103, 3-0301). Commissioner Basil Seggos has led the NYSDEC in that regard since his appointment in 2015. Plaintiff nevertheless "call[s] for a remedy which would embroil the judiciary in the management and operation" of the environmental program that Commissioner Seggos is charged with administering (*NY State Inspection*, 64 NY2d at 239; *see Jones*, 45 NY2d at 408 ["the judicial process is not designed or intended to assume the management and operation of the executive enterprise"]). The enforcement of environmental

permit regulations involves "questions of judgment, discretion and the allocation of the resources and priorities which are inappropriate for resolution in the judicial arena" (*Kerness v Berle*, 85 AD2d 695 [2d Dept 1981], *aff'd* 57 NY2d 1042 [1982]).

Because "nonjusticiability ... by reason of political question ... implicates the subject matter jurisdiction of the court," (*see NY State Inspection*, 64 NY2d at 241 n.3), Waste Management's motion is also predicated on CPLR 3211(a)(2).

C. Plaintiff improperly pursues mandamus relief in an effort to commandeer the state government against a private business.

The remainder of Plaintiff's allegations pertaining to the government are complaints about State *in*action rather than State *action*. Such allegations fail to state a claim because Plaintiff may not seek mandamus relief through this plenary proceeding. Plaintiff is, in essence, seeking a writ of mandamus to compel certain government action—in particular, to compel NYSDEC to rescind or modify WM's Part 360 Permit. Plaintiff may not seek mandamus in this plenary proceeding and, even if it could, the Complaint fails to plead a plausible basis for the extraordinary remedy of mandamus.

1. *Plaintiff may not seek mandamus relief through this plenary proceeding.*

Any cause of action seeking to test the inaction of a public officer, *i.e*., seeking mandamus to compel, must be brought pursuant to CPLR Article 78 (CPLR 7801; 7803 [1]; *NYCLU v State of New York*, 4 NY3d 175, 183-184 [2005] ["Inasmuch as plaintiffs seek to test the action or inaction of a public officer, their sole available remedy lies ... in a CPLR article 78 proceeding seeking mandamus to compel."]).

The following allegations present complaints of government *failures to act* and thus are in the nature of mandamus:

- That the State and NYSDEC "have failed to enforce applicable laws, regulations and permits applicable to the Landfill" (Compl., ¶6);

- "NYC *can* enforce" its contracts with WM (¶18 [emphasis added]), but "NYC is not enforcing" those contracts (¶131);
- "NYC has failed to abate" alleged environmental conditions (¶159);
- "NYC [has] fail[ed] to implement a long-term plan to reduce, recycle and reuse its garbage" and "failed to properly incentivize recycling" (¶¶159-161);
- "NYSDEC has failed to enforce their [sic] final cover regulations in relation to the side slopes" (¶66), and has not required scanning of side slopes (¶74);
- NYSDEC did not adopt recommendations by Plaintiff's expert at an April 26, 2021 meeting regarding monitoring (¶¶83-84);
- "NYSDEC has done nothing to require the remaining 27 Mega-Landfills in New York, including this Landfill, to be in a position to achieve [climate change] goals" (¶101);
- NYSDEC has failed to "impos[e] new additional organic material recycling requirements on the Landfill" or "impos[e] cover system and monitoring controls" (¶113);
- "The State is doing little to nothing to curb emissions from the few remaining New York landfills, including the Landfill, and has failed to fully implement a strategic recycling program" (¶116);
- "The State has failed to implement its own 2010 Solid Waste Management Plan" (¶119);
- "The State has done little to encourage the development of recycling and waste to energy facilities" (¶¶122, 126-127); and
- That the State has "delaying actions to drastically cut GHG emissions" (¶156).
- That a constitutional violation results from "[t]he combined acts and omissions of the Defendants in the management of MSW, including the failure of the State to properly exercise its enforcement powers" (¶¶154, 163).

Indeed, the ultimate relief Plaintiff seeks also indicates that its claim sounds in mandamus: Plaintiff seeks "an injunction directing the immediate proper closure of the Landfill" and, alternatively, "to immediately abate the Odors and Fugitive Emissions ... by ... installing a permanent cover as defined in the 6 NYCRR Part 360 regulations ... and daily SEM monitoring of the entire surface of the Landfill" (¶¶167-168).

How Plaintiff has styled its claim is irrelevant. Because the gravamen of Plaintiff's claim and the relief sought sound in mandamus, an Article 78 proceeding is its exclusive remedy (*see NYCLU*, 4 NY3d at 183-84; *see e.g.*, *Peconic Baykeeper, Inc. v NYSDEC*, 2014 NY Slip Op 32436[U], *4-5 [Sup Ct, Suffolk County 2014] ["Although petitioner attempts to graft declaratory judgment language onto its three causes of action..., the gravamen of the relief sought is mandamus to compel respondent DEC to act on its modification request."]; *Grant v Cuomo*, 130 AD2d 154, 168 [1st Dept 1987] [observing that supreme court's issuance of an injunction was "in effect an order of mandamus"]).

Although the Court is empowered under CPLR 103(c) to convert a judicial proceeding into the proper form, it need not convert this action into an Article 78 proceeding because, as demonstrated below, Plaintiff has not stated a viable claim for mandamus relief.

2. *Plaintiff has not alleged any "ministerial act" that any government body or official failed to perform.*

"Mandamus is generally not available to compel government officials to enforce laws and rules or regulatory schemes that plaintiffs claim are not being adequately pursued" (*Alliance to End Chickens as Kaporos v NY City Police Dept.* [*Kaporos*], 152 AD3d 113, 118 [1st Dept 2017], *aff'd* 32 NY3d 1091 [2018]). Rather, this "extraordinary remedy ... will lie only to compel the performance of a ministerial act and only when there exists a clear legal right to the relief sought" (*Francois v Dolan*, 263 AD2d 483, 483 [2d Dept 1999], *aff'd* 95 NY2d 33 [2000], citing *Legal Aid Society v Scheinman*, 53 NY2d 12, 16 [1981]); *see Ass'n of Surrogates & Supreme Ct. Reporters v Bartlett*, 40 NY2d 571, 574 [1976] [holding that obtaining mandamus relief requires that the "right to performance must be so clear as not to admit of reasonable doubt or controversy"] [internal quotation marks and citation omitted].

Mandamus will not issue "to compel an act in respect to which [a public] officer may exercise judgment or discretion" (*Kaporos*, 32 NY3d at 1093 [internal quotations omitted]). "Discretionary acts involve 'the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result'" (*id.*, quoting *NYCLU v State of New York*, 4 NY3d 175, 184 [2005]). Furthermore, mandamus "may only issue to compel a public officer to execute a legal duty; it may not 'direct how [the officer] shall perform that duty'" (*id.*, quoting *Klostermann v Cuomo*, 61 NY2d 525, 540 [1984]).

Courts routinely hold that mandamus is unavailable to compel an administrative agency to act in its enforcement capacity as against a third party where the decision of whether and how to enforce the laws and regulations would implicate agency discretion (*e.g., Kaporos*, 32 NY3d at 1092-1093 [mandamus unavailable to compel municipal agencies to enforce against private parties "laws related to preserving public health and preventing animal cruelty" as enforcement "would involve some exercise of discretion" and plaintiffs did "not seek to compel the performance of ministerial duties but, rather, seek to compel a particular outcome"]; *NYC Yacht Club v NYC Dept of Buildings*, 172 AD3d 606, 606 [1st Dept 2019] [no right to compel the Department of Buildings to issue a notice of violation]; *Church of the Chosen v City of Elmira*, 18 AD3d 978, 979 [3d Dept 2005] ["the decision to enforce a municipal code rests in the discretion of the public officials charged with its enforcement and relief in the nature of mandamus is simply unavailable."]; *Haydock v Passidomo*, 121 AD2d 540 [2d Dept 1986] [no right to compel commissioner of motor vehicles to revoke or suspend a dealer's used vehicle registration for alleged misuse of dealer number plates]).

Here, the relief sought by Plaintiff amounts to a writ of mandamus revoking or modifying WM's environmental permit. And yet "[t]he determination [of NYSDEC] to initiate proceedings leading to the revocation of a permit is a discretionary function with respect to which mandamus does not lie" (*Town of Riverhead v NYSDEC*, 50 AD3d 811, 813 [2d Dept 2008], citing ECL § 23-2711[6]; *see also Peconic Baykeeper, Inc. v NYSDEC*, 2014 NY Slip Op 32436[U], *3 [Sup Ct, Suffolk County 2014]). In *Peconic Baykeeper*, the petitioner sought a determination that NYSDEC "abused its discretion and acted arbitrarily, capriciously and contrary to law in denying [a] petition to modify certain State Pollution Discharge Elimination System permits" previously issued to an assisted living facility. The court found that "the gravamen of the relief sought [wa]s mandamus to compel [NYSDEC] to act on its modification request" pursuant to 6 NYCRR § 621.13, which authorizes NYSDEC to modify, suspend, or revoke a permit (2014 NY Slip Op 32436[U] at *4-5; *see* 6 NYCRR § 621.13[a],[b]). The court dismissed the petition, holding:

> "A reading of ECL 17-0817(5) and 6 NYCRR 621.13(b) reveals that the granting or denial of a request for a modification of a permit is a purely discretionary act and is not subject to mandamus to compel .... [They] clearly state the respondent *may* consider requests for modification and, therefore, such decision is purely discretionary. Thus, petitioner has failed to establish that respondent can be compelled to act in this matter."

(2014 NY Slip Op 32436[U] at *5-6 [emphasis in original]; *see also Zahav Enters. v Martens*, 45 Misc 3d 1221[A], 2014 NY Slip Op 51660[U], *6-7 [Sup Ct, Kings County 2014]). Inasmuch as Plaintiff's claim in essence seeks to force NYSDEC to revoke or modify WM's permits, it fails to state a claim as a matter of law.

Plaintiff has not identified either a "clear legal right to the relief demanded" or any "corresponding nondiscretionary duty on the part of [NYSDEC] to grant that relief" (*Doorley v DeMarco*, 106 AD3d 27, 34 [4th Dept 2013]). Rather, Plaintiff invites the Court to usurp

NYSDEC's statutory duties (*see* ECL § 3-0301), which involve "questions of judgment, discretion and the allocation of the resources and priorities which are inappropriate for resolution in the judicial arena" (*Kerness*, 85 AD2d at 696, citing *Jones*, 45 NY2d at 407). Consequently, mandamus does not lie, and the Court lacks subject matter jurisdiction to compel NYSDEC to act in this manner (*see Town of Riverhead*, 50 AD3d at 813 [affirming dismissal of proceeding challenging NYSDEC's refusal to revoke a mining permit, holding that NYSDEC's "determination to initiate proceedings leading to the revocation of a permit is a discretionary function with respect to which mandamus did not lie"]). For example, in *Kerness*, 85 AD2d at 696, the Appellate Division held that Supreme Court should have dismissed a petition which sought to compel NYSDEC and county environmental conservation commissioners to enforce Article 17 of the Environmental Conservation Law against private entities that were allegedly discharging waste into ground water, as the commissioners' duties involved the "exercise of a great deal of day-to-day judgment and discretion which would be impossible for the court[] to oversee" (*see also Zahav Enters*., 2014 NY Slip Op 51660[U], *6-7 [dismissing cause of action that sought "to have the Court compel action which is not ministerial, but instead within the discretion of [NYSDEC] Commissioner", and holding court lacked "subject matter jurisdiction to provide this relief"]; *Peconic Baykeeper, Inc.*, 2014 NY Slip Op 32436[U], *3).

Further, Plaintiff is not entitled to mandamus relief compelling NYSDEC's Commissioner to affirmatively enact any particular regulations. Promulgating regulations is inherently a matter of discretion (not to mention a political question, *see supra*), and New York's ERA contains no language imposing any such affirmative obligation on the Commissioner (*see also Blue Mt. Pres. Ass'n v Twp. of Eldred*, 867 A2d 692, 701-704 [Pa. Commw. Ct. 2005] [holding that

Pennsylvania's ERA did not "create an affirmative duty to enact legislation specifically preserving and protecting environmental treasures"]).

Finally, even if mandamus relief were available, the claim should be dismissed because Plaintiff has not alleged that NYSDEC has refused a demand by Plaintiff. "Before bringing a petition seeking mandamus, a party must first make a demand and await a refusal" (*Schwartz v Morgenthau*, 23 AD3d 231, 233 [1st Dept 2005], *aff'd* 7 NY3d 427 [2006], citing *Austin v Bd. of Higher Educ.*, 5 NY2d 430, 442 [1959]).[5]

POINT III

IN ANY EVENT, PLAINTIFF FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES THROUGH THE NYSDEC PERMIT PROCESS.

Even if the ERA were self-executing and allowed Plaintiff to pursue relief against a private party, Plaintiff's complaint is subject to dismissal because Plaintiff did not exhaust administrative remedies through the NYSDEC permitting process. The Complaint fails to allege that any recognized exception to the exhaustion requirement applies, and none applies. NYSDEC—not the Court—should determine in the first instance whether the ERA constitutes a change in circumstances warranting further action as to Waste Management's Part 360 Permit.[6] If private parties are permitted to circumvent the NYSDEC permitting procedure by running straight to court whenever they dislike a particular environmental permit, chaos would result.

Generally, "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (*Lehigh Portland*

[5] The Part 360 regulations allow an interested party to request that NYSDEC modify, suspend, or revoke a permit for operation of a Landfill (*see infra* Point III). Plaintiff does not allege that its "expert" followed this procedure when making his "recommendations" concerning monitoring in April 2021 (Compl., ¶¶83-84). Further, any attempt to challenge NYSDEC's 2019 Response to Plaintiff's 2018 DEC Petition is time-barred (*see* Exh. 2).

[6] This program is now entitled Part 363 pursuant to NYSDEC's recent amendments to the State's solid waste management regulations.

Cement Co. v NYSDEC, 87 NY2d 136, 140 [1995], quoting *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). "This doctrine furthers the salutory goals of relieving the courts of the burden of deciding questions entrusted to an agency, preventing premature judicial interference with the administrators' efforts to develop, even by some trial and error, a coordinated, consistent and legally enforceable scheme of regulation and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its 'expertise and judgment'" (*Watergate II Apts.*, 46 NY2d at 57 [citations omitted]). Although exhaustion of administrative remedies is not required "when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or when resort to an administrative remedy would be futile" (*id.*), "merely asserting a constitutional violation will not excuse a litigant from first pursuing administrative remedies that can provide the requested relief" (*Town of Oyster Bay v Kirkland*, 19 NY3d 1035, 1038 [2012], quoting *Schulz v State*, 86 NY2d 225, 232 [1995] [couching complaint regarding school board's conduct in terms of a constitutional violation did not obviate the statutory mandate to originate the matter before the Commissioner of Education]). Indeed, "[a] constitutional claim that may require the resolution of factual issues reviewable at the administrative level should initially be addressed to the administrative agency having responsibility so that the necessary factual record can be established" (*Schulz*, 86 NY2d at 232).

As Plaintiff is well aware, any interested party may make a request for a modification, suspension, or revocation of a permit pursuant to 6 NYCRR § 621.13(b). Upon receipt of such a request, NYSDEC must review and "decide whether the request is justified and the action to be taken in response" (6 NYCRR § 621.13[b]). Only through this process for administrative review would NYSDEC have a full opportunity to assess Plaintiff's factual allegations of ongoing harm in the context of the current legal requirements, and make a reasoned determination regarding

whether a change to the Landfill's permit is warranted. Plaintiff is well aware of this administrative remedy, having availed itself of it in 2018 by filing a petition with NYSDEC requesting permit modifications (Exh. 1) ("2018 Petition"). NYSDEC's thorough 19-page decision with tables, figures, and voluminous attachments (Exh. 2; Exh. 3) ("NYSDEC Response") demonstrates the importance of vetting allegations concerning landfill operations and environmental concerns with NYSDEC.

Plaintiff based its 2018 Petition on assertions strikingly similar to those leveled in this lawsuit. In its 2018 Petition, Plaintiff complained that Landfill operations (including, for example, the transport of waste by rail) contributes to off-site odor from landfill gas. NYSDEC issued a highly-detailed written decision in response to Plaintiff's 2018 Petition, which reflected NYSDEC's administrative expertise and judgment. NYSDEC's March 2019 Response (Exh. 2) summarizes in detail its months-long investigation into Plaintiff's assertions and carefully responded to each request contained in the 2018 Petition. Although NYSDEC did not grant the full extent of relief Plaintiff requested, it nonetheless imposed several "operational requirements designed to assist in overall waste management and odor control" (*id.* at 18). Plaintiff did not appeal NYSDEC's Response, and its time to do so expired after four months (CPLR § 217[1]).

Years later, Plaintiff now repeats many of its earlier allegations, this time arguing that the ERA mandates a change to Landfill operations based upon alleged ongoing harm. The relief sought by Plaintiff in this lawsuit no doubt qualifies as a "modification ... or revocation" (6 NYCRR 621.13[b]) of WM's Part 360 Permit (*see* Compl., ¶167 [requesting "closure of the Landfill"]; ¶168 [requesting operational changes]). Yet, Plaintiff did not petition NYSDEC pursuant to 6 NYCRR § 621.13(b) for a determination regarding whether any current set of circumstances requires changes to Landfill operations. Had Plaintiff done so, and been dissatisfied

with NYSDEC's response, it could have then challenged NYSDEC's determination in court, and the Court would have the benefit of a full administrative record (*see Town of Lysander v Hafner*, 96 NY2d 558, 565 [2001] ["Where … interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute"]).

Furthermore, when a challenge relies on factual claims about the nature of an agency-issued permit, the agency that issued the permit must first have the opportunity to establish a factual record and apply its expertise before a court acquires jurisdiction to address the challenge (*see Town of Oyster Bay*, 19 NY3d at 1038; *Schulz*, 86 NY2d at 232; *Timber Ridge Homes v State*, 223 AD2d 635, 636 [2d Dept 1996] [judicial relief precluded where the landowner failed to apply to NYSDEC for a permit, thus NYSDEC never rendered a determination or created a factual record]). Here, NYSDEC should be given the opportunity to develop the necessary factual record and to apply its expertise and judgment to determine whether and to what extent a change in circumstances requires modifications to WM's permits (6 NYCRR § 621.13[b]).

Plaintiff cannot invoke the futility exception to exhaustion. Although Plaintiff alleges it "has advocated to NYSDEC for changes and modifications to the Landfill to decrease the Odors and Fugitive Emissions to no avail" (Compl., ¶64), no allegations support that a renewed petition pursuant 6 NYCRR 621.13(b) would be futile. Any claim of futility is undermined by NYSDEC's March 2019 Response's statements that its determinations "are appropriate under the circumstances as they now exist" and that NYSDEC "retains all of its authority to take any necessary action in the future should circumstances change" (Exh. 2 at 18). Resorting to administrative remedies cannot be said to be futile where, as here, the administrative agency did

not previously issue any sort of determination or statement of policy on the issue in dispute (*compare Lehigh Portland Cement Co*., 87 NY2d at 142 [resort to administrative remedies would have been futile because NYSDEC had "clearly and unequivocally stated its long-established [contrary] position ... both in correspondence with plaintiff and through the affidavit of the Chief Permit Administrator"]). NYSDEC has never passed on the issue of whether current circumstances require revocation or modification of WM's Part 360 permit.

Even if the Complaint otherwise stated a claim under the ERA, it should be dismissed in its entirety due to Plaintiff's failure to exhaust its available administrative remedies. It is respectfully submitted that any lawsuit under the ERA seeking to restrict a private party who is already governed by a State environmental permit must, at the very least, be supported by a full administrative record.

CONCLUSION

In light of the foregoing, WM respectfully requests that the Court dismiss the Complaint pursuant to CPLR 3211 (a) (1), (a) (2), and/or (a) (7), and grant such other relief that this Court deems just and proper.

Dated: May 6, 2022
Pittsford, New York

Respectfully Submitted,

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CERTIFICATION PURSUANT TO 22 N.Y.C.R.R. § 202.8-b

The filing attorney hereby certifies, pursuant to 22 N.Y.C.R.R. § 202.8-b, that the foregoing document complies with the applicable word count limit, which the Court extended from 7,000 to 10,000. The total number of words in this document, inclusive of point headings and footnotes and exclusive of the caption, table of contents, table of authority, and signature block is 8,914.

Dated: May 6, 2022