MONROE COUNTY CLERK'S OFFICE THIS IS NOT A BILL. THIS IS YOUR RECEIPT.

Receipt #

Book Page

Return To:
LINDA RADKO SHAW

No. Pages: 26

Instrument: MEMO IN OPPOSITION

Control #: Unrecorded #8967659
Index #: E2022000699

Date:

Fresh Air for the Eastside, Inc.

Time:

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

Employee:

State of New York

MONROE COUNTY CLERK'S OFFICE
WARNING – THIS SHEET CONSTITUTES THE CLERKS ENDORSEMENT, REQUIRED BY SECTION 317-a(5) & SECTION 319 OF THE REAL PROPERTY LAW OF THE STATE OF NEW YORK. DO NOT DETACH OR REMOVE.

JAMIE ROMEO

MONROE COUNTY CLERK

SUPREME COURT
STATE OF NEW YORK COUNTY OF MONROE

FRESH AIR FOR THE EASTSIDE, INC.,

Plaintiff,

vs.

Index No.: E2022000699

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.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION TO DISMISS BY DEFENDANTS THE STATE AND NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

KNAUF SHAW LLP
Attorneys for Plaintiff
Linda R. Shaw, Esq.,
Alan J. Knauf, Esq.,
Dwight E. Kanyuck, Esq.,
Melissa M. Valle, Esq., and
William F. Kellermeyer, Esq.,
of Counsel
1400 Crossroads Building
2 State Street
Rochester, New York 14614
Tel: (585) 546-8430

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND OTHER AUTHORITIES

PRELIMINARY STATEMENT

Plaintiff Fresh Air for the Eastside, Inc. ("FAFE" or "Plaintiff") submits this Memorandum of Law in opposition to the Motion to Dismiss filed by the State of New York and the New York State Department of Environmental Conservation ("NYSDEC") (together "the State"). In this action, FAFE complains, *inter alia*, that the constitutional rights of its members (the "Members") to clean air and a healthy environment, guaranteed by Section 19 of Article I of the New York Constitution (the "Green Amendment"), are being violated as a result of the actions or inactions on the part of the Defendants regarding the High Acres Landfill ("the Landfill"). Complaint, Docket No. 2 ("Compl.") ¶ 1. Defendant Waste Management of New York, L.L.C. ("WMNY") owns and operates the Landfill, which accepts and disposes of mostly garbage generated by the Defendant City of New York ("NYC") and transported to the Landfill via rail. Compl. ¶¶ 1, 4.

This State's Motion to Dismiss is one of three such Motions separately filed by the Defendants.[1] The Defendants attack FAFE's Complaint on numerous grounds using arguments which misconstrue or misunderstand the allegations in FAFE's Complaint. FAFE brought this action pursuant to the newly enacted Green Amendment, guaranteeing "[e]ach person shall have a right to clean air and water, and a healthful environment." Compl. ¶ 1. The Green Amendment was placed in the Bill of Rights of the New York State Constitution; as such "[i]t is a guarantee of those rights which are essential to the preservation of the freedom of the individual -- rights which are part of our democratic traditions and which no government may invade." *People v. Barber*, 289 N.Y. 378, 385 (1943). These rights are treasured by the courts, and are a fundamental part of our system of justice. *Application of Williams*, 23 Misc. 2d 78, 80 (Erie Co. Ct. 1960), *aff'd sub nom. People v. Williams*, 19 A.D.2d 592 (2d Dept. 1963).

[1] To avoid repetition, this Preliminary Statement addresses all three Motions, and is incorporated by reference into Plaintiff's MOLs addressing the Motions by Defendants WMNY and NYC.

On November 2, 2021, New York State voters overwhelmingly passed a ballot measure adding the Green Amendment to the State Constitution. It was approved at time when comprehensive laws, regulations, and policies already existed that regulate air and the environment, and was enacted despite the existing laws of the State of New York which created the NYSDEC with the purpose to "conserve, improve and protect [New York's] natural resources and environment." *See* Environmental Conservation Law ("ECL") §§ 1-0101, 3-0101. The New York State Constitution is the blueprint of governance in the state. All laws, regulations, and state actions must be consistent with the provisions in the Constitution. Notably, this new right to clean air and a healthful environment was not placed into the Environmental Conservation Law by the Legislature, rather it was placed in the Bill of Rights of our Constitution.

As a result of the new constitutional right to clean air, FAFE's Complaint raises novel legal issues, as a matter of first impression for this Court. The Defendants attempt to pigeonhole FAFE into previously existing procedural avenues to address environmental harms, which simply are inappropriate to manage the inquiry of whether or not that there has been a constitutional violation. Defendants WMNY and NYC (but not the State) even argue that the Green Amendment is not self-executing and cannot be enforced by a private party, but clearly the Green Amendment had a purpose and was not superfluously added to the Bill of Rights. *See* Docket No. 60 ("WMNY MOL") at 3; Docket No. 23 ("NYC MOL"). If the Green Amendment was found not to be self-executing, the provision would be a paper tiger with little, if any, independent legal force, and not worth the major effort it took to amend the Constitution, which involved approval by two successive Legislatures and a vote by the People of the State. *Tonis v. Bd. of Regents of Univ. of State of N.Y.*, 295 N.Y. 286, 293 (1946) ("It is one of the accepted canons of construction that statutes must be read so that each word will have a meaning, and not so read that one word will

cancel out and render meaningless another"). By the plain meaning of its very simple terms, the Green Amendment allows the People of the State of New York the right to be free from unclean air and water and an unhealthful environment. Those rights would be meaningless if they could not seek redress for violations.

Likewise, if the Green Amendment does not allow one private party to sue another private party whose actions are so entwined with governmental policies or so impregnated with a governmental character that it can be regarded as governmental action, then the Green Amendment is meaningless as an impediment to polluters. *Id.* WMNY has acted jointly and/or in concert with the State and NYC, and with the approval of NYSDEC, to operate the Landfill in a manner that results in the Odors and Fugitive Emissions which deprive Members of their right to clean air and a healthful environment. Compl. ¶ 164.

Defendants NYC and WMNY present this Court with an unavailing parade of horribles, detailing the speculative effects the Green Amendment would have on private parties and the already regulated community once this new Constitutional right is found to be self-executing and enforceable by a private cause of action by this Court. *See* NYC MOL at 15; WMNY MOL at 10. If private parties are in compliance with applicable environmental state laws and regulations, have valid permits issued by NYSDEC, and are not causing any environmental harm, they may not need to fear the Green Amendment. That is not the case here, however.

The Green Amendment has not created a new method for a private party to enter into the court system, because our judicial system already allowed citizens to sue when their constitutional rights, specifically rights embodied in the Bill of Rights, are infringed upon. *See Brown v. State,* 89 N.Y.2d 172 (1996). The Green Amendment merely created a new right: the right to clean air and a healthful environment. FAFE's claims against each of the Defendants are valid and its

Complaint should not be dismissed.

FACTS

A. The Landfill.

The Landfill is located at 425 Perinton Parkway in the Town of Perinton, Monroe County, and in the Town of Macedon, Wayne County, in the State of New York. Compl. ¶ 1. The Landfill causes fugitive emissions ("Fugitive Emissions") of landfill gas ("Landfill Gas"), including among other constituents, greenhouse gasses ("GHG") laced with hazardous substances released and otherwise discharged into the air, as well as persistent, noxious, and offensive odors ("Odors") of garbage and Landfill Gas. *Id.* ¶ 2.

The Landfill has been in operation since about 1972, at which time it was much smaller in size and did not ship in waste by rail. *Id.* 20. When the rail transportation of waste from NYC commenced in about 2015, serious problems began. Compl. ¶ 77; 135-148. The Landfill is governed by numerous permits issued by the State and other government agencies, including for example, its 6 N.Y.C.R.R. Part 360 Solid Waste Management Facility Permit (the "Landfill Permit") and Title V Clean Air Act Permit (the "Air Permit") (together, the "Permits"). *Id.* ¶ 23. The Landfill Permit expires on July 8, 2023, and the Air Permit expired on December 1, 2021. *Id.* ¶¶ 24, 27. The Landfill Permit was modified in 2013 to allow WMNY to construct and operate a rail siding to manage waste brought to the Landfill via intermodal rail from NYC, and since 2015, NYC Garbage has represented an increasing majority of the total MSW the Landfill accepts for disposal. *Id.* ¶¶ 31, 32. In fact, beginning in mid-2015, rates of NYC Garbage brought to the Landfill by rail caused the total MSW disposed to increase by more than 250%, and NYC Garbage currently represents about 90% of all MSW disposed at the Landfill. *Id.* ¶ 33.

B. The Landfill Causes Unclean Air and an Unhealthful Environment.

Since at least 2015, the Landfill's Odors and Fugitive Emissions have invaded the Community, including public places, private properties, and homes of FAFE Members. *Id.* ¶ 38. The Landfill's untreated Fugitive Emissions, which include at least 15% of the total Landfill Gas created by the Landfill, are well-documented. *Id.* ¶ 39. The Fugitive Emissions consist of methane, carbon dioxide, and non-methane organic compounds ("NMOC"), which include volatile organic chemicals ("VOCs"), and hazardous air pollutants ("HAPs"), as well as hydrogen sulfide and other odorous reduced sulfur compounds that smell of rotten eggs, even in the parts per billion range. *Id.* ¶¶ 40, 41, 43. The methane present in the Fugitive Emissions is a potent greenhouse gas ("GHG") *Id.* ¶ 44.

FAFE was created in late 2017 because the Odors and Fugitive Emissions were negatively impacting the rights of Members and their children to breathe clean air. Compl. ¶ 9. The Members of FAFE include more than 200 individuals who own property and/or reside about 0.3 to 4 miles from the Landfill, and whose lives and properties have been and continue to be adversely impacted by persistent, noxious, offensive Odors and Fugitive Emissions being released from the Landfill. *Id.* ¶ 10. FAFE Members began complaining to the Town of Perinton and NYSDEC, but were so frustrated by the lack of response, a software application ("FAFE App") was developed to document complaints of Odors and/or Fugitive Emissions. *Id.* ¶ 48.

Since the FAFE App was created in 2017, through January 4, 2022, it has logged over 23,670 complaints of Odors and Fugitive Emissions, over a wide-spread area around the Landfill. *Id.* ¶ 52. At least 99 of those complaints were made after January 1, 2022. *Id.* ¶ 52. NYSDEC has logged at least 2,626 complaints of Odors and/or Fugitive Emissions. *Id.* ¶ 55. The Odor and Fugitive Emissions are continuing in nature. *Id.* ¶ 10. FAFE Members are not only exposed to

Odors and/or Fugitive Emissions when they are outside in public spaces or in their own backyards, but also inside their private residences since the gasses contaminate the indoor air in their homes. *Id.* ¶ 135. Members are not only concerned with Fugitive Emissions (which NYSDEC does not require WMNY to monitor on a frequent and continuous basis) that pollute their air, but also with the impacts large GHG emitters like the Landfill will have on climate change and their environment, especially because WMNY admits that changes to weather conditions interfere with its ability to properly operate the Landfill and control the Odors and Fugitive Emissions emanating from the Landfill. *Id.* ¶ 148.

C. The Landfill Is Not in Compliance with Numerous State Environmental Laws and Regulations.

The Odors/Fugitive Emissions problems at the Landfill are well-known. The Complaint details the various ways that the Landfill is already operated contrary to or in violation of current laws and regulations: the Landfill is not complying with cover requirements (*Id.* ¶¶ 63-68); the Landfill constantly exceeds its emission limits (*Id.* ¶¶ 69-85); the Landfill is contributing to global climate change (*Id.* ¶¶ 86-96); the Landfill and its emissions are contrary to the New York Climate Leadership Community Protection Act ("CLCPA") (*Id.* ¶¶ 99-116); and the Landfill is contrary to the State's Solid Waste Hierarchy[2] (*Id.* ¶¶ 117-128).

A misapplication of the current and ineffective laws and regulations cause Defendants to fail to protect FAFE and its Members against the Odors/Fugitive Emissions. The State has failed to properly take any meaningful and proper action to uphold or enforce the applicable laws and regulations. WMNY claims it has tried to mitigate the Odor/Fugitive Emissions problem within the confines of its existing Permits and the existing State laws and regulations, but the

[2] This Court recognized the applicability of the Hierarchy to the Landfill in *Preserve Scenic Perinton Alliance, Inc. v. Porter*, 32 Misc. 3d 1216(A) (Sup. Ct. Monroe Co. 2010.) ("Consistent with ECL § 27-0106, a [Waste-to-Energy] facility would be preferred to a landfill, a position not lost on the DEC").

Odors/Fugitive Emissions, which are causing unclean air and an unhealthful environment, persist. *Id.* ¶ 57.

D. New York City

The Landfill's majority waste generator is New York City. Compl. ¶ 4. NYC, pursuant to its Charter, has arranged for the collection, transportation and disposal of NYC garbage ("NYC Garbage") to the Landfill via rail pursuant to various contracts with WMNY (the "Contracts"). *Id.* ¶¶ 4, 17, 159. NYC has failed to take appropriate steps and measures to remedy or mitigate the impacts caused by NYC Garbage on FAFE or its Members. *Id.* ¶¶ 131-34. Yet, NYC is completely capable of abating this constitutional violation. NYC Garbage currently represents about 90% of all MSW disposed at the Landfill. *Id.* ¶ 33. Since 2015, NYC Garbage has represented an increasing majority of the total MSW the Landfill accepts for disposal, which corresponds with the timing of the commencement of the unacceptable levels of Odors and Fugitive Emissions. *Id.* ¶ 32. The NYC Garbage is transported to the Landfill via rail, and is significantly more odorous than waste transported to the Landfill by other means because, *inter alia*, of the increased transport time and the inevitable delays in intermodal transportation on the CSX rail line. *Id.* ¶ 35. The various contracts NYC has with WMNY demonstrate that NYC is not powerless, and is capable of abating the Odors and Fugitive Emissions. *Id.* ¶ 18.

E. Summary

As a result of the newly enacted Green Amendment, the Landfill can no longer be allowed to cause so much harm and impact so many people and go unchecked, without the proper intervention from the State, and mandated compliance by the Landfill operator (WMNY), and the major waste generator (NYC). The voters in this State have empowered impacted citizens to bring a Green Amendment case when their right to breath clean air and live in a healthful environmental

has been violated.

As detailed below, the State's Motion should be denied in its entirety because FAFE's lawsuit is procedurally proper, it was timely, it was unnecessary to first petition NYSDEC, and the State lacks the discretion to violate the Constitution.

LEGAL ARGUMENT

LEGAL STANDARD

The State seeks to dismiss FAFE's complaint in its entirety pursuant to CPLR § 3211 for failure to state a claim for the relief of mandamus to compel and because FAFE's claims are allegedly time-barred. *See* Docket No. 61. On a CPLR § 3211 motion to dismiss, "[a]ny facts in the complaint and submissions in opposition to the motion to dismiss are accepted as true, and the benefit of every possible favorable inference is afforded to the plaintiff." *Gibraltar Steel v. Gibraltar Metal Proc.*, 19 A.D.3d 1141, 1142 (4th Dep't 2005). '"On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired."' *Bank of New York Mellon v. Craig*, 169 A.D.3d 627, 628 (2d Dep't 2019); *Barry v. Cadman Towers*, Inc., 136 A.D.3d 951, 952 (2d Dep't 2016).

POINT ONE

FAFE'S LAWSUIT IS PROCEDURALLY PROPER

The State has failed its burden to warrant dismissal of FAFE's Complaint pursuant to CPLR § 3211(a)(7), as FAFE has properly stated a cause of action.

Initially, it is clear that the State misconstrues and misunderstands FAFE's Complaint. FAFE is not challenging "DEC's issuance of the Permits" as the State claims. State MOL at 14. Rather, FAFE challenges the State's daily actions or inactions that result in the current and on-

going violations of FAFE Members' right to breath clean air under the New York State Constitution regarding the Landfill, since the State is allowing WMNY to continuously emit Odors and Fugitive Emissions which violate their constitutionally protected, affirmative rights to "clean air … and a healthful environment." Compl. ¶¶ 152, 153. FAFE is not challenging the issuance of the Permits. FAFE did provide this Court with background on the numerous Permit violations occurring at the Landfill to substantiate its claims. FAFE is seeking redress for actions, inactions and/or or results that violate the Permits or which otherwise cause unclean air or an unhealthful environment, and thus violate the Constitution. Thus, the State's reliance on CPLR § 7803(4) is inapplicable.

As for the State's second point, that FAFE challenges "DEC's alleged failure to take enforcement action against Waste Management," and therefore must proceed under Article 78, is ironic. In one breath, the State concedes it is obligated to enforce the Permits "by law," but then in the next breath argues that it is entitled to full discretion and immunity from the courts' review because its enforcement actions are "discretionary." State MOL at 19. FAFE has alleged more than just than the State's failure to enforce the Permits results in a violation of the Constitution, but rather that numerous and continuous acts and omissions of the Defendants result in the violation of the Constitution. Compl. ¶153. As detailed more in Point Three, the State lacks the discretion to violate the Constitution.

Further, the State's argument that "FAFE may raise its Green Amendment claim in an Article 78 proceeding" does not meet its burden on a Motion to Dismiss. The State fails to cite any binding authority mandating that FAFE pursue this action as a CPLR Article 78 proceeding, as opposed to a Declaratory Judgment action. The State is incorrect that an "Article 78 is the only appropriate vehicle for its cause of action." State MOL at 15. FAFE's Complaint was properly

pursued as one for a Declaratory Judgment because the relief it seeks are not available through CPLR Article 78. FAFE requests that this Court award the following relief:

> 1) declare the Defendants are violating Plaintiff's constitutional rights under the Green Amendment in Article I §19 of the New York State Constitution to clean air and a healthful environment by causing the Odors and Fugitive Emissions and the emissions of GHGs into the atmosphere, furthering the cumulative impact of climate change; and (2) ordering the immediate proper closure of the Landfill, or alternatively directing Defendants to immediately abate the Odors and Fugitive Emissions in the Community; and (3) granting such other further relief as this Court deems just and proper, including Plaintiff's costs, reasonable attorney's fees, and disbursements pursuant to CPLR Article 86.

Compl. at 29.

A declaration of constitutional rights is most appropriate in a declaratory judgement action, not a CPLR Article 78 proceeding. *See Bunis v. Conway*, 17 A.D.2d 207, 208 (4th Dep't 1962) ("It is the settled law that an action for a declaratory judgment will lie 'where a constitutional question is involved'"); *Parry v. County of Onondaga*, 51 A.D.3d 1385, 1387 (4th Dep't 2008); *Levenson v. Lippman*, 4 N.Y.3d 280, 287 (2005); *Murphy v. Diamond*, 78 Misc. 2d 309, 311 (Sup. Ct. Albany Co. 1973). "While an Article 78 proceeding is 'as plenary as an action,' it is 'brought on with the ease, speed, and economy of a mere motion' … 'By contrast, a declaratory judgment action brings with it all the apparatus of an action, proceeding to trial unless the court dismisses the case or grants a motion for summary judgment.' Because of the summary nature of an Article 78 proceeding, 'It is ill fit as a vehicle for constitutional analysis.'" *See Skelos v. Paterson*, 25 Misc. 3d 347, 354 (Sup. Ct. Nassau Co. 2009), *aff'd*, 65 A.D.3d 339 (2d Dep't 2009), *rev'd on other grounds*, 13 N.Y.3d 141 (2009) [citations omitted].

Likewise, FAFE's relief for the Landfill to close or the Odors/Fugitive gases to be abated is proper in a declaratory judgment action. "The use of a declaratory judgment, while discretionary with the court, is nevertheless dependent upon facts and circumstances rendering it useful and

necessary. The discretion must be exercised judicially and with care." *James v. Alderton Dock Yards*, 256 N.Y. 298, 305 (1931). "The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations … No limitation has been placed, or attempted to be placed, upon its use…" *Id.* [citations omitted]. Here, the method to "quie[t]" FAFE's dispute is to close the Landfill or cause the Defendants to abate the Odors/Fugitive Emissions.

Again, and importantly, the State failed to cite any authority stating that FAFE was obligated to pursue this action under CPLR Article 78. The State can only provide authority demonstrating that FAFE "may" (MOL at 14), "could" (MOL at 15), "could also" (MOL at 15) pursue its action pursuant to Article 78. Regardless, even if this action is more appropriate in the form of a special proceeding, it should be converted and not dismissed. *See* CPLR § 103(c); *City of New York v. State Bd. of Equalization and Assessment*, 60 A.D.2d 932, 933 (3d Dep't 1978).

POINT TWO

EVEN IF THIS ACTION IS CONVERTED TO AN ARTICLE 78, FAFE'S SUIT LIES

A. FAFE's Action Is Timely.

"On a motion to dismiss a complaint pursuant to CPLR § 3211(a)(5) on the ground that the complaint is barred by the applicable statute of limitations, the defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired." *Barry*, 136 A.D.3d at 952. Thus, the State has failed its burden to warrant dismissal of FAFE's Complaint pursuant to CPLR § 3211(a)(5), because no applicable statute of limitations barring FAFE's Complaint has been shown.

The State's timeliness argument rests on, once again, a misinterpretation of FAFE's argument: FAFE is not challenging the issuance of the Permits. Rather, FAFE has alleged that the

State's daily actions or inactions result in the current and on-going violations of the New York State Constitution regarding the Landfill, which continuously emits Odors and Fugitive Emissions which violate the constitutionally protected, affirmative rights of the Members to "clean air … and a healthful environment." Compl. ¶¶ 152, 153 The governmental actions at issue here are what the State has and has not done since the enactment of the Green Amendment. The Green Amendment went into effect on January 1, 2022. The combined acts and omissions of the Defendants have resulted in the violation of the Constitution. *Id.* ¶ 153. Every day that the State chooses to violate FAFE's rights embodied in the Constitution, the State violates the Constitution itself. *See U.S. v. City of Yonkers*, 96 F.3d 600, 622 (2d Cir. 1996) (once a constitutional violation occurs, a state agency whose actions have contributed to violation have duty to take necessary steps to eliminate the violation, and each instance of failure or refusal to fulfill this affirmative duty continues the violation); *see also Connolly v. McCall*, 254 F.3d 36, 41 (2d Cir. 2001) (applying continuing wrong doctrine to constitutional violations); *Grossman v. Rankin*, 43 N.Y.2d 493, 506 (1977) (failure to follow constitutional mandate in classifying civil service positions is continuing wrong such that usual time limits did not bar review).

FAFE commenced this action on January 28, 2022, a mere 27 days after the Green Amendment became effective. Therefore, FAFE has satisfied all applicable statutes of limitations, regardless if this action is treated as one for Declaratory Judgment or lies under Article 78. However, it is well-understood that constitutional violations are subject to the six-year statute of limitations under CPLR § 213. Therefore, there is no question that FAFE's claims are not time-barred. *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801 (2003).

The State's argument regarding the retroactivity of the Green Amendment is a red herring. Again, FAFE is not challenging Defendants' actions that took place prior to January 1, 2022, only

the actions or inactions that took place after the Green Amendment went into effect. Compl. ¶ 153. The Odors and Fugitive Emissions have continued after January 1, 2022 and will continue unless the State or this Court take action. *Id.* ¶ 52. Even if this Court found that the Defendants' actions or inactions FAFE challenges pre-date the enactment of the Green Amendment, once the Green Amendment did become effective, Defendants were required to correct and comply with the Constitution. *City of Yonkers*, 96 F.3d at 622.

Further, even if this Court found that the actions or inactions FAFE challenges pre-date the enactment of the Green Amendment, it should also find that the Green Amendment is remedial in nature and thus retroactive. "An exception to the general principle that statutes are to be applied prospectively unless the language expressly, or by necessary implication, requires otherwise is commonly made for "remedial legislation or statutes governing procedural matters." *See Jaquan L. v. Pearl L.*, 179 A.D.3d 457, 458-59 (1st Dep't 2020) (*citing Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 584 (1998)). "Remedial statutes should be liberally construed to carry out the reform intended and spread its beneficial effects as widely as possible, and therefore should be accorded retroactive effect." *Lesser v. Park 65 Realty Corp.*, 140 A.D.2d 169, 173 (1st Dep't 1988).

The Green Amendment was enacted despite the existing laws of the State of New York, which created the NYSDEC with the purpose to "conserve, improve and protect [New York's] natural resources and environment." *See* Environmental Conservation Law ("ECL") §§ 1-0101, 3-0101. The Green Amendment seeks to reform the State's air, water, and environment, and thus, should be treated as retroactive, *Lesser*, 140 A.D.2d at 173, meaning that to the extent this Court found that FAFE was challenging actions or inactions prior to the enactment of the Green Amendment, its action is timely.

B. FAFE Did Not Fail to Exhaust Administrative Remedies.

Another a red herring is the State's argument that FAFE "*may*" petition NYSDEC to modify or revoke Permits on the ground that they violate the Green Amendment, then seek the relief stated in its Complaint through NYSDEC's administrative permit review process, and only then "*may*" it seek judicial review pursuant to an Article 78 proceeding. *See* State MOL at 18; 6 NYCRR §§ 621.13(a)(4), 621.13(b). Again, the State is merely making suggestions as to the different procedural avenues FAFE could have chosen. It provides no concrete, binding authority for a procedural process FAFE was required to take to bring its Green Amendment claim. The State's arguments simply do not justify dismissing FAFE's Complaint.

The law in the State of New York is clear "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." *Watergate II Apartments v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978). There are however exceptions to the general rule. One exception is if "an agency's action is challenged as either unconstitutional or wholly beyond its grant of power." *Id.*; *Stallone v. Fischer*, 67 A.D.3d 125, 130 (2d Dep't 2009). Another exception is if the exhaustion of "administrative remedies would be futile." *Klein v. New York State Off. of Temp. and Disability Assistance*, 84 A.D.3d 1378, 1379 (2d Dep't 2011). Here, both exceptions apply.

The State's suggestion that somehow, NYSDEC, a governmental agency, is better equipped to resolve a Constitutional violation than this Court is troubling at best. The State cites no authority for this argument, nor could it. One of the most fundamental principles of the United States' legal system is for there to be a separation of powers. *See Patchak v. Zinke*, 138 S. Ct. 897, 904 (2018) ('"To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying

them in cases properly brought before the courts."') [citations omitted]. The Checks and Balances system provides each branch of government with individual powers to check the other branches and prevent any one branch from becoming too powerful.

The State suggests that NYSDEC, an executive body, is somehow better equip to interpret the newly enacted Green Amendment than this Court, and thereby asks this Court to break our system of Checks and Balances. *See Commodity Futures Trading Commn. v. Schor*, 478 U.S. 833, 848 (1986) (system of checks and balances "protect[s] 'the role of the independent judiciary within the constitutional scheme of tripartite government,' and ... safeguard[s] litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government"') [citations omitted]; *see also Seaman v. Fedourich*, 16 N.Y.2d 94, 102 (1965) ("Nor can there be any question that the courts of New York, obliged as they are to uphold [this State's Constitution]" and "are vested with jurisdiction of actions brought to vindicate the" rights contained in the Bill of Rights); *People v. Glubo,* 5 N.Y.2d 461, 474 (1959) ("It goes without saying that the courts construe statutes, not the [Executive Branch]").

Thus, any attempt by FAFE to exhaust its administrative remedies and first proceed pursuant to 6 NYCRR § 621.13 would be inappropriate because of the constitutional question at stake, and ultimately futile because NYSDEC has not been granted authority to make Constitutional determinations, and is not better suited than this Court to determine whether a Constitutional violation has occurred. The Green Amendment was placed into our Bill of Rights, not the Environmental Conservation Law, and thus, this matter is within this Court's purview.

POINT THREE

THE STATE LACKS DISCRETION TO NOT COMPLY WITH THE CONSTITUTION

The final argument put forth by the State is that it has discretion on whether or not to

comply with the Constitution. This is simply not so. The State rests its argument on the allegations made by FAFE that the State is failing to utilize its enforcement authority to remedy the on-going Constitutional violations. While true, this is not the sole basis for FAFE's claim. Rather, FAFE claims that all the actions and omissions of all Defendants have resulted in a violation of the Green Amendment. As the State claims, it may be true that "[t]he Permits, the ECL, and the regulations grant DEC the discretion to take enforcement action," the State has no discretion on whether or not to comply with the Constitution. *See D.J.C.V., v. USA*, 2022 WL 1912254, at *16 (S.D.N.Y. June 3, 2022) (the government '"lack discretion to violate the Constitution"') [citations omitted]; *Finn's Liquor Shop, Inc. v. State Liquor Auth.*, 24 N.Y.2d 647, 655 (1969) (State agencies are obligated to conduct their activities in conformity with the Constitution).

Liability for a constitutional violation by a state agency may be premised not only on action but on a refusal to act. *See Arthur v. Nyquist*, 573 F.2d 134, 141 (2d Cir. 1978); *see also Duchesne v. Sugarman*, 566 F.2d 817, 832 (2d Cir.1977) ("[w]here conduct of the supervisory authority is directly related to the denial of a constitutional right it is not to be distinguished, as a matter of causation, upon whether it was action or inaction"). Once a constitutional violation occurs, a state agency whose actions have contributed to a violation have the duty to take necessary steps to eliminate the violation, and each instance of failure or refusal to fulfill this affirmative duty continues the violation. *See City of Yonkers*, 96 F.3d at 622; *see also Connolly*, 254 F.3d at 41 (applying continuing wrong doctrine to constitutional violations); *Grossman*, 43 N.Y.2d at 506 (failure to follow constitutional mandate in classifying civil service positions is a continuing wrong such that usual time limits did not bar review); *New York Ass'n of Convenience Stores v. Urbach*, 169 Misc. 2d 906, 914-915 (Sup. Ct. Albany Co. 1996) (failing to utilize enforcement authority to the detriment of another was a constitutional violation).

Here, the State must ensure that its citizens have the right to clean air and a healthful environment. Because the decision on whether or not to comply with the Constitution is nondiscretionary, the State's argument that mandamus is available only to force a public official to perform a ministerial duty enjoined by law is without merit. State MOL at 20. Complying with the Constitution is not optional for a state agency, and is thus nondiscretionary and ministerial. *See D.J.C.V.,* 2022 WL 1912254, at *16; *Finn's Liquor Shop,* 24 N.Y.2d at 655; *City of Yonkers,* 96 F.3d at 622. The violation continues until it is corrected. *Id.* Contrary to the State's argument, it is unnecessary for the Green Amendment to "impose any mandatory duty on the State" (State MOL at 22) because of the State's nondiscretionary obligation to comply with the Constitution. *Id.*

In fact, NYSDEC, as a state agency, has limited authority and has only been granted certain powers by the State Legislature. *See* ECL §§ 1-0101, 3-0101. It has not been granted the right to violate the Constitution. *Id.; New York Const. Materials Ass'n, Inc. v. New York State Dept. of Envtl. Conservation,* 83 A.D.3d 1323 (3d Dep't 2011) (state agencies must not act beyond the powers granted to them by the Legislature).

Utilizing its enforcement authority is just one of the ways the State could respond to the Constitutional violation, but is not the sole option it has, and is not the sole basis for FAFE's Complaint. *See* Compl. ¶ 153. The State attempts to defend itself by listing the various changes it has forced WMNY to make at the Landfill (State MOL at 21). However, this only bolsters FAFE's Complaint; notably, that the situation at the Landfill has risen to a level which violates FAFE's constitutional rights of clean air and a healthful environment, and the Defendants have not properly remedied the on-going problem. In other words, despite the State's efforts, the Landfill is still causing Odors and Fugitive Emissions which plague the community, therefore more needs

to be done to protect FAFE's constitutional right to clean air and a healthful environment.

Further, the State's reliance on statements made by Assemblyman Englebright, that "the Green Amendment 'does not change [] any of the existing laws of the State"' is misplaced. *See* State MOL at 22. For the reasons discussed more fully in FAFE's response to WMNY's Motion to Dismiss, this Court need not look at the legislative history to decide whether there has been a constitutional violation, since there is no ambiguity in the plain language of the Green Amendment. *See Makinen v. City of New York*, 30 N.Y.3d 81, 85 (2017); *Best Way Beer & Soda Distribs. v. New York State Liq. Auth.*, 99 A.D.2d 727 (1st Dep't 1984); *Day v. Summit Sec. Services Inc.*, 53 Misc. 3d 1057, 1063 (Sup. Ct. N.Y. Co. 2016), *aff'd*, 159 A.D.3d 549 (1st Dep't 2018). Regardless, those statements were made by a non-lawyer, and are being taken out of context. As explained in Plaintiff's Memorandum of Law in Response to the Motion to Dismiss of WMNY at Point One (B)(ii), if the legislative history needs to be consulted, it actually supports Plaintiff's position. However, it is up to the Court to interpret the plain language of the Green Amendment, not the State. *Lighthouse Pointe Prop. Associates LLC v. New York State Dept. of Envtl. Conservation*, 14 N.Y.3d 161, 176 (2010) (the courts do not defer to an agency where the issue is "pure statutory reading and analysis").

Thus, this Court is fully entitled to compel the State to comply with the Constitution.

CONCLUSION

For the reasons stated above, the State has not carried its burden on its Motion to Dismiss FAFE's Complaint, and thus its Motion should be denied.

Dated: June 17, 2022
Rochester, New York

/s/ Linda R. Shaw
KNAUF SHAW LLP
Attorneys for Plaintiff

Linda R. Shaw, Esq.,
Alan J. Knauf, Esq.,
Dwight E. Kanyuck, Esq.,
Melissa M. Valle, Esq., and
William F. Kellermeyer, Esq.,
of Counsel
1400 Crossroads Building
2 State Street
Rochester, New York 14614
Tel: (585) 546-8430
Lshaw@nyenvlaw.com
Aknauf@nyenvlaw.com
Dkanyuck@nyenvlaw.com
Mvalle@nyenvlaw.com
Wkellermeyer@nyenvlaw.com

WORD COUNT CERTIFICATION

Pursuant to the Uniform Civil Rules for the Supreme Court & the County Court section 202.8-b(c), counsel hereby certifies that this document complies with the word count limit contained in section 202.8-b(a). The word count for this Memorandum of Law, inclusive of point headings and footnotes and exclusive of the caption, table of contents, and signature block is 5,895.

Dated: June 17, 2022
Rochester, New York

/s/ Linda R. Shaw
KNAUF SHAW LLP
Attorneys for Plaintiff
Linda R. Shaw, Esq.,
Alan J. Knauf, Esq.,
Dwight E. Kanyuck, Esq.,
Melissa M. Valle, Esq., and
William F. Kellermeyer, Esq.,
of Counsel
1400 Crossroads Building
2 State Street
Rochester, New York 14614
Tel: (585) 546-8430
Lshaw@nyenvlaw.com
Aknauf@nyenvlaw.com
Dkanyuck@nyenvlaw.com
Mvalle@nyenvlaw.com
Wkellermeyer@nyenvlaw.com